NO. _____

In the

Supreme Court

IN RE

JOHN DOES 1 AND 2,

RELATORS

FROM THE NINTH COURT OF APPEALS
AT BEAUMONT

Trial Court Cause No. E-184,784

RELATORS' PETITION FOR WRIT OF MANDAMUS

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EMERGENCY RELIEF REQUESTED

RELATORS REQUEST ORAL ARGUMENT

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The Honorable Donald J. Floyd *Respondent*	

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NO._____

IN RE JOHN DOES 1 AND 2,

RELATORS

PETITION FOR WRIT OF MANDAMUS

Relators John Does 1 and 2 are the authors of content on website addresses[1] www.operationkleinwatch.blogspot.com and www.samtheeagleusa.blogspot.com. Such websites are commonly known as "blogs."[2] Relators submit this petition for writ of mandamus complaining of the **January 29, 2010**, order of Hon. Donald J. Floyd, presiding judge of the 172nd District Court of Jefferson County, Texas. For convenience, Relators are referred to as "Relators;" real parties-in-interest blogs www.operationkleinwatch.blogspot.com and www.samtheeagleusa.blogspot.com are referred to as "the Blogs;" real parties-in-interest PRK Enterprises, Inc., and Klein Investments, Inc., are referred to as "Klein;" real party-in-interest Google, Inc., is referred to as "Google;" and Respondent, the Honorable Donald J. Floyd, is referred to as "Respondent."

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[1] In both his Original and First Amended Original Petitions, Klein names as respondents "www.operationkleinwatch.blogspot.com" and "www.samtheeagleusa.blogspot.com." The named respondents are merely website addresses and not truly persons or entities with the capacity to be sued, although they appeared anonymously in the underlying suit and filed motions to quash the Klein subpoena.

[2] The word "blog" is a shortened version of the term "web log," and refers to a website on which authors offer free and continuously updated opinion, information, or satirical comment concerning topics of interest to readers who usually share similar political or philosophical viewpoints.

STATEMENT OF THE CASE

The Underlying Proceeding. Relators contribute content to two websites devoted chiefly to criticizing Philip R. Klein. **Tabs C** and **D**. Klein petitioned the 172nd District Court for an order pursuant to TEX. R. CIV. P. 202 allowing him to depose Google, allegedly to investigate potential claims against the Blogs. **Tabs C** and **D**. In fact, Klein was interested only in learning Relators' identities. *Id*.; **Tab E**. Attorneys for Klein and Google agreed that instead of the hearing on the petition required by Rule 202, Klein could serve a subpoena duces tecum upon Google for documents that would reveal Relators' identity. **Tab E**. Klein did so. **Tab F**. The Blogs (representing themselves *pro se*) moved to quash Klein's subpoena in order to protect Relators' anonymity. **Tabs G** and **H.**

The Respondent. The Respondent is the Honorable Donald J. Floyd, presiding judge of the 172nd District Court of Jefferson County, Texas.

Respondent's actions. After a hearing on **January 15, 2010**, Respondent on **January 29, 2010**, denied the Blogs' motions to quash Klein's subpoena duces tecum and ordered Google to respond. **Tab A**.

Petition in court of appeals. On **April 23, 2010**, Relators filed a petition for writ of mandamus and motion for emergency stay in the Ninth Court of Appeals. The panel considering the petition consisted of Chief Justice McKeithen and Justices Gaultney and Horton.

Disposition of case. On **April 29, 2010**, the court of appeals denied Relators' petition and motion. **Tab B**. The panel issued a per curiam opinion.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a writ of mandamus, prohibition, or injunction under TEX. CONST. art. V, § 6, and TEX. GOV'T CODE § 22.221(a).

This petition for writ of mandamus was first filed in the Ninth Court of Appeals, which denied the relief requested. *See* TEX. R. APP. P. 52.3(e). The opinion is reported as ***In re John Does 1 and 2***, No. 09-10-00189-CV, 2010 Tex. App. Lexis 3190 (Tex. App.—Beaumont April 29, 2010, orig. proceeding). A copy of the opinion denying the petition is included in the appendix under **Tab B**.

ISSUE PRESENTED FOR REVIEW

Issue 1: Whether Respondent abused his discretion when he disregarded the procedures of Rule 202 and ordered a form of pre-suit discovery *other than* a deposition—the only discovery authorized by that rule.

A. Mandamus is available to review Respondent's order refusing to quash Klein's subpoena duces tecum and compelling Google to produce documents destroying Relators' anonymity.

B. Rule 202 does not permit Respondent to enforce Klein's subpoena duces tecum.

C. A Rule 11 agreement between Klein and Google cannot waive the procedural or substantive rights of Relators, who were not parties to the agreement.

D. The Blogs' failure to appear at the January 15, 2010, hearing on the Blogs' motions to quash does not excuse Respondent's abuse of discretion.

