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**YOU DON'T KNOW MY NAME:
IN RE ANONYMOUS ONLINE SPEAKERS
AND THE RIGHT TO REMAIN
CLOAKED IN CYBERSPACE**

*Joshua Rich**

The right to speak anonymously predates the Constitution, and the U.S. Supreme Court has long recognized it as protected under the First Amendment. So it was in line with a long tradition that, in 2007, several anonymous speakers posted comments on Internet message boards criticizing a business called Quixtar, which was embroiled in several lawsuits at the time. Before long, however, the posters' comments became the subject of a legal conundrum: did Quixtar's request to unmask the unknown authors during discovery outweigh the authors' First Amendment right to remain cloaked? In ultimately answering that question, the Ninth Circuit upheld the district court's decision to reveal some, but not all, of the authors' identities. And while the case, In re Anonymous Online Speakers, was one of first impression for the Ninth Circuit—in that it involved anonymous nonparty online postings where the speech was commercial in nature—the court failed to clarify the law in this area. This Comment examines the court's ruling and argues that while the Ninth Circuit took a good step forward in the discussion of anonymous speech on the Internet, a great leap forward would have been better.

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I. INTRODUCTION

They called themselves “Publius.”¹ The Founding Fathers who campaigned for the ratification of the Constitution wrote the *Federalist Papers* like many political and social commentators before them had: anonymously.² Their method was so successful that their opponents, the Anti-Federalists, penned pseudonymous screeds in response.³ And critics of all stripes have regularly repeated the process of publishing anonymously—a right that the Supreme Court has repeatedly recognized as protected under the First Amendment⁴—in the centuries since.⁵

So it was in line with a great tradition that several anonymous speakers posted comments on Internet message boards in 2007, criticizing a business called Quixtar, otherwise known as the celebrated sales firm Amway.⁶ Coinciding with several lawsuits involving Quixtar and some of its former employees, the posters’ anonymous comments soon became the subject of a legal conundrum: did Quixtar’s request to unmask the unknown authors during discovery outweigh their First Amendment right to remain cloaked?⁷ The U.S. District Court for the District of Nevada determined that some, but not all, of the anonymous speakers’ identities should be revealed.⁸ And the U.S. Court of Appeals for the Ninth Circuit upheld that decision when it reviewed the parties’ respective petitions for writs of mandamus.⁹

For the Ninth Circuit, the case was one of first impression, in that it boasted a fact pattern involving anonymous nonparty online

1. *In re Anonymous Online Speakers*, No. 09-71265, 2011 U.S. App. LEXIS 487, at *5 (9th Cir. Jan. 7, 2011).

2. *Id.*; Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 836 (2010).

3. Mazzotta, *supra* note 2, at 836.

4. *See infra* notes 77–83 and accompanying text.

5. *See, e.g., Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487.

6. *Id.* at *1–2.

7. *See id.* at *2.

8. *Id.* at *4–5.

9. *Id.* at *21.

postings where the speech was commercial in nature.¹⁰ Few other federal appeals courts have encountered such a scenario,¹¹ and the rules guiding a court's balancing of anonymous speech with discovery requests are muddled.¹² Nevertheless, the Ninth Circuit did not clarify the law in this arena.

This Comment argues that the Ninth Circuit's decision in *In re Anonymous Online Speakers*¹³ took a good step forward in the discussion of anonymous speech on the Internet, but that it should have gone further. Part II sets forth the facts of the case, and Part III examines the court's reasoning. Part IV then demonstrates that the right to speak anonymously is firmly rooted in the American political, social, and legal mind. It goes on to assert that as the Internet becomes a surrogate for the town square, and as lawsuits regarding anonymous speech in cyberspace grow in number, courts like the Ninth Circuit should set forth clear rules governing online conduct. Their failure to do so risks unmasking anonymous speakers and excluding them from a key forum of contemporary democracy.

