In this case, a county official who lost his re-election campaign seeks to identify a constituent who criticized him and his fellow incumbent public officials in a series of emails before and after the election. The emails denounced certain wasteful public expenditures and the county budget deficit which, the writer felt, was the consequence of such expenditures, and satirized the public officials by placing their heads on photographs from series such as "Hogan's Heroes" and "Star Wars." The official claims that the emails were libelous and that, under the Texas Election Code, communications about an election cannot be made anonymously. However, the emails were pure expressions of opinion and are not actionable as defamation. Moreover, the statements are not alleged either to have been false, or to have been made with actual malice. In addtion, emails do not fall within the statutory definition of "political advertising," and, even if they did, plaintiff does not have standing to sue over alleged violations of the advertising identification provisions of Texas election law. Because the First Amendment guarantees the right to speak anonymously unless that right is abused, and because there is neither allegation nor evidence that the speaker committed any actionable wrong, the subpoena should be quashed.

STATEMENT OF THE CASE

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to read them. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997), "From the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, . . . the same individual can become a pamphleteer." The Court held,

therefore, that full First Amendment protection applies to speech on the Internet. *Id.* Or, as another court put it, "[defendant] is free to shout 'Taubman Sucks!' from the rooftops . . .. Essentially, this is what he has done in his domain name. The rooftops of our past have evolved into the internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit, and Mishkoff has a First Amendment right to express his opinion about Taubman." *Taubman v. WebFeats*, 319 F.3d 770, 778 (6th Cir. 2003).

Plaintiff Jimmy Cokinos is a Jefferson County Commissioner. Since 1999, when the County enjoyed a substantial surplus and reserves, the County has been spending in excess of its revenues, with the result that, in the upcoming fiscal year, a large tax increase has been required to meet expenditures. *E.g.*, Gallaspy, *Fund Surplus Has Dwindled*, Beaumont Enterprise, Sept, 26, 2004, page A1. Consequently, the incumbent officeholders became the focus of a public debate about the wisdom of a variety of expenditures, including large expenditures for an entertainment center at Beaumont's Ford Park and a public subsidy for a private golf course at Pleasure Island. Some members of the public also question whether individual members of the County Commission are sufficiently independent or whether they are allowing themselves to be guided too much by the current County Judge, Carl Griffiths. *E.g.*, Editorial, *Ford Park Issues Require Decisive Action by County*, Beaumont Enterprise, Mar. 10, 2004, page A10; Gallaspy, *Ford Park is Big Target*, Beaumont Enterprise, Feb. 22, 2004, page A6; Weaver, *Officials Field Complex Questions*, Port Arthur News, Jan. 8, 2004, http://www.panews.com/articles/2004/01/08/news/export9.txt; Weaver, *Unity Rally Starts Campaign to Change County Government*, Port Arthur News, Oct. 23, 2003, www.panews.com/articles/2003/10/23/news/export30.txt; KDFM News, *Jefferson County*

Commissioners Approve Budget; Opponents Pack Courtroom and Speak Out, Sept. 29, 2003, http://www.kfdm.com/engine.pl?station=kfdm&id=2914&template=pagesearch.shtml; KDFM News, *County Department Heads Ask Commissioners Not To Cut Employees' Salaries; They Say All Taxpayers Should Have To Pay For The County's Budget Woes*, Sep. 10, 2003, http://www.kfdm.com/engine.pl?station=kfdm&id=2725&template=pagesearch.shtml.

Recall_carl01 is the pseudonym of a local citizen who has participated in that debate. In a series of emails to individuals employed by Jefferson County, sent with that pseudonym, recall_carl01 identified several possibly wasteful expenditures, each of which has been discussed in the local media, and urged fellow citizens to keep those expenditures in mind when voting in local elections. In addition, recall_carl01 attached satirical cartoons, adapting photographs from the popular television shows and movies such as Hogan's Heroes in which the faces of local political figures, including petitioner Cokinos, were substituted for characters from the show.

