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| **Assessmentgate,** | **SUPERIOR COURT OF NEW JERSEY** |
| | **LAW DIVISION: Essex County** |
| Plaintiff, | |
| | Docket No. L - 9391-13 |
| v. | |
| | Civil Action |
| **Montclair Board of Education,** | |
| Defendant. | |

**BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE TO QUASH SUBPOENA ISSUED TO GOOGLE INC. AND FOR INJUNCTIVE RELIEF**

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## PRELIMINARY STATEMENT

Throughout the history of this country, anonymous and pseudonymous speakers have engaged in public debate about the issues of their day. The constitutional right to speak anonymously on matters of public interest is well-established. In recent decades, courts have affirmed that this right extends to those who express themselves on the Internet.

New Jersey courts have held in both the civil and criminal context that because anonymous speech is constitutionally protected, subpoenas for the disclosure of identifying information of anonymous speakers requires, at the very least, a balancing of the speaker's rights and interests against the subpoenaing party's need for the extraordinary relief of piercing anonymity. For civil subpoenas, the party seeking the information must present sufficient evidence of alleged wrongdoing by the anonymous speaker before a court will consider weighing the interests. Further, because fundamental constitutional rights are at stake, a government actor issuing a civil subpoena should be required to demonstrate that it has a compelling need for the information, that it has made narrowly tailored attempts to otherwise meet its goals, and that the subpoena is the least restrictive way to obtain it.

The Montclair Board of Education ("MBOE" or the "Board") seeks to pierce the anonymity of one of its online critics, Plaintiff Assessmentgate ("AG"), with the issuance of a subpoena to Google Inc. for Plaintiff's identifying information. It does so despite the fact that it cannot establish a sufficient nexus between the online speaker and the alleged wrongdoing that the Board is investigating.

Not only does Defendant's subpoena to Google implicate and violate the constitutionally-protected rights of Plaintiff, but the MBOE has issued it without the authority to do so. It relies on educational statutes that only authorize boards of education to subpoena people and documents to appear at actual hearings regarding disputes about school laws, and not for wide-ranging investigations of wrongdoing.

Indeed, because the Defendant's subpoena is, at most, based on speculation and unsubstantiated beliefs, the Court cannot ignore the possibility that the MBOE is misusing its subpoena authority as a fishing expedition to identify its critics and chill the robust and ongoing online debate in the school district.

## STATEMENT OF FACTS

Plaintiff is a Critic of Standardized Testing

Plaintiff Assessmentgate, is a Montclair resident and parent of at least one child who attends a school run by the Defendant Montclair Board of Education.

Plaintiff has been concerned about the school district's recent decision to implement standardized testing in the form of common, quarterly assessments for each grade. For example, all sixth grade students in the school district will take identical math tests each quarter. Assessmentgate is opposed to these tests and to other decisions made by the Defendant MBOE and Montclair School District Superintendent Penny MacCormack.

The district planned to administer the first of the quarterly assessments during the week of Monday, October 28, 2013. On October 27, 2013, to foster community discussion about the standardized tests, Plaintiff created the e-mail account Assessmentgate@gmail.com and opened accounts on Facebook and Twitter.

Plaintiff also started a blog on the community website Montclair Patch (www.montclair.patch.com) called Assessmentgate. AG subtitled it "What the Superintendent and BOE aren't telling you about this week's tests may harm your child's marking period, GPA, and transcripts."

Plaintiff, who is not and has never been employed by the MBOE, believes that the MacCormack and the MBOE have been secretive and "Nixonian" in their approach to dealing with the public about their plans. Plaintiff chose the moniker to analogize MacCormack's and MBOE's actions regarding the use of assessments to the Watergate controversy that resulted in President Richard Nixon's resignation from office. Since the creation of these accounts, Assessmentgate has been a vocal critic of the MBOE and MacCormack.

MBOE Responds to Release of Proprietary Information

On October 27, 2013, Superintendent MacCormack informed parents via e-mail that 14 out of 60 district-wide assessments that were scheduled to be administered to students that week had been posted on a public website. She did not indicate how long the documents had been posted online.