II. STATEMENT OF THE CASE

Signature Management TEAM ("TEAM") and Quixtar were two companies that started as close collaborators but wound up as fierce rivals in litigation.¹⁴ Quixtar was a successor to Amway, the famous direct-selling firm.¹⁵ It distributed a wide array of products like cosmetics and nutritional supplements to consumers via individual contractors known as "Independent Business Operators," or IBOs.¹⁶ While working for Quixtar, two IBOs founded TEAM, a business-training firm that sold motivational guides and educational programs to other Quixtar IBOs.¹⁷

10. *Id.* at *11. The court initially issued an opinion that addressed the commercial nature of the anonymous commentators' speech. *In re Anonymous Online Speakers*, 611 F.3d 653, 661 (9th Cir. 2010), *withdrawn and superseded by* No. 09-71265, 2011 U.S. App. LEXIS 487 (9th Cir. Jan. 7, 2011). But it later withdrew that opinion and replaced it with one that sidestepped the commercial speech issue. *Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487, at *17-19. Therefore, this Comment will not address the knotty commercial speech doctrine in detail.

11. *See infra* note 54 and accompanying text.

12. *See infra* notes 54-61 and accompanying text.

13. No. 09-71265, 2011 U.S. App. LEXIS 487 (9th Cir. Jan. 7, 2011).

14. *Id.* at *3.

15. *Id.* at *1-2.

16. *Id.* at *2-3.

17. *Id.* at *3.

But a dispute arose in August 2007 when Quixtar fired the two TEAM founders.¹⁸ As IBOs, the pair had signed contracts that included post-termination, non-compete, and non-solicitation clauses.¹⁹ Thus, their departure from Quixtar, coupled with their ongoing work for TEAM, led to a disagreement over whether they were complying with their IBO contracts and whether the contracts were enforceable at all.²⁰ The TEAM founders joined a class action against Quixtar, and a protracted and heated series of lawsuits between Quixtar and TEAM arose around the country.²¹

In the case that eventually made its way to the Ninth Circuit—*Quixtar Inc. v. Signature Management TEAM, LLC*²²—Quixtar sued TEAM for tortious interference, claiming that TEAM disrupted Quixtar’s existing business contracts and advantageous relations.²³ Quixtar asserted that TEAM had engaged in an Internet smear campaign to encourage remaining Quixtar IBOs to leave Quixtar and join a rival company that was affiliated with TEAM.²⁴

Several anonymous Internet postings illustrated its claim, Quixtar argued.²⁵ The statements appeared on many different online sources, including blogs called *Save Us Dick DeVos*, *Q’Reilly*, *Integrity Is TEAM*, and *IBO Rebellion*, as well as a video titled *Hooded Angry Man*.²⁶ The anonymous comments were consistently critical of Quixtar’s business and employment practices, with such postings as “Quixtar has regularly, but secretly, acknowledged that its products are overpriced and not sellable”; “Quixtar refused to pay bonuses to IBOs in good standing”; “[Quixtar] terminated IBOs without due process”; “Quixtar currently suffers from systemic dishonesty”; and “Quixtar is aware of, approves, promotes, and facilitates the systematic noncompliance with the FTC’s Amway rules.”²⁷

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. 566 F. Supp. 2d 1205 (D. Nev. 2008).

23. *Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487, at *3.

24. *Id.*

25. *Id.* at *4.

26. *Id.*

27. *Id.*

Quixtar believed that the anonymous speakers were “TEAM officers, employees, or agents”²⁸ and sought to uncover their identities during discovery.²⁹ It deposed TEAM’s online content manager, Benjamin Dickie, asking him to identify the speakers, but Dickie refused.³⁰ As a result, Quixtar filed a motion to compel him “to testify regarding his knowledge of the authors” of the anonymous comments from the five aforementioned online sources.³¹

The district court granted the motion in part, ordering Dickie to reveal the identities of the speakers from three of the sources.³² Consequently, the people behind those statements—the “Anonymous Online Speakers”—tried to block Dickie’s testimony by filing a petition for a writ of mandamus with the Ninth Circuit.³³ Quixtar opposed that petition and sought its own writ of mandamus, demanding that Dickie reveal the identities of the speakers from the two remaining blogs.³⁴ Therefore, the issue on appeal was whether to grant the parties’ respective petitions and thereby either protect or further unmask the Anonymous Online Speakers.³⁵

III. REASONING OF THE COURT

The Ninth Circuit denied both parties’ petitions, reasoning that neither side had shown that it was entitled to relief via a writ of mandamus³⁶—an “‘extraordinary’ remedy limited to ‘extraordinary’ causes.”³⁷ Indeed, the court made clear that while an appeals court’s mandamus power is ultimately “discretionary,”³⁸ it is limited in the discovery context, where deference to trial court rulings is high.³⁹ Still, the court added, “[W]e have exercised mandamus jurisdiction to review discovery orders raising particularly important questions of

28. *Id.*

29. *Id.* at *2.