Petitioner Cokinos was a candidate for re-election this past spring, and was defeated in the Republican primary. In response, he filed a petition for pre-litigation discovery claiming that several of the emails from recall_carl01 were "defamatory" in that they, allegedly, "identified Petitioner as corrupt and clearly implied that Petitioner had engaged in criminal conduct with respect to his handling of public funds." However, the verified petition does not contain several allegations that would be necessary for a public official to state a claim for defamation. Most notably, the petition does not allege that the emails contain any false factual statements, or that the statements were made with "actual malice" – that is, either with knowledge of their falsity or reckless disregard of the likelihood that they are false. Nor does the petition set forth the allegedly defamatory words; and, although several emails were apparently attached to the

petition, none of them contains any reference to corruption or to criminal conduct. Finally, although the petition is verified, there is no evidence showing either that movant made false factual statements or that he made statements with actual malice.

The petition further alleges that the emails violated the Texas Election Code in two respects, both predicated on the proposition that emails are "political advertising" under the Code. The petition alleges first that the author of the emails failed to identify himself, as the Code requires for many kinds of political advertising. The petition also alleges a violation of the Code's prohibition of the use of public machinery to display political advertising, although it does not allege that movant used public machinery to create the messages. Instead, Cokinos claims that, because the emails were sent to the work addresses of Jefferson County employees, recall_carl01 was causing those employees to use their computers improperly by reading the emails at work.

On June 23, 2004, Cokinos filed a petition with this Court seeking leave to take the depositions of certain Internet Service Providers ("ISP"). Eventually, Cokinos was able to identify to ISP Time-Warner Cable emails from which Time-Warner could identify movant. The Court granted leave to serve a subpoena on Time-Warner, subject to the provisos that Time-Warner then had to notify the sender of the email, and that all privileges and other objections to the subpoena would be preserved. Movant received that notice, and now asks the Court to quash the subpoena on the ground that the discovery sought would violate his right under the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution to speak anonymously about the official conduct of elected public officials.

ARGUMENT

Under Rule 202 of the Rules of Civil Procedure, the determination of whether to allow pre-suit discovery depends on a balancing of the burden or prejudice to the target of the discovery against the benefit to the prospective plaintiff in being able to take discovery immediately without first filing suit. *In re Hochheim Prairie Farm Mut. Ins. Ass'n*, 115 S.W.3d 793, 795-796 (Tex. App.- Beaumont 2003). In this case, there is insufficient benefit to Cokinos because the verified petition affords no basis for concluding that he had valid claims against movant, and there is grave potential prejudice to movant because his identification would permanently deprive him of his First Amendment right to criticize elected officials anonymously.

A. The First Amendment Protects Against the Compelled Identification of Anonymous Internet Speakers.

It is well-established that the First Amendment protects the right to speak anonymously. *Watchtower Bible and Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960); *Doe v. State*, 112 S.W.3d 532 (Tex. Crim. App. 2003), *aff'g State v. Doe*, 61 S.W.3d 99, 103 (Tex. App. – Dallas 2001). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court said in *McIntyre*,

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having

> anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

514 U.S. at 341-342, 356.

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998); *ACLU v. Miller,* 977 F. Supp. 1228, 1230 (N.D. Ga. 1997); *see also ApolloMEDIA Corp. v. Reno*, 526 U.S. 1061 1450 (1999)*, aff'g* 19 F. Supp.2d 1081 (C.D. Cal. 1998) (protecting anonymous denizens of a web site at www.annoy.com, a site "created and designed to annoy" legislators through anonymous communications); *Global Telemedia v. Does*, 132 F. Supp.2d 1261 (C.D. Cal 2001) (striking complaint based on anonymous postings on Yahoo! message board based on California's anti-SLAPP statute); *Doe v. 2TheMart.com*, 140 F.Supp.2d 1088, 1092-1093 (W.D. Wash. 2001).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that readers will assume that the group feels the same way. They may want to say or imply things