A local blog reported that on Monday, October 28, 2013, MBOE President Robin Kulwin reported the incident to the Montclair Police Department. That same day, MacCormack advised parents via e-mail that the district had launched "a full legal investigation to determine how the common assessments came to be posted to an external website without our knowledge and to identify the individual or individuals involved."

Plaintiff is an unabashed critic of the district's use of assessments, but had no involvement in obtaining or posting the assessments. Assessmentgate has not accessed nor attempted to access information that the MBOE sought to secure.

To further respond to the unauthorized public posting of the assessments, on November 1, the MBOE passed a resolution citing its authority pursuant to *N.J.S.A.* 18A:6-19 and -20 to authorizing its attorney to "conduct [an] investigation and hearings" and "vested [him] with the authority to issue subpoenas in [its] name. . . for the purposes of obtaining relevant documentation and/or testimony."

The resolution states that the MBOE would use its authority "for the purpose of conducting hearings regarding the suspected unauthorized release of proprietary/confidential District tests/assessments, *as well as investigating other incidents of conduct contrary to the Board's best interest. . .*" Exhibit 1 (emphasis added).

On November 7, 2013, MBOE attorney signed a subpoena to Google Inc. The subpoena provides:

> In accordance with *N.J.S.A.* 18A:6-19 and 20 [sic] and the Resolution of the Montclair Board of Education. . . and in anticipation of the investigatory hearing to be held before the Board of John Doe and/or Jane Doe, the Board Demands that you produce the following. . . by the close of business on November 18, 2013:

- Any and all information relating to the personal identification for the user "Assessmentgate@gmail.com," including without limitation, the full name, address(es), email or gmail addresses, telephone number, alternate email addresses, ISP information and computer IP addresses used.

[Ex. 1.]

On November 15, 2013, Google Inc. contacted Plaintiff advising AG that unless AG took formal legal action by December 5, 2013, Google may comply with the subpoena. Ex. 1.

After a request to do so, MBOE has declined to withdraw the subpoena.

**LEGAL ARGUMENT**

**I. THE INTERESTS OF JUSTICE REQUIRE THE COURT TO ALLOW ASSESSMENTGATE TO PROCEED UNDER A PSEUDONYM**

Courts in New Jersey have long permitted parties to proceed pseudonymously to protect those persons' privacy when appropriate. *See, e.g., New Jersey Div. of Youth and Family Services v. Y.N.*, 431 *N.J. Super.* 74, 76 n.2 (App. Div. 2013) (employing pseudonym to protect the privacy of a minor), certif. granted on other grounds 216 *N.J.* 13 (2013); *In re E.F.G.*, 398 *N.J. Super.* 539, 539 n.1 (App. Div. 2008) ("Because we found that plaintiff has made a clear and convincing showing that there exists a genuine risk of physical harm to her, we have *sua*

*sponte*, but with plaintiff's consent, amended the caption and allowed plaintiff to proceed anonymously."); *Stern v. Stern*, 66 *N.J.* 340, 343 n.1 (1975) (recognizing that pseudonymity "serves a legitimate end where the interests of minor children are concerned, as well as upon other miscellaneous but rare occasions.").

As held by the Appellate Division in *A.B.C. v. XYZ Corp.*, 282 *N.J. Super.* 494 (App. Div. 2008), plaintiffs should be permitted to proceed pseudonymously upon:

> a clear and convincing showing that there exists a genuine risk of physical harm, the litigation will entail revelation of highly private and personal information, *the very relief sought would be defeated by revealing the party's identity*, or other substantial reasons why identification of the party would be improper.
>
> [*Id.* (emphasis added); *see also Doe v. Tris Comprehensive Mental Health, Inc.*, 298 *N.J. Super.* 677 (Law Div. 1996) (granting right to proceed pseudonymously for HIV positive plaintiff).]