30. *Id.* at *2–4.

31. *Id.* at *4.

32. *Id.* at *4–5.

33. *Id.* at *5.

34. *Id.*

35. *Id.*

36. *Id.* at *21–22.

37. *Id.* at *8 (quoting *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct.*, 408 F.3d 1142, 1146 (9th Cir. 2005)).

38. *See id.* at *9.

39. *Id.* at *8.

first impression, especially when called upon to define the scope of an important privilege.”⁴⁰

Thus, before it denied the parties’ petitions, the court attempted to define the scope of a speaker’s right to maintain his or her anonymity on the Internet.⁴¹ In doing so, it addressed two concerns: (1) the nature of the speech at issue, and (2) the standards that courts apply in balancing discovery with the First Amendment right to anonymous speech.⁴²

First, the Ninth Circuit catalogued different types of speech.⁴³ It made clear that anonymous speech has long enjoyed First Amendment protection,⁴⁴ and that the U.S. Supreme Court recognizes that the First Amendment covers a speaker’s decision to remain anonymous.⁴⁵ Moreover, the court reasoned that “online speech stands on the same footing as other speech—there is ‘no basis for qualifying the level of First Amendment scrutiny that should be applied’ to online speech.”⁴⁶ Accordingly, the court noted that anonymous speech on the Internet has significant social value:⁴⁷ it “promotes the robust exchange of ideas and allows individuals to express themselves freely without ‘fear of economic or official retaliation . . . [or] concern about social ostracism.’”⁴⁸

Nevertheless, the court acknowledged that there are at least some limits on any right to speak, and that courts determine the degree of protection that a particular statement deserves “depending on the circumstances and the type of speech at issue.”⁴⁹ In sum, political speech usually merits great protection, commercial speech gets limited protection, and so-called fighting words and obscenity

40. *Id.* (quoting *Perry v. Schwarzenegger*, 591 F.3d 1147, 1157 (9th Cir. 2010)).

41. *See id.* at *5–21.

42. *See id.* at *5–17.

43. *Id.* at *6–7.

44. *Id.* at *5–6.

45. *Id.*; *see infra* notes 77–83 and accompanying text.

46. *Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487, at *6 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)).

47. *See id.*

48. *Id.* (alteration in original) (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995)).

49. *Id.*

boast no First Amendment shield.⁵⁰ But the court stopped short of categorizing the speech at issue in this case because the distinction had no bearing on its ruling.⁵¹

Second, the Ninth Circuit sought to apply a standard that appropriately balanced discovery with the right to speak anonymously.⁵² This case offered a matter of first impression for the Ninth Circuit.⁵³ In fact, only two other circuits had dealt with analogous fact patterns, but in both cases the courts “declined to establish or follow any particular standard.”⁵⁴ Nonetheless, the Ninth Circuit acknowledged that several state and federal district courts had dealt with this issue and applied a variety of standards—from very low thresholds for disclosing the identities of anonymous speakers⁵⁵ to somewhat stricter standards⁵⁶ to high bars⁵⁷ to no standards at all.⁵⁸

Turning to the district court’s decision in *Quixtar*, the Ninth Circuit noted that the lower court used “the most exacting standard, established by the Delaware Supreme Court in *Doe v. Cahill*.”⁵⁹ In the *Cahill* case, involving political speech, the court required the plaintiff “to be able to survive a hypothetical motion for summary judgment and give, or attempt to give, notice to the speaker before discovering the anonymous speaker’s identity.”⁶⁰ The court did so

50. *Id.* at *7. The First Amendment also does not absolutely protect defamation. RODNEY A. SMOLLA, 3 SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 23:1 (2011), available at Westlaw FREESPEECH.

51. *Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487, at *18–19.

52. *Id.* at *10–17.

53. *Id.* at *11.