about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and spark retaliation. Whatever the reason for wanting to speak anonymously, a rule that makes it too easy to remove the cloak of anonymity deprives the marketplace of ideas of valuable contributions, and potentially brings unnecessary harm to the speakers themselves.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor every speaker and discover his or her identity. The technology of the Internet is such that any speaker who sends an e-mail or visits a website leaves behind an electronic footprint that, if saved by the recipient, provides the beginning of a path that can be followed back to the original sender. *See* Lessig, *The Law of the Horse*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom. As a result, many informed observers have argued that the law should provide special protections for anonymity on the Internet. *E.g.*, Post, *Pooling Intellectual Capital: Thoughts of Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1996 U. Chi. Legal F. 139; Tien, *Innovation and the Information Environment: Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Ore. L. Rev. 117 (1996).

A court order, even when issued at the behest of a private party, constitutes state action and hence is subject to constitutional limitations. *New York Times Co. v. Sullivan*, 364 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Supreme Court has held that a court order to compel production of individuals' identities in a situation that would threaten the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the rights to speech and press, "even though

unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. First Amendment rights may also be curtailed by means of private retribution following such court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524. As the Supreme Court has held, due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995).

The courts have recognized the serious chilling effect that subpoenas to reveal the names of anonymous speakers can have on dissenters, and the First Amendment interests that are implicated by such subpoenas. *E.g.*, *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281, 1284-1285 (11th Cir. 1982); *Ealy v. Littlejohn*, 560 F.2d 219, 226-230 (5th Cir. 1978). In a closely analogous area of law, the courts have evolved a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of such otherwise anonymous sources. In those cases, courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of its case; (2) disclosure of the source to prove the issue is "necessary" because the party seeking disclosure is likely to prevail on all the other issues in the case, and (3) the discovering party has exhausted all other means of proving this part of its case. *United States v. Caporale*, 806 F.2d 1487,

1504 (11th Cir. 1986); *Miller v. Transamerican Press*, 621 F.2d 721, 726 (5th Cir. 1980); *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972); *Campbell v. Klevenhagen*, 760 F. Supp. 1206, 1210, 1215 (S.D. Tex. 1991); *Channel Two Television Co. v. Dickerson*, 725 S.W.2d 470, 472 (Tex.App.-- Houston [1st Dist.] 1987).

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identity was allegedly relevant to the defense against a shareholder derivative suit, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001).

B. The Qualified Privilege for Anonymous Speech Supports a Five-Part Standard for the Identification of John Doe Defendants.

In a number of recent cases, courts have drawn on the privilege against revealing sources to enunciate a similar standard for protecting against the identification of anonymous Internet speakers. The leading case is *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), where a corporation sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo! That court enunciated a five-part standard for cases involving subpoenas to identify anonymous Internet speakers, which movant urges the Court to apply in this case:

> We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

> We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.
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> The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.
>
> The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to [New Jersey's rules], the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
>
> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
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> 342 N.J. Super. at 141-142, 775 A.2d at 760-761.[1]

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[1] *Dendrite* has received a favorable reception among commentators. *E.g.*, O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L.Rev. 2745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001); Furman, *Cybersmear or Cyberslapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U.L. Rev. 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J.Computer & Info.L. 493 (2001).

A similar approach was used in *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), where the plaintiff sued several anonymous defendants who had registered Internet domain names that used the plaintiff's trademark. The court expressed concern about the possible chilling effect that such discovery could have:

> 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 identities.
>
> *Id*. at 578.

Accordingly, the *Seescandy* court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and to provide them with notice that the suit had been filed against them, thus assuring them an opportunity to defend their anonymity. The court also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id*. at 579. This demonstration included a review of the evidence in support of the trademark claims that the plaintiff was bringing against the anonymous defendants. *Id.* at 580.