The Appellate Division further explained in *T.S.R. v. J.C.*, 288 *N.J. Super.* 48, 57 (App. Div. 1996):

> There is no bright-line rule available for determining whether specific circumstances present one of these rare occasions [where proceeding pseudonymously is appropriate]. We observed in *A.B.C.* that federal courts have used a balancing test, weighing the public interest in open proceedings against the particularized injury which a party will suffer if anonymity is lost.
>
> [*Id.*, *citing* *A.B.C.*, 282 *N.J. Super.* at 501.]

The current matter is the prototypical case where proceeding pseudonymously is required. The entire purpose of the instant action is to quash the subpoena in order to ensure that Plaintiff's constitutional rights to anonymous free speech and privacy are protected. If Plaintiff's true name were required to be disclosed in order to simply appear before the court, his ability to protect his constitutional rights would be negated before this court were ever to hear the merits of his case. In other words, unless he is permitted to proceed pseudonymously, "the very relief sought would be defeated by revealing the party's identity. . . ." *Id.*

Indeed, the New Jersey Supreme Court has already recognized that the New Jersey Constitution "protects an individual's privacy interest in the subscriber information he or she provides to an Internet service provider." *State v. Reid*, 194

*N.J.* 386, 399 (2008). In addition, as the Appellate Division noted in *Dendrite Int'l, Inc. v. John Doe No. 3*, 342 *N.J. Super.* 134, 151 (App. Div. 2001), in quoting a district court's discussion of the importance of maintaining the privacy of internet service provider information:

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. . ..People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.
>
> [*Id.*, *quoting Columbia Ins. Co., v. Seescandy.com*, 185 *F.R.D.* 573, 578 (N.D.Cal. 1999).]

The court in *Dendrite* set forth standards that must be met before a party to an action (there, a defamation action) can obtain anonymous speakers' identifies from an internet service provider (as is the issue here). Those standards are discussed in more detail in Point III of this brief.

Plaintiff must therefore be permitted to proceed pseudonymously in order for his arguments to be meaningfully presented and for his constitutional rights to privacy and to speak anonymously (which are being improperly infringed upon by

defendant via the subpoena process, as explained herein) to ultimately be vindicated.

## II. THE SUBPOENA DUCES TECUM TO GOOGLE INC. DEMANDING ASSESSMENTGATE'S PERSONAL INFORMATION SHOULD BE QUASHED BECAUSE IT WAS ISSUED *ULTRA VIRES* AND IS DEFECTIVE

As a preliminary matter, the MBOE does not have the authority to issue the subpoena in this matter nor has it effectively served Google.

Local boards of education are creations of the Legislature and as such can only exercise those powers which are granted by the Legislature. *Elizabeth Bd. of Educ. v. New Jersey Transit Corp.*, 342 *N.J. Super.* 262, 268 (App. Div. 2001) (citations omitted. In all of Title 18A, the Education statutes, there is only one grant of power for a local school board to exercise its subpoena authority, and Defendant purports to rely on this grant. *N.J.S.A.* 18A:6-20.

The subpoena provision relied on by the Defendant and the related statute regarding oaths, are part of a statutory scheme titled "Controversies and Disputes" which contain three subsections. *See N.J.S.A.* 18A:6-9 *et seq.* (headings preceding statutory language). The first subsection is titled "Jurisdiction" and vests the Commissioner of Education with jurisdiction to hear all "controversies and disputes under school laws" (*N.J.S.A.* 18A:6-9), provides that his decisions are

final agency actions (*N.J.S.A.* 18A:6-9.1), and divests the State Board of Education of authority to hear appeals (*N.J.S.A.* 18A:6-9.1). The second subsection is titled "Tenure Employees Hearing Law" and allows a board of education to initiate proceedings to dismiss a tenured teacher. *N.J.S.A.* 18A:6-10 and -11. It also provides other rights and obligations related to tenure charges and hearings. (*N.J.S.A.* 18A:6-13 through -18.1).