54. *Id.* at *11–12 (citing *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240 (4th Cir. 2009); *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998)).

55. *Id.* at *14 (citing *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999)) (“The lowest bar that courts have used is the motion to dismiss or good faith standard.”).

56. *Id.* (citing *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Sony Music Entm’t, Inc. v. Does 1–40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004)) (“A number of courts have required plaintiffs to make at least a prima facie showing of the claim for which the plaintiff seeks the disclosure of the anonymous speaker’s identity.”).

57. *Id.* at *15 (citing *Doe v. Cahill*, 884 A.2d 451 (Del. 2005)).

58. *Id.* at *13–14 (citing *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, 2006 Phila. Ct. Com. Pl. LEXIS 1, *rev’d*, *Klehr v. JPA Dev.*, 898 A.2d 1141 (Pa. Super. Ct. 2006)) (“[A] few courts have declined to adopt a new or different standard to accommodate anonymous speech.”).

59. *Id.* at *15 (citing *Cahill*, 884 A.2d at 460).

60. *Id.*

because of a concern “that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously.”⁶¹

Even though it let the district court’s order stand, the Ninth Circuit determined that “[i]n the context of the speech at issue here balanced against a discretionary discovery order . . . *Cahill*’s bar extends too far.”⁶² It reasoned that “the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes.”⁶³ Therefore, because the Anonymous Online Speakers’ comments amounted to something less than the political speech at issue in *Cahill*, the court did not believe that their comments deserved such strong protection.⁶⁴

However, referring to its assertion that trial-court-discovery rulings warrant great deference,⁶⁵ the Ninth Circuit did not overturn the district court’s decision to use a high bar for disclosure because the district court did not clearly err in its order.⁶⁶ Thus, it charged the district court with crafting procedures for revealing the Anonymous Online Speakers’ identities; it noted that a safeguard like a protective order that mandates disclosure for “Attorneys’ Eyes Only” is appropriate in such a potentially sensitive First Amendment case.⁶⁷ The court reached that conclusion after it observed that the district court had correctly balanced the relative merits of discovery and protected anonymous speech; the lower court had also acknowledged that there is “‘great potential for irresponsible, malicious, and harmful communication’ and that particularly in the age of the

61. *Id.* at *16 (quoting *Cahill*, 884 A.2d at 457).

62. *Id.* at *17.

63. *Id.* at *18 (“For example, in discovery disputes involving the identity of anonymous speakers, the notion that commercial speech should be afforded less protection than political, religious, or literary speech is hardly a novel principle. The specific circumstances surrounding the speech serve to give context to the balancing exercise.” (citation omitted)). It is also worth noting that even political speech is not always protected; defamation against a political figure is not covered by the First Amendment if the speaker acted with actual malice. *See SMOLLA, supra* note 50, § 23:3.

64. *Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487, at *17–18. Besides, the Ninth Circuit is not obligated to follow Delaware Supreme Court precedent.

65. *Id.* at *19.

66. *Id.* at *18–19.

67. *Id.* at *19–20.

Internet, the ‘speed and power of internet technology makes it difficult for the truth to “catch up” to the lie.’”⁶⁸

IV. ANALYSIS

The Ninth Circuit’s decision in *In re Anonymous Online Speakers* was a solid first step toward clarifying the rules that govern speech on the Internet. In balancing the speakers’ First Amendment right against the plaintiff’s discovery right, the court appropriately allowed a standard that favored free speech⁶⁹—even though the court did not necessarily believe that this case warranted such a strong protection.⁷⁰ But in leaving open the possibility that future jurists might choose a less stringent standard,⁷¹ the court missed an opportunity to blaze a broader trail through what it recognized as a relatively uncharted area of the law: “the First Amendment claims of an anonymous, non-party speaker on the Internet in the context of commercial contractual relationships.”⁷² Considering the constant growth of the Internet and its increasing importance in the social and commercial arenas, establishing the firmest possible rules governing online speech should be a priority. Indeed, although the Ninth Circuit’s decision here was a solid first step, a solid first leap would have been better.