Similarly, in *Melvin v. Doe*, 49 Pa. D.&C.4th 449 (2000), *rev'd on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003), the court ordered disclosure only after finding genuine issues of material fact requiring trial. In reversing the order of disclosure, the Pennsylvania Supreme Court expressly recognized the right to speak anonymously and sent the case back for a determination of whether, under Pennsylvania libel law, actual economic harm must be proved as an element of the cause of action. 836 A.2d at 50. In another case, the Virginia Circuit Court for Fairfax County considered a subpoena for identifying information of an

AOL subscriber. The subscriber did not enter an appearance, but AOL argued for a standard that would protect its subscribers against needless piercing of their protected anonymity. The court required plaintiff to submit the actual Internet postings on which the defamation claim was based, and then articulated the following standard for disclosure: The court must be

> satisfied by the pleadings or evidence supplied to that court . . . that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed, and . . . the subpoenaed identity information [must be] centrally needed to advance that claim.
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> *In re Subpoena Duces Tecum to America Online,* 52 Va.Cir. 26, 34, 2000 WL 1210372 (Va.Cir. Fairfax Cy. 2000), *rev'd on other grounds*, 261 Va. 350, 542 S.E.2d 377 (2001).[2]

More recently, a Connecticut court applied a balancing test to decide whether it was appropriate to compel Time-Warner Cable Co. to identify one of its subscribers, who was accused of defaming the plaintiff. *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, 36 Conn. L. Rptr. 170 (Conn.Super. 2003). The Court took testimony from one of the plaintiff's officials, who attested both to the falsity of the defendant's communication and to the damage that the communication had caused. Drawing on such cases as *America Online* and *Doe v. 2TheMart.Com,* that court decided that the evidence was sufficient to establish "probable cause that it has suffered damages as the result of the tortious acts of defendant Doe," at *7, and therefore ordered identification.

Although each of these cases sets out a slightly different standard, each requires the courts to weigh the plaintiff's interest in obtaining the name of the person that has allegedly violated its rights against the

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[2] Virginia has implemented a *Dendrite*-like policy by statute, Va. St. § 8.01-407.1, and proposals for similar legislation are pending in other states.

interests implicated by the potential violation of the First Amendment right to anonymity, thus ensuring that First Amendment rights are not trammeled unnecessarily. Put another way, the qualified privilege to speak anonymously requires courts to review a would-be plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a valid reason for piercing the speaker's anonymity.

C. Cokinos Cannot Meet the Standard for Identification of an Anonymous Speaker.

Courts should follow the five steps enumerated in *Dendrite* in deciding whether to allow plaintiffs to compel the identification of anonymous Internet speakers. Because Cokinos cannot meet these standards, he is not entitled to have his subpoena enforced.

1. Give Notice of the Threat to Anonymity and an Opportunity to Defend It.

When a court receives a request for permission to subpoena an anonymous Internet poster, it should require the plaintiff to undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Seescandy*, 185 F.R.D. at 579. Thus, in *Dendrite*, the trial judge required the plaintiff to post on the message board a notice of an application for discovery to identify anonymous message board critics. The notice identified the four screen names that were sought to be identified, and provided information about the local bar referral service so that the individuals concerned could retain counsel to voice their objections, if any. (The posted Order to Show Cause, as it appears in the Appendix in the *Dendrite* appeal, is appended to this brief). The Appellate Division specifically approved this requirement. 342 N.J. Super at 141, 775 A.2d at 760. This Court met that concern by ordering Time-Warner to notify

recall_carl01, and that notice did reach him.[3]

2. Require Specificity Concerning the Statements.

The qualified privilege to speak anonymously requires the court to review the plaintiff's claims to ensure that plaintiff does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that is alleged to have violated his rights. Indeed, like most states, Texas requires that defamatory words be set forth verbatim in a complaint for defamation. *Perkins v Welch*, 57 S.W.2d 914, 915 (Tex. Civ. App. – San Antonio 1933); *see also Granada Biosciences v. Barrett*, 958 S.W.2d 215, 222 (Tex.App.– Amarillo 1997); *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979). Cokinos has not alleged the supposedly actionable words with any specificity – instead, he alleges in very general terms that certain emails "identified Petitioner as corrupt" and "implied that Petitioner had engaged in criminal misconduct." He further claims that unspecified emails constitute "political advertising," but because the contents of the emails are not specifically alleged, the Court cannot determine whether they meet the statutory definition of "political advertising."