The third and operative subsection is titled "Conduct of Hearings; Compelling Attendance of Witnesses; Determinations" and MBOE relies on its authority pursuant to two provisions therein. *N.J.S.A.* 18A:6-19 provides that a board of education that is "lawfully authorized to hold a hearing may administer oaths to witness in such a hearing." *N.J.S.A.* 18A:6-20 permits a party to "any dispute or controversy or charged therein" to have the right, *inter alia*, "to have compulsory process by subpoena *to compel the attendance of witnesses to testify and to produce books and documents in such hearing* when issued by (a) the president of the board of education, if the hearing is to be held before such board." (emphasis added).

Should a party subpoenaed pursuant to these provisions not comply, *N.J.S.A.* 18A:6-21 provides a remedy:

> If a person subpoenaed *to attend at any such hearing* fails to obey the command of the subpoena, without reasonable cause, or *if a person in attendance at any such hearing*

> *refuses without lawful cause . . . to exhibit any book, or other document, when ordered to do so by the officer holding such hearing*, they or he may apply to any judge of the Superior Court. . . for an order [to show cause].
>
> [*N.J.S.A.* 18A:6-21.]

**A. The Montclair Board of Education Acted *Ultra Vires* in Issuing the Subpoena**

The statutes upon which MBOE relies do not provide it *carte blanche* to issue subpoenas to nonparties for any reason it so resolves.

By the text and structure of sections 6-19 through -21, it is clear that for subpoenas to issue, the legislature intended (1) an existing controversy or dispute under school laws; (2) a board of education be "lawfully authorized" to hold a hearing about it; (3) a hearing be scheduled; (4) testimony and documents be provided "at" or "in" the hearing.

From the resolution purporting to authorize the subpoena and the subpoena itself, it is clear that the Defendant has not met any of these criteria. *First*, there is no existing controversy or dispute under school laws. The MBOE has not charged an employee with a disciplinary infraction. The MBOE does not know whether any infraction did in fact occur and does not have evidence to form the basis of a charge against a "John Doe" or "Jane Doe" employee. For the purposes of this motion, Plaintiff will assume that the MBOE has a "sufficient basis" to

believe that an employee is responsible for the unauthorized release of proprietary information. Ex. 1. Such a belief, however, does not create a controversy or dispute.

*Second*, the legislature has only authorized boards of education to hold hearings for controversies and disputes arising *under school laws*. Even if there was an existing controversy about the unauthorized release of proprietary information, such matter is not authorized as actionable under school law. Though the MBOE may be the victim of wrongdoing, the statutes do not provide for wide-ranging hearings about potentially criminal conduct.

*Third*, as evident by the lack of charges, the MBOE has not scheduled a hearing. The subpoena misleads Google Inc. by suggesting that such information will be used "in anticipation of disciplinary hearings." As of the date of the subpoena, the MBOE could not anticipate such a hearing. It did not know whether the release of its proprietary information was intentional, inadvertent or the result of an insecure server infected with malicious software. Likewise, it did not know whether the person responsible for the release was a district employee or a third party.

*Fourth*, without a hearing, the MBOE does not have the authority to command the information it seeks. *N.J.S.A.* 18A:6-19, -20, and -21 each contain specific language regarding the

subpoenaed information or witnesses to be produced "at" or "in" a hearing. The Appellate Division in *Greenblatt v. Board of Pharmacy*, 214 *N.J. Super.* 269, 273-74 (App. Div. 1986), is extremely helpful in clarifying the meaning of such phrases.

The Appellate Division, in *Greenblatt*, a case examining the subpoena power of the Attorney General to investigate unlawful pharmacy practices, looked to text of the statute at issue. *Id.* at 273-74. The court found that the Attorney General was empowered to hold investigative hearings and could compel the production of information absent a hearing, but only because the statue specifically provided for it. *Id.* at 275 (noting that the Attorney General need not hold hearings because "the statute specifically allows compulsion of records at a hearing 'or inquiry.'") Here, there is no similar language permitting the MBOE to inquire into potential violations of school law when no hearing is scheduled. There is no legal basis for the MBOE to believe that it had the authority to seek information in advance of a hearing to "investigate and prosecute." Ex. 1.