The right to speak freely and anonymously is deeply ingrained in the American social and political mind. In the years leading up to independence, some colonists departed from their town squares, opting instead to vent their political frustrations and sway public opinion through books and essays that they published under

68. *Id.* at *17 (quoting *Quixtar Inc. v. Signature Mgmt. TEAM, LLC*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008)).

69. *Id.* at *16.

70. *Id.* at *17–18.

71. Indeed, less than four months after the Ninth Circuit issued its *Anonymous Online Speakers* opinion, the U.S. District Court for the District of Nevada applied a lower standard in a decision involving a similar fact pattern. *Fodor v. Doe*, 3:10-CV-0798-RCJ (VPC), 2011 U.S. Dist. LEXIS 49672, at *9 (D. Nev. Apr. 27, 2011) (“Although the Ninth Circuit examined . . . four approaches to anonymous online speech, it did not adopt a single standard to guide lower courts. Therefore, this court has considered the various approaches to this unique issue and the specific facts of this case, and concludes that the prima facie standard . . . is appropriate in this instance.” (citation omitted)).

72. *Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487, at *11.

pseudonyms.⁷³ Thomas Paine's *Common Sense* pamphlet, which is widely regarded as providing the main literary spark for the American Revolution,⁷⁴ originally appeared under the signature of "An Englishman."⁷⁵ In fact, the Framers drafted the First Amendment in part as a response to English laws that silenced government criticism by requiring that all authors disclose their identities.⁷⁶

Nearly two hundred years later, the Supreme Court first recognized the right to anonymous speech in its 1960 decision *Talley v. California*.⁷⁷ There, the Court voided a Los Angeles city ordinance that banned the distribution of anonymous handbills.⁷⁸ In doing so, the Court reasoned that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."⁷⁹ During the following half-century, the Court upheld the First Amendment protection of anonymous speech in successive decisions that generally dealt with political speech⁸⁰: *McIntyre v. Ohio Elections Commission*,⁸¹ *Buckley v. American Constitutional Law Foundation*,⁸² and *Watchtower Bible & Tract Society v. Village of Stratton*.⁸³ Now, one could reasonably argue that this issue is settled law.

Apparently settled, too, is the notion that First Amendment protections extend to the Internet. The Court recognized this in its 1997 opinion *Reno v. American Civil Liberties Union*.⁸⁴ There, in striking down provisions of the Communications Decency Act of 1996, which sought to protect minors from exposure to indecent

73. Jennifer B. Wieland, Note, *Death of Publius: Toward a World Without Anonymous Speech*, 17 J.L. & POL. 589, 591 (2001). Celebrated examples include mid-18th century works by "Cato" and "Junius"; the latter's identity is still not known. *Id.*

74. DANIEL J. BOORSTIN ET AL., A HISTORY OF THE UNITED STATES 78–79 (David R. Zarowin ed., 1990).

75. Wieland, *supra* note 73, at 591–92.

76. Mazzotta, *supra* note 2, at 836–37.

77. 362 U.S. 60 (1960).

78. *Id.* at 65.

79. *Id.*

80. See Mazzotta, *supra* note 2, at 837–38.

81. 514 U.S. 334 (1995).

82. 525 U.S. 182 (1999).

83. 536 U.S. 150 (2002).

84. 521 U.S. 844 (1997).

materials online,⁸⁵ the majority of the Court⁸⁶ noted that “the growth of the Internet has been and continues to be phenomenal.”⁸⁷ Given that context, the majority went on to reason that “governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it,” and that “encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”⁸⁸

Nevertheless, the right to speak anonymously—whether online or in the public square—is not absolute.⁸⁹ As with harmful speech in other contexts, plaintiffs may seek redress against defendants whose anonymous words have injured them.⁹⁰ This ability takes on particular importance in the online world, where federal law immunizes Internet service providers, or ISPs, from suits regarding speech transmitted over their systems.⁹¹ Thus, plaintiffs must sue speakers directly—a process that often involves serving ISPs with subpoenas that seek the speakers’ identities.⁹² Consequently, courts often encounter discovery motions to reveal the identities of people who do not know that their anonymity is in jeopardy, especially if they are not parties to the underlying action.⁹³ But there is no clear standard for unmasking such speakers.⁹⁴

In determining whether to reveal the identity of an unnamed online speaker, courts tend to balance the plaintiff’s interest in seeking compensation against the defendant’s interest in exercising the First Amendment right to anonymity.⁹⁵ Courts do not agree, however, on how to do that balancing.⁹⁶ As a result, various jurisdictions have developed similar but inconsistent standards for

85. *Id.* at 858–59.