Although Cokinos has filed certain emails with the Court, none of them states that Cokinos is either corrupt or criminal – they simply complain that various public expenditures were wasteful or unwise, either in themselves or because of the resulting budget deficits. Making charges about the waste of the public fisc are plainly within a citizen's speech rights, and cannot be the basis for a defamation action by a public

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[3]On the other hand, because petitioner complains about speech in an email, and petitioner has recall_carl01's email address, petitioner could easily have notified the speaker of his application for leave to take discovery; there is no reason why such notice should not have been given here.

official against his constituents.

3. Review the Facial Validity of the Claims After the Statements Are Specified.

Third, the court should review each statement to determine whether it is facially actionable. In a defamation case, for example, some statements may be too vague or insufficiently factual to be defamatory. Still other statements may be non-actionable because they are merely statements of opinion, which are expressly excluded from the cause of action for defamation. *Carr v. Brasher*, 776 SW2d 567, 570 (Tex. 1989); *Brewer v. Capital Cities/ABC*, 986 SW2d 636, 643 (Tex. App. – Ft. Worth 1998).

To the extent that Cokinos' claim for defamation may rest on the emails that have been furnished to the Court, they are plainly non-actionable expressions of opinion about the manner in which Cokinos and other incumbents conducted themselves in office. For example, the March 15 email entitled "Waymon Hallmark" described various sums of money as having been "wasted," and asked rhetorically "please explain to me how Waymon Hallmark, Carl Griffith and Jimmie P Cokinos have done such a great job with our Tax Dollars." Petition, Exhibit pages 2-3. Similarly, the February 9 email "Know your ABC's before you vote" complains about the expenditure of $80,000,000 for a park complex that "is not even completed yet," $3,000,000 for a golf course "and Jefferson County doesn't even own a part in the Golf Course," and about "wasting a $24,000,000 surplus of our TAX MONEY." Petition, Exhibit page 13. The facts on which the emails were based were stated, and the underlying problems, along with their impact on the County budget, have been widely reported in the media. *See, e.g.,* articles reported *supra* at page 2. The negative assessments are pure opinion.

To the extent that Cokinos bases his request for discovery on his desire to file a complaint with the

Texas Ethics Commission ("TEC") about alleged violations of Texas election laws governing "political advertising," the allegations do not support the requested discovery. First, there is no precedent for invoking Rule 202 to determine the basis for filing a complaint with a state agency, and there is no private cause of action for violation of the political advertising rules. Rule 202's purpose is to afford discovery needed before filing a proceeding in court, in which that same discovery would also be available. If the Court were to expand Rule 202 as broadly as Cokinos' petition suggests, any person could use the pre-litigation petition procedure to gather facts for an intended workers compensation claim, an administrative complaint about a business competitor, a judicial misconduct charge, or a tax refund request, which is surely not what the drafters of the Rule intended.

Second, the Texas Election Code does not define individual emails as "political advertising." In contradistinction to the statutory term "campaign communication," which includes **any** "means of written or oral communication relating to a campaign for nomination or election to public office," Section 251.001(17), a communication is political advertising only if it is published in certain carefully defined ways:

> (16) "Political advertising" means a communication supporting or opposing a candidate . . . that:
>
> (A) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or
>
> (B) appears:
>
> (i) in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication; or
>
> (ii) on an Internet website.

Texas Election Code, Section 251.001(16).