### B. The Subpoena Issued to Google Inc. is Defective

Even had the legislature intended to provide boards of education with broad authority to investigate wrongdoing without conducting a hearing, the MBOE subpoena to Google Inc. is

technically defective for the following reasons and should be quashed.

*1. The Board President is the only person authorized to issue a subpoena*

The plain language of *N.J.S.A.* 18:A6-20 requires that the president of the Board of Education issue the subpoena. Contrary to the plain language of the statute, the Board resolution suggests that the entire MBOE was vested with the authority to issues subpoenas. It then purported to delegate an investigator to issue subpoenas on its behalf. This was an improper delegation of the president's authority to the MBOE and subdelegation to the investigator.

*2. The statute does not confer extra-territorial subpoena authority and the subpoena was not properly served*

Google Inc. does not have offices in New Jersey and the information sought is not located in New Jersey. MBOE served the subpoena on a registered agent for Google instead of serving it on Google's headquarters located in Mountainview, California, or at the office where the records are located.

*N.J.S.A.* 18A:6-20 provides that "[t]he subpoena shall be served in the same manner as subpoenas issued out of the superior court are served." In an action in Superior Court in which records are located outside of New Jersey, Plaintiff could find no authority suggesting that litigants may subpoena such

records through service on a registered corporate agent. Without an express grant of authority from the legislature, a board of education cannot assert that its power to issue a subpoena is greater than that of the courts. *Cf. Silverman v. Berkson*, 141 *N.J.* 412, 417-19 (1995)(discussing "extraordinary" grant of statutory authority to Bureau of Securities for extraterritorial investigatory subpoenas).

Because the use of civil subpoenas in Superior Court are limited to narrow circumstances by court rules, litigants who seek records are required to conduct a deposition. *See R.* 4:14-7(c). To compel testimony by a nonparty in another jurisdiction, litigants' documents must seek process through the courts of that state or through letters rogatory pursuant to *R.* 4:11-5. Because it did not serve a subpoena on a foreign corporation in line with the rules of the Superior Court, MBOE's subpoena is defective and should be quashed.

## III. THE SUBPOENA SHOULD BE QUASHED BECAUSE PLAINTIFF HAS A CONSTITUTIONALLY-PROTECTED RIGHT TO EXPRESS OPINIONS ANONYMOUSLY THAT DEFENDANT CANNOT JUSTIFY PIERCING

Even if the MBOE has the authority to issue subpoenas to investigate wrongdoing, its need for Assessmentgate's identity does not outweigh AG's constitutionally protected right to speak freely and anonymously on the Internet. Because the disclosure of the identity of an anonymous online speaker is an

extraordinary step, the New Jersey Constitution requires courts to conduct a searching review to justify such exposure in civil proceedings. *Dendrite, supra*, 342 *N.J.* at 149-58.

Civil subpoenas are not insulated from constitutional scrutiny. *See, e.g., Dendrite, supra; New York Times Co. V Sullivan*, 376 *U.S.* 254, 265 (1964). Courts have held that subpoenas seeking information regarding anonymous individuals raise First Amendment concerns. *See NAACP v. Alabama ex rel. Patterson*, 357 *U.S.* 449, 462 (1958) (holding that discovery order requiring NAACP to disclose its membership list violated First Amendment).

For the MBOE to use its subpoena power to pierce Assessmentgate's identity, it must - at a minimum - identify and bring forward evidence of AG's actionable conduct. Given the MBOE's stated intention to investigate "conduct contrary to the Board's best interest", Compl. Ex. 1, it is difficult to view this subpoena as anything but an overly-broad, oppressive and unreasonable action designed to expose the identity of a critic.