E. Respondent's order was "state action" depriving Relators of their First Amendment right to anonymous speech.

STATEMENT OF FACTS

This proceeding arises from a petition in the 172nd District Court by two corporations owned by Philip Klein, a local Texas public figure and the owner and editor of a blog known as the "Southeast Texas Political Review." **Tab J**, 5:10-21. Although the Klein parties are referred to for convenience as "Klein," Philip Klein himself was not named as a petitioner individually. Klein sought an order under TEX. R. CIV. P. 202 to take the pre-suit deposition of Internet search giant Google, Inc., allegedly to investigate potential defamation claims against Blogs www.operationkleinwatch.blogspot.com and www.samtheeagleusa.blogspot.com. **Tabs C** and **D**. In reality, the only objective of Klein's "investigation" was to learn Relators' identities. **Tabs C-F**. Relators are authors of Blog content which is chiefly devoted to criticizing Klein, exposing claimed factual inaccuracies in Klein's political commentary and holding Klein up to public ridicule. **Tab G**.

Klein made no attempt to serve his petitions upon either the Blogs[3], as required by Rule 202.3(a), or Relators, as required by Rule 202.3(b)(1). **Tabs C** and **D**. Respondent never held a hearing on Klein's petition, as required by Rules 202.3 and 202.4. Respondent never made the required findings or entered an order allowing a pre-suit deposition, as required by Rule 202.4(a) or (b).

Instead, attorneys for Klein and Google agreed to dispense with the procedures and findings required by Rule 202. **Tab E**. In lieu of a deposition,

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[3] *See, e.g.*, **Tab A**, paragraphs 4 and 5, ("No service is requested at this time," as to either of the Blogs); **Tab B**, paragraphs 4 and 5 (same).

Google agreed that Klein could obtain documents revealing Relators' identities and destroying their anonymity by serving a subpoena duces tecum for documents that would contain such information. *Id*. On **September 29, 2009**, Klein served such a subpoena upon Google for, among other things:

> **1. Any and all identifiers, user account IP addresses, user access Email Addresses, user entry logs, user posting logs, registered user information, account access IP addresses and/or any identifying descriptors for the following blogspots for the previous year:**
>
> **a) http://samtheeagleusa.blogspot.com/**
> **b) http://operationkleinwatch.blogspot.com/**
> **c) http://notthisonetoojacques.blogspot.com/**

Tab F. The Klein subpoena purported to be a "subpoena duces tecum" pursuant to TEX. R. CIV. P. 176.2(b), commanding Google "to return said documents" and referring Google "to the attached Exhibit 'A'" for documents to be produced. *Id*. However, the items listed in the Klein subpoena's Exhibit A are not "documents" in the usual sense of the word, but more in the nature of topics on which an examination might be sought. For example, Google was to "[i]dentify all persons, parties or entities responsible for the websites," who "provide contributions of money or literary substance to these websites," or who were "in anyway (sic) affiliated with, or connected with in any capacity, these websites." **Tab F**.

The Blogs appeared *pro se*, each filing a motion to quash the Klein subpoena issued to Google. **Tabs G** and **H**. Blog operationkleinwatch.com argued that disclosing Relators' identities would violate federal constitutional rights to exercise free speech anonymously. **Tab G**. Blog samtheeagleusa.com pointed out that the trial court had not followed the procedures of Rule 202 and

that Rule 202 does not permit subpoenas duces tecum as a form of pre-suit discovery. **Tab H**. In addition, samtheeagleusa.com argued that even if subpoenas were allowed under Rule 202, Klein's subpoena, **Tab F**, was unenforceable[4] because it was served more than 150 miles from the place where production of requested documents was required.

Klein filed a response and motion to compel addressing operationkleinwatch.com's constitutional right-to-anonymous-speech arguments but ignoring samtheeagleusa.com's arguments that (i) a subpoena was not a permissible form of discovery under Rule 202.1; (ii) the trial court failed to comply with the procedures of Rule 202; and (iii) the Klein subpoena was unenforceable under Rule 176.3(a). **Tab I**.

On **January 15, 2010**, the trial court held an oral hearing on the Blogs' motions to quash. **Tab J**. No one attended the hearing on behalf of Relators or the *pro se* Blogs. *Id.* Because Klein's attempt to destroy Relators' anonymity was the *sine qua non* of both Klein's Rule 202 petition and the motions to quash, affected parties could not appear in open court to argue in support of the motions without revealing their identities and rendering the challenge moot. Klein acknowledged this "Catch 22" to the trial court, and even helpfully explained that this was a *typical* response to a litigant's attempt to discover anonymous bloggers' identities:

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[4] More precisely, the *pro se* movant argued—perhaps inartfully—that the service of Klein's subpoena to Google "more than 150 miles from the county where suit is pending" meant that the "suit does not have jurisdiction over either Google or Sam the Eagle weblog."

> **And it's typical—under federal law Google is required to notify the bloggers that their identity is being sought…. So, often in these types of situations the bloggers file anonymous objections and then they don't appear in court. So this is not a surprise.**

Tab J, 7:3-10.