86. Justice Stevens wrote the majority opinion, which six other members joined, while Justice O’Connor, joined by Chief Justice Rehnquist, concurred in part and dissented in part. *Id.* at 848.

87. *Id.* at 885.

88. *Id.*

89. Mazzotta, *supra* note 2, at 839.

90. *See* McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 352–53 (1995).

91. 47 U.S.C. § 230(c) (2006).

92. Mazzotta, *supra* note 2, at 842.

93. *Id.* at 843.

94. *See id.* at 835.

95. *Id.*

96. *Id.*

plaintiffs to meet before unmasking their opponents.⁹⁷ For the most part, such inquiries have occurred in state and federal district courts; before *In re Anonymous Online Speakers*, for instance, only two federal appeals courts had addressed the issue, and neither followed a particular standard.⁹⁸

Unfortunately, while the Ninth Circuit reached an appropriate conclusion in *In re Anonymous Online Speakers*, it should have applied a clearer standard for determining when to unmask an anonymous online speaker. Instead, it simply let stand the district court's adoption of the *Cahill* test, even though it acknowledged that it did not fully agree with the district court's application of that test.⁹⁹ Such a holding is problematic because of two simultaneous developments: (1) communication in cyberspace is increasingly becoming a primary means of discourse in society, and (2) anonymous speech on the Internet is notably prevalent.¹⁰⁰ Meanwhile, lawsuits dealing with anonymous online users have been on the rise since the Internet became popular in the 1990s.¹⁰¹ Thus, while this may have been a case of first impression for the Ninth Circuit, it is unlikely the last such case that the court will encounter.

Complicating matters is the fact that the legal system has struggled with this issue from the start. At first, courts appeared to lack interest in protecting anonymity on the Internet.¹⁰² Plaintiffs tended to be large businesses while defendants were lone individuals.¹⁰³ ISPs often disclosed identities without even telling the speakers that their covers had been blown.¹⁰⁴ Commonly, such

97. *Id.* at 835, 846; *see also supra* text accompanying notes 54–61 (showing that courts employ a range of standards when they decide whether to unmask anonymous speakers). In his note, Matthew Mazzotta offers an “Appendix of Unmasking Standards,” which details ten different balancing tests that state and federal trial courts use in such situations. Mazzotta, *supra* note 2, at 866–69. With some exceptions, most of those standards roughly resemble the *Cahill* test. *See supra* text accompanying note 60.

98. *See supra* text accompanying note 54.

99. *In re Anonymous Online Speakers*, No. 09-71265, 2011 U.S. App. LEXIS 487, at *17–19 (9th Cir. Jan. 7, 2011).

100. *See id.* at *6.

101. Mazzotta, *supra* note 2, at 844.

102. Lyrisa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1374 (2009).

103. *Id.* To be sure, drawing special attention were “strategic lawsuits against public participation,” or “SLAPP suits,” where corporations sought to censor criticism by drowning defendants in expensive litigation. Mazzotta, *supra* note 2, at 844.

104. Lidsky, *supra* note 102, at 1374.

revelations occurred during discovery, a pretrial step that merely requires that plaintiffs have cognizable claims.¹⁰⁵ Worse, judges regularly showed themselves to be ignorant of basic aspects of the Internet.¹⁰⁶ Thus, commentators started to fear that such scenarios could cause a chilling effect on anonymous speech in cyberspace.¹⁰⁷ Indeed, such a cold wind could cause damage far beyond the Internet. Because the online universe is fast replacing the town squares and newspapers in which people like “Publius” once presented their platforms,¹⁰⁸ any censorship thereon effectively prevents complete participation in contemporary democracy. Something so vital to our social and political dialogue demands concrete governance.