### A. The New Jersey Constitution Protects Plaintiff's Right to Publish Views on the Internet Anonymously

Assessmentgate is engaging in this country's rich tradition of using a pseudonym as a tool in political debate. *See generally, McIntyre v. Ohio Elections Commission*, 514 *U.S.* 334, 341-42 (1995). AG has a constitutional right to free expression

that includes posting on the Internet, and doing so anonymously. *See Buckley v. American Constitutional Law Found.*, 525 *U.S.* 182, 199-200 (1999) (invalidating statute requiring ballot petitioners to wear identification); *McIntyre*, 514 *U.S.* at 357 ("Anonymity is a shield from the tyranny of the majority."); *Reno v. ACLU*, 521 *U.S.* 844, 870 (1997) (fully extending First Amendment principles to the Internet). As with other forms of expression, the ability to speak anonymously online promotes the robust exchange of ideas and allows speakers to express themselves without "fear of economic or official retaliation ... [or] concern about social ostracism." *McIntyre*, 514 *U.S.* at 341-42.

The New Jersey Constitution affords even more protection to the right to free speech than the Federal Constitution, and the affirmative rights that flow from it are "the most substantial in our constitutional scheme." *Dendrite*, 342 *N.J.* at 149 (*quoting Green Party of New Jersey v. Hartz Mountain Indus., Inc.* 164 *N.J.* 127, 144 (2000)).

The speech at issue, critique of local educational policymakers, lies at the "core" of the First Amendment. "It is speech on matters of public concern that is at the heart of the First Amendment's protection. The same is true under our State Constitution." *Rocci v. Ecole Secondaire Macdonald-Cartier*, 165

*N.J.* 149, 155 (2000)(citations omitted). As a result, this speech "requires maximum protection." *Id.*

Thus, governmental restrictions on such speech are entitled to "exacting scrutiny" and are upheld only when they are narrowly tailored to serve an overriding state interest. *McIntyre*, 514 *U.S.* at 347; see also *State v. Neulander*, 173 *N.J.* 193, 223 (2002) (Long, J., concurring) ("Restrictions on speech may be lawfully imposed, if at all, only when narrowly tailored to achieve a compelling state interest)(quotation and citation omitted). Without such scrutiny, when a party - here, the government - seeks to strip the anonymity of Internet users, the free exchange of ideas is threatened.

### B. *Dendrite* Enunciates the Appropriate Balance That Must Be Struck When A Party Seeks to Uncover the Identity of an Anonymous Internet User

When faced with the free speech principles at stake in the context of subpoenas in civil actions, the Appellate Division set forth rigorous conditions for parties who seek to pierce the constitutionally-protected identity of anonymous internet users. *Dendrite*, 342 *N.J. Super.* at 141-42. The *Dendrite* test that a party must meet before obtaining discovery of the identity of anonymous posters can be summarized as:

1. Notice of the subpoena must be given to the anonymous speaker, and the Court must defer deciding whether to allow discovery until there has been a reasonable opportunity to respond to the request for discovery.

2. The plaintiff must identify, verbatim, the precise words alleged to be actionable, and explain why those words are actionable.

3. The court must apply a motion to dismiss standard to the allegations based on the specified words, and determine that they state a valid claim.

4. The plaintiff must produce sufficient evidence to establish a prima facie case on each elements of his claim.

5. If the plaintiff meets each of these criteria, the court then balances the plaintiff's interest in going forward with his suit against the defendant's interest in remaining anonymous.

*Id.* Courts apply these standards in actions when "anonymous internet posters are sued for allegedly violating the rights of individuals corporations and businesses" and trial courts are tasked to balance the defendant's "well-established First Amendment right to speak anonymously" against a plaintiff's right" to protect its proprietary interests and reputation through the assertion of cognizable claims based on [defendant's] actionable conduct". *Immunomedics v. Doe*, 342 *N.J. Super.* 160, 165 (2001). Importantly, the text is a "flexible, non-technical, fact sensitive mechanism" meant to prevent the abuse of discovery procedures "to harass, intimidate or silence critics in the public forum opportunities presented by the Internet." *Dendrite*, 342 *N.J. Super.* at 156.

While the *Dendrite* standards were created in the context of a defamation action, the same principles apply with full force here. In *Dendrite*, the Appellate Division sought to make clear that, due to the importance of the constitutional right to anonymous speech, a party seeking to pierce such anonymity through a subpoena must, when challenged, be subjected to scrutiny, with the need for the information balanced against the constitutional interest at stake. *Id.* at 141-42. And where the justification for piercing the anonymity is insufficient, the subpoena must be quashed. *Id.; see also id.* at 156.