The emails mentioned in Cokinos' petition were not "published for consideration" as required by subsection (A), and they are not "pamphlets, circulars, fliers" or similar forms of written communication, as required

for subsection (B)(i). Nor did the emails appear "on an Internet website" as required by subsection (B)(ii). By referring separately to Internet communications but specifically providing that the only Internet communication covered is a "website," the statute deliberately excludes "emails" from the category of political advertising, under the principle of expressio unius, exclusio alterius. *Martinez v. Second Injury Fund of Texas*, 789 S.W.2d 267, 270 (Tex.1990).

Indeed, in the course of the leading case on the constitutionality of a related provision of the Texas Election Code, one Justice recognized that, under the Code, "there are ways available to a significant portion of the electorate to anonymously disseminate political ideas to a significant portion of the electorate. For example, . . . one may send targeted mailing and emails or post messages on the internet message boards and chat rooms, and so forth." *Doe v. State*, 112 S.W.3d 532, 540 (Tex. Crim. App.2003) (Justice Holcomb, dissenting). Similarly, California's Fair Political Practices Commission has ruled that individuals may express their views about campaigns by email without identifying themselves or otherwise treating their emails as political advertising. *Report of the Bipartisan California Commission on Internet Political Practices* (December 2003) at 39.

Third, the Texas Election Code contains an express exemption from the disclosure requirements for "circulars or flyers that cost in the aggregate less than $500 to publish and distribute." Section 255.001(d)(3). Thus, even if emails were deemed political advertising on the theory that they were analogous to circulars or flyers under the definition in Section 251.001(16)(B)(i), the Verified Petition would fail to state a claim that recall_carl01's handful of emails had to carry the required disclosures, because there is no allegation that they cost more than $500 to distribute. Indeed, it should be apparent that the cost of disseminating all of the emails attached to the Verified Petition imposed no marginal cost

on recall_carl01, and hence was effectively zero.

Fourth, construing the statute not to apply to emails avoids the need to confront the constitutional questions that would be posed if the state were to try to regulate the expression of opinions by individual citizens during the course of an election. It is one thing for the government to regulate contributions to candidates, or the purchase of campaign advertising, or coordinated expenditures of money by interest groups supporting or opposing candidates for office. It is quite another thing for a state to restrict the right of individual citizens to express their views on candidates in letters or emails to each other. Because it is the TEC and state district attorneys, and not individual candidates, who are authorized to enforce the laws on political advertising, this Court should not rush to address the constitutional questions that would be presented by such an adventurous construction of Texas Election Code.

4. Require an Evidentiary Basis for the Claims.

No person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of his cause of action to show that he has a realistic chance of winning a lawsuit against that defendant. The requirement of presenting evidence prevents a plaintiff from being able to identify critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need identification of the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless he comes forward with evidence in support of his claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of **relief** in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark,* California Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who bring cases like this one have publicly stated that the mere identification of their clients' anonymous critics may be all they desire to achieve in court. *E.g.,* Werthammer, *RNN Sues Yahoo Over Negative Web Site,* Daily Freeman, November 21, 2000, http://www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=74969&rfi=8. One of the leading advocates of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online* , http://www.fhdlaw.com/html/corporate_reputation.htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, http://www.fhdlaw.com/html/bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer and Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept./Oct. 2000), at 46. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.*

Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the public official who has filed the action. *Id.* However, imposition of a requirement that proof of wrongdoing be presented to obtain the names of the anonymous critics, and not just to secure an award of damages or other relief, may well persuade plaintiffs that such subpoenas are not worth pursuing unless they are prepared to litigate.

To address this potential abuse, this Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D.Cal. 1976). *See also Schultz v. Reader's Digest*, 468 F.Supp. 551, 566-567 (E.D.Mich. 1979). In effect, the plaintiff should be required to show genuine issues of material fact on all issues in the case, including issues with respect to which it needs to identify the anonymous speakers, before it is given the opportunity to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

The extent to which a proponent of compelled disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of its claims at the outset of its case, to obtain an injunction compelling the identification of the defendant, varies with the nature of the element. On many issues in suits for defamation or disclosure of inside information, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false. Thus, it is ordinarily proper to require a plaintiff to present proof of this element of its claims as a condition of enforcing a subpoena for the identification of a Doe defendant. The same is true with respect to the proof of damages. Even if discovery is needed to develop the full measure of damages, a plaintiff surely should have some information at the outset supporting claims that he suffered actual damages.