Not all of the Ninth Circuit’s opinion merits criticism, however. The court took important strides toward fleshing out the issue of anonymous online speech and cataloguing the various standards that courts employ while balancing plaintiffs’ and defendants’ respective rights in this arena.¹⁰⁹ It correctly noted that not all online speech is protectable, given the speed and reach of the Internet, where “harmful communication” is very possible.¹¹⁰ It aptly implied that discovery requests often do have great merit,¹¹¹ especially when cases cannot proceed unless the plaintiff knows who was responsible for the speech at issue.¹¹² And it wisely suggested that in situations where an anonymous online speaker’s identity is uncovered, the unmasking should be done with safeguards that limit the revelation

105. Mazzotta, *supra* note 2, at 834.

106. Lidsky, *supra* note 102, at 1374. Jurists’ general lack of technological expertise also encourages clearer rules to guide them in cases arising in cyberspace. Although the Supreme Court has generally extended traditional First Amendment rights into cyberspace, *see Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997), reports of the Justices’ failure to understand the basics of electronics abound, *see, e.g., Adam Liptak, Justices Get Personal over Privacy of Messages*, N.Y. TIMES, Apr. 20, 2010, at A12 (describing some Justices’ confusion regarding how text messaging and pagers work).

107. Lidsky, *supra* note 102, at 1374.

108. Indeed, today the Internet provides the central public forum where many people exercise their free speech right. *See Stacey D. Schesser, Comment, A New Domain for Public Speech: Opening Public Spaces Online*, 94 CALIF. L. REV. 1791, 1795–96 (2006).

109. *In re Anonymous Online Speakers*, No. 09-71265, 2011 U.S. App. LEXIS 487, at *10–18 (9th Cir. Jan. 7, 2011).

110. *Id.* at *17.

111. *See id.*

112. Mazzotta, *supra* note 2, at 834.

to only interested parties.¹¹³ Unfortunately, critics and courts looking to the Ninth Circuit for guidance on this matter may reasonably argue that this line of reasoning was merely dicta.¹¹⁴ Therefore, a more reliable holding is necessary to prevent future confusion.

What, then, should such a rule look like? Certainly, anonymous and pseudonymous speech should receive strong protection on the Internet, just as it is strongly protected elsewhere. Accordingly, the *Cahill* standard is a good guide because it strives to set a high bar for unmasking anonymous speakers. But perhaps an even stronger standard would not focus on whether the plaintiff could survive a summary judgment motion or on the type of speech at issue. Rather, it might zero in on the actual harm that the anonymous person's speech caused. One of the basic elements of any libel claim is that the plaintiff suffered some reputational harm as a result of the defendant's statement.¹¹⁵ So it makes sense to bring the anonymous online speech doctrine in line with that of libel. The result would be great protection of anonymous speech, but it would not come at the expense of plaintiffs who actually suffer from the words at issue.

Therefore, in *In re Anonymous Online Speakers*, Quixtar would only be able to unmask the Anonymous Online Speakers if it could prove that it suffered actual harm as a result of their statements. The plaintiff would have a potential remedy and innocuous anonymous speech would run even less risk of being chilled. As more cases like this one arise, such policy rationales call for a clearer rule on when to unmask anonymous speakers in cyberspace.

V. CONCLUSION

The Ninth Circuit's opinion in *In re Anonymous Online Speakers* was a significant step in the ever-expanding legal area of anonymous speech on the Internet.¹¹⁶ But the court should have done more. Standards that courts apply in cases where they must balance plaintiffs' discovery requests against defendants' First Amendment

113. *Anonymous Online Speakers*, 2011 U.S. App. LEXIS 487, at *19–20.

114. In its holding, the court simply denied the parties' respective petitions for writs of mandamus. *Id.* at *21.

115. See SMOLLA, *supra* note 50, § 23:1.

116. See generally Jason A. Martin et al., *Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online*, 16 COMM. L. & POL'Y 89 (2011) (seeking to untangle the thorny issues that have arisen in the Internet age involving online anonymity and news organizations' confidential sources).

right to anonymous speech still need clarification. Judges must develop an even greater understanding of—and sensitivity to—legal issues arising in cyberspace. And participation in discourse on the Internet, the town square of today, cannot be curtailed. As a result, courts' failure to establish firmer and clearer rules regarding anonymous online speech risks not only the unmasking of unnamed Internet denizens—it risks cutting off a substantial portion of the populace from contemporary democracy.