### C. Constitutional Principles Require This Subpoena to be Reviewed Using the *Dendrite* Standards and that MBOE Demonstrate a Compelling Need for the Information

Assessmentgate is entitled to at least as much scrutiny of the subpoena issued by MBOE as are anonymous defendants in civil actions. While the particular language of the *Dendrite* test is tailored to a defamation action, because the court here is faced with state action to infringe on the constitutional right to anonymous free speech, it should engage in a similarly rigorous balancing test.

At a minimum, a board of education should be required to provide a sufficient nexus to "actionable" conduct and establish a need for piercing AG's anonymity that would override AG's constitutional right. *Dendrite*, 342 *N.J. Super.* at 141-42. In

other words, the Court should balance AG's right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the MBOE to obtain the anonymous party's identity. *Id.*

When weighing the competing interests, the Appellate Division has recognized "particular care must be taken to prevent the suppression of criticism or the flow of legitimate speech." *Warren Hospital v. Does*, 430 *N.J. Super.* 225, 230 (App. Div. 2013) (citing *New York Times Co. v. Sullivan*, 376 *U.S.* 254, 270 (1964)). It noted that courts risk "unmasking those who have said nothing actionable, leaving them vulnerable to powerful and vindictive plaintiffs with the ability to seek revenge and retribution." *Id.* at 231 (citation omitted).

This case is all the more constitutionally significant because the party seeking to pierce the anonymity of the speaker is the government. When the government infringes upon a person's constitutional right to free speech, it must establish a compelling need and must venture to meet that need in the least restrictive or most narrowly tailored way possible. Reno v. ACLU, 541 *U.S.* at 874-75. Because MBOE cannot meet even the lesser "balancing" standard of *Dendrite*, it clearly cannot meet the strict scrutiny applied to government infringements of speech.

### D. The Subpoena is Not the Least Restrictive Means to Obtain Information and MBOE Has More Narrowly Tailored, Alternative Avenues to Investigate Alleged Wrongdoing

In this case, MBOE may be an aggrieved party, but should its subpoena be quashed it is not left without remedy. *Cf. Warren Hospital,* 430 *N.J. Super. at* 230. There has been no showing that the information it seeks is not available from another source. "[T]he First Amendment right of free speech is a fundamental right and an infringement of that right . . .should be accomplished through the least restrictive means available." *Friends of Governor Tom Kean v. New Jersey Election Law Enforcement Com'n*, 203 *N.J. Super.* 523, 536 (App. Div. 1985), citing *Anderson v. Celebrezze*, 460 *U.S.* 780 (1983).

The MBOE can achieve its goals through means far less intrusive than stripping a speaker of anonymity. Though Plaintiff's position is that these investigatory subpoenas are an *ultra vires* use of a school board's authority, *see infra* Point II, if these types of subpoenas are permissible, MBOE can subpoena the website to which its proprietary information was uploaded and demand records regarding the dates, times, and identities of the persons who uploaded the information. This type of evidence would be better suited to meet the goals of an investigation of the unauthorized release of proprietary information than is issuing subpoenas to pierce the anonymity of an individual who is simply an anonymous critic of the

district's actions. Likewise, MBOE could conduct a forensic examination of its own information technology systems to determine the subset of employees that downloaded the 14 tests that were released. Seeking evidence of actual wrongdoing would not raise the constitutional concerns that arise here, where the MBOE has targeted a critic on nothing more than unsubstantiated speculation based on AG's critical online speech.

Because MBOE has failed to attempt those other, more direct and superior avenues of meeting their need but, instead, in the first instance invoked an action that infringes upon AG's constitutional rights, MBOE's action does not pass any level of scrutiny. As such, the subpoena must be quashed to protect AG's constitutional rights.