In this case, Cokinos has yet to introduce **any** evidence that anything recall_carl01 said about him

is false, not to speak of showing a reason to believe that complaints about funding problems that were already the subject of extensive public discussion were made with actual malice. For this reason as well, the motion to quash should be granted.

5. Balance the Equities.

After the Court has satisfied itself that the anonymous emailer has made at least one statement that is actionable,

> the final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . .. On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.
> *Missouri ex rel. Classic III v. Ely*, 954 SW.2d 650, 659 (Mo. App. 1997).

Just as the Missouri Court of Appeals approved such balancing in a reporter's source disclosure case, *Dendrite* called for such individualized balancing when the plaintiff seeks to compel identification of an anonymous Internet speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
>
> The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue.
>
> *Dendrite v. Doe*, 342 N.J. Super. 134, 141-142, 775 A.2d 756, 760-761 (App. Div. 2001).

See also In re Hochheim Prairie Farm Mut. Ins. Ass'n, 115 S.W.3d 793, 795-796 (Tex. App.-

Beaumont 2003) (Rule 202 requires balancing of interests).

If the plaintiff cannot come forward with concrete evidence sufficient to prevail on all elements of its case on subjects that are based on information within its own control, there is no basis to breach the anonymity of the defendants. *Bruno v. Stillman*, 633 F.2d 583, 597 (1st Cir. 1980); *Southwell v. Southern Poverty Law Center*, 949 F.Supp. 1303, 1311 (W.D.Mich. 1996). Similarly, if the evidence that the plaintiff is seeking can be obtained without identifying anonymous speakers or sources, the plaintiff is required to exhaust these other means before seeking to identify anonymous persons. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 8-9 (2d Cir. 1982). *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981) ("an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure"). If the case can be dismissed on factual grounds that do not require identification of the anonymous speaker, it can scarcely be said that such identification is "necessary" or that identification "goes to the heart" of the plaintiff's case.

The adoption of a standard comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities, is particularly appropriate because an order of disclosure is a permanent injunction, and denial of a motion to identify the defendant does not compel dismissal of the complaint, but only defers the ultimate disposition of the case. Therefore, any contention that the effect of defendant's argument against being identified would be to deny it the opportunity to have its day in court, is erroneous.

Denial of a motion to enforce a subpoena identifying the defendant does not terminate the litigation, and hence is not comparable to a motion to dismiss or a motion for summary judgment. At the very least, the plaintiff retains the opportunity to renew its motion after submitting more evidence. And because the

case has not been dismissed, the plaintiff can pursue discovery from third parties and possibly on a limited basis from the anonymous defendant, as it attempts to develop sufficient evidence to warrant an order identifying the speaker.

However, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker loses her anonymity, she can never get it back. Moreover, any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976).

On the other side of the balance, the Court should consider the strength of the plaintiff's case, and its interest in redressing the alleged violations. In this regard, the Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of cause significant damage to the plaintiff, and the extent to which the plaintiff's own fault is responsible for the problems of which he complains.

Here, several considerations weigh heavily against Cokinos at the balancing stage of the case. First, Cokinos is a public official trying to identify a constituent who criticized his conduct in office. By seeking to be re-elected, Cokinos voluntarily made his conduct a fair subject for comment, even robust and very unkind comment; and the comments for which recall_carl01 has been sued are core political speech, for which the protection of the First Amendment is at its apogee.