## IV. PLAINTIFF HAS A CONSTITUTIONALLY PROTECTED PRIVACY INTEREST THAT MBOE CANNOT OVERCOME

Not only is MBOE infringing on Plaintiff's rights to free speech, but its investigation also violates the privacy protections afforded to individuals pursuant to Article I, Paragraphs 7 of the New Jersey Constitution. *State v. Reid*, 194 *N.J.* at 399-400. In *Reid*, the New Jersey Supreme Court found a constitutionally protected privacy interest in information disclosed to Internet service providers ("ISP"). *Id.* ("We now hold that citizens have a reasonable expectation of privacy, protected by Article I, Paragraph 7, of the New Jersey

Constitution, in the subscriber information they provide to Internet service providers – just as New Jersey citizens have a privacy interest in their bank records stored by banks and telephone billing records kept by phone companies"). The Court explained that, under state law, disclosure of one's identity and other information to a third-party provider does not undermine an individual's privacy interest in keeping that information confidential in relationship to others, including the government. *Id.* It further noted that the right to privacy in ISP information was similar to the right to privacy in one's bank records and one's long distance billing information, which the Court also deemed worthy of constitutional protection. *Id.* at 398. *See also State v. McAllister*, 184 *N.J.* 17, 32-33 (2005) (finding constitutional right to privacy in bank records); *State v. Hunt*, 91 *N.J.* 338 (1982) (right to privacy in telephone billing records).

The Court in *Reid* held that the deficient municipal subpoena the police attempted to use in that case warranted suppression of the evidence. 194 *N.J.* at 390. The Court ultimately held that, in criminal matters, at a minimum, a grand jury subpoena would be required to overcome the individual's privacy interest as well as a sufficient nexus between the requested information and the investigation. *Id.* at 35-36. One important aspect of the grand jury process that was highlighted

by the Court was the mandate of grand jury secrecy. *Id.* at 404-05, *quoting McAllister*, 184 *N.J.* at 42 ("'[o]ur grand jury process—bounded by relevancy and safeguarded by secrecy — conforms to our jurisprudence'").

The Court noted that *Reid* was a criminal matter, and while it recognized the Appellate Division's decision in *Dendrite*, it did not venture to discuss what standard would be appropriate for overcoming the expectation of privacy in civil matters. 194 *N.J.* at 402, n.4. Yet in *Reid*, the New Jersey Supreme Court confirmed the idea that some level of protection beyond a mere request for information is required when the government seeks to obtain ISP information and to pierce the anonymity of persons using the Internet.

This court is of course bound by both *Reid* and *Dendrite*. Thus, this court is bound by the principles that there is an expectation of privacy in ISP information and that, in both civil and criminal cases, some significant level of process is required, and some degree of need must be established, to overcome that privacy interest. A school district subpoena (especially when not moored to an actual hearing and when the subject is an individual over whom the district has no authority) does not provide the type of protection that is consistent with the principles of *Dendrite* or *Reid*.

Even assuming *arguendo* that a mere district subpoena is a sufficient mechanism for the government to pierce an individual's anonymity (which Plaintiff does not believe is the case), a sufficient nexus to actionable activity must at the very least be established. Here, MBOE has simply established that AG is a vocal critic of the proposed assessments (as are many others). It has shown no evidence that AG had anything to do with the procurement or disclosure of the district's assessment tests. Allowing the uncovering of an anonymous critic's identity, without sufficient process and with no significant nexus to any wrongdoing, improperly eviscerates the constitutional rights at stake and is contrary to the New Jersey court precedent described above.

As such, under Article I, paragraph 7, the subpoena must be quashed.

## CONCLUSION

For the foregoing reasons, the subpoena issued to Google Inc., must be quashed and the Montclair Board of Education should be enjoined from issuing any subpoenas seeking absent a scheduled hearing for a controversy or dispute under school laws. It should be further enjoined from issuing subpoenas seeking any identifying information of anonymous Internet speakers without following the procedures outlined in *Dendrite* and establishing that it has a compelling need for the information, that it has made narrowly tailored attempts to otherwise meet its goals, and that the subpoena is the least restrictive way to obtain it.

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