Second, public employees have been in the forefront of criticizing Jefferson County's failure to plan revenues to match its budgets, and in the course of publicizing his effort to suppress recall_carl01's speech, Cokinos and his supporters have made clear their belief that their critic is a public employee (in fact, they alleged that their critic was using his work computer to send the critical emails, but an investigation by the

District Attorney failed to substantiate that accusation, which recall_carl01 denies). *See* Jordan, *Legal Action Taken Against Recall Carl*, The Examiner, June 24-30, 2004, page 6. As such an employee, recall_carl01 would be exposed to retaliation by the elected officials of the county should his identity be revealed. Thus, the potential harm to recall_carl01 is not merely the theoretical loss of the right to remain anonymous, but the very real possibility of serious economic harm.

Finally, given his failure to identify the particular emails alleged to be defamatory, or introduce any evidence to support his claims that he was falsely charged with corruption or other criminal conduct, Cokinos has not shown any significant interest in learning the identity of his critic. Cokinos need not identify an alleged wrongdoer to pursue a complaint with the TEC; he could file a complaint alleging that an unknown person sent the emails, and the TEC would then decide whether emails of this sort are political advertising whose anonymity potentially violates the law. Moreover, while conducting its investigation, the TEC would not be required to identify recall_carl01 to persons who have the power to retaliate against him, a result that would surely follow from an order allowing Cokinos and his fellow incumbents to identify a persons who had strongly criticized them.

* * *

The principal advantage of the *Dendrite* test is its flexibility. It balances the interests of the plaintiff who claims to have been wronged against the interest in anonymity of the Internet speaker who claims to have done no wrong. In that way, it provides for a preliminary determination based on a case-by-case, individualized assessment of the equities. It avoids creating a false dichotomy between protection for anonymity and the right of victims to be compensated for their losses. It ensures that online speakers who make wild and outrageous statements about public figures or private individuals or companies will not be

immune from identification and from being brought to justice, while at the same time ensuring that persons with legitimate reasons for speaking and criticizing anonymously will be allowed to maintain the secrecy of their identity as the First Amendment allows.

The *Dendrite* test also has the advantage of discouraging the filing of unnecessary lawsuits. In the first few years of the Internet, hundreds or even thousands of lawsuits were filed seeking to identify online speakers, and the enforcement of subpoenas in those cases was almost automatic. Consequently, many lawyers advised their clients to bring such cases without being serious about pursuing a claim to judgment, on the assumption that a plaintiff could compel the disclosure of its critics simply for the price of filing a complaint. ISP's have reported some staggering statistics about the number of subpoenas they received – AOL's amicus brief in the *Melvin* case reported the receipt of 475 subpoenas in a single fiscal year, and Yahoo! stated at a hearing in California Superior Court that it receives "thousands" of such subpoenas. *Universal Foods Corp. v. John Doe*, Case No. CV786442 (Cal. Super. Santa Clara Cy.), Transcript of Proceedings July 6, 2001, at page 3.

Although no firm numbers can be cited, experience leads undersigned counsel to believe that the number of civil suits currently being filed to identify online speakers has dropped dramatically from the earlier figures. We credit the decisions in *Dendrite*, *2TheMart.com*, *Melvin, Seescandy* and other cases that have adopted strict legal and evidentiary standards for defendant identification with sending a signal to would-be plaintiffs and their counsel to stop and think before they sue. At the same time, the publicity given to these lawsuits, to the occasional libel verdict against anonymous defendants, as well as the fact that many online speakers have been identified in cases that meet the *Dendrite* standards (indeed, two of the Doe defendants in *Dendrite* were identified), has discouraged some would-be posters from the sort of

Wild West atmosphere that originally encouraged the more egregious examples of online irresponsibility, if not outright illegality. We urge the Court to preserve this balance by adopting the *Dendrite* test that weights the interests of defamation plaintiffs to vindicate their reputations in meritorious cases against the right of Internet speakers to maintain their anonymity when their speech is not actionable.

CONCLUSION

The subpoena to Time-Warner should be quashed.

Respectfully submitted,

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