During the hearing, Respondent neither expressed any interest in, nor acted with reference to, any guiding rules or legal principles regarding—

(i) whether the Klein subpoena was served in accordance with Rule 176.3(a);

(ii) whether the Klein subpoena was enforceable under Rule 176.8(b);

(iii) whether there was a compelling state interest that outweighed Relators' First Amendment rights to anonymity; or

(iv) whether the Klein pre-suit subpoena duces tecum was permitted by Rule 202.1 under any circumstances *at all*.

Tab J. The Klein subpoena itself, **Tab F**, does not appear to have been filed below—even when Klein sought to enforce it.[5] Respondent's only comment regarding Klein's cavalier dismissal of Relators' rights was, "Okay." **Tab J**, 7:11. Respondent told Klein to "hand deliver [an order denying the motions to quash] to me and I'll sign it." *Id*. On **January 29, 2010**, Respondent did so. **Tab A**.[6] Thus, in a single stroke, Respondent eviscerated Relators' First Amendment right to anonymously criticize a public figure—apparently without even reviewing the subpoena with which Respondent ordered Google to comply.

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[5] The record of the hearing on the Blogs' motions to quash reflects no examination of the subpoena by Respondent. **Tab J**. The "E-File Inventory Sheet," **Tab K**, of documents filed in the underlying cause contains no entry for Klein's subpoena, nor is the subpoena appended as an exhibit either to the Blogs' motions to quash, **Tabs G** and **H**, or to Klein's response. **Tab I**.

[6] Although the order signed by Respondent, **Tab A**, is captioned "Amended Order," no earlier order pertaining to the Klein subpoena appears of record. *See* **Tab K**.

ARGUMENT & AUTHORITIES

ISSUE 1: Whether Respondent clearly abused his discretion when he disregarded the procedures of Rule 202 and ordered a form of pre-suit discovery other than a deposition—the *only* discovery authorized by that rule.

A. Mandamus is Available to Review Respondent's Order Refusing to Quash Klein's Subpoena Duces Tecum and Compelling Google to Produce Documents Destroying Relators' Anonymity

Mandamus is available when the trial court abuses its discretion if there is no adequate remedy by appeal. ***Walker v. Packer***, 827 S.W.2d 833, 839-40 (Tex. 1992). A trial court abuses its discretion when it acts without reference to any guiding rules and principles. ***Downer v. Aquamarine Operators, Inc***., 701 S.W.2d 238, 241-42 (Tex. 1985). Here, Respondent not only acted without reference to the guiding rules and procedures applicable to pre-suit discovery, Respondent:

(i) ordered a form of discovery not permitted by Rule 202;

(ii) compelled Google to comply with a subpoena that had not been served in accordance with Rule 176.3(a); and

(iii) enforced a subpoena that was not accompanied by proof under oath that all witness fees had been paid, as required by Rule 176.8(b).

A trial court abuses its discretion if it fails to analyze or apply the law correctly. ***In re Cerberus Capital Mgmt., L.P***., 164 S.W.3d 379, 382 (Tex. 2005).

Mandamus is appropriate to review a discovery order if the appellate court would be unable to cure the trial court's error. ***Volkswagen, A.G. v. Valdez***, 909 S.W.2d 900, 903 (Tex. 1995). Mandamus will also lie when appeal is insufficient to protect a relator's specified constitutional right. ***Tilton v. Marshall***, 925

S.W.2d 672, 682 (Tex. 1996). An order destroying the relator's First Amendment right to anonymous speech falls squarely within this protection. *See* ***In re Does 1-10***, 242 S.W.3d 805, 811-12 (Tex. App.—Texarkana 2007, orig. proceeding). Here, if Google produces documents revealing Relators' identities, no appellate court will be able to restore the Relators' anonymity. The trial court's erroneous order, **Tab A**, enforcing Klein's subpoena, **Tab F**, strips Relators of their First Amendment right to anonymous speech. Thus, mandamus will lie.

B. Rule 202 Does Not Permit Respondent to Enforce Klein's Subpoena Duces Tecum

Mandamus review of a trial court's application of the law is not limited to purely substantive matters. This Court has addressed the application of procedural rules under such a rubric. *See* ***In re Pirelli Tire, L.L.C.***, 247 S.W.3d 670 (Tex. 2007); ***In re Van Waters & Rogers, Inc.***, 145 S.W.3d 203 (Tex. 2004). So have the courts of appeals. *See* ***In re Does 1-10***, 242 S.W.3d at 811-12. Although mandamus is extraordinary, no other remedy is adequate when, as here, a trial court fails to adhere to the specific requirements of TEX. R. CIV. P. 202. At least three courts have granted mandamus to correct such an abuse of discretion. ***In re Denton***, 2009 Tex. App. Lexis 1322 (Tex. App.—Waco 2009, orig. proceeding) (granting mandamus because trial court did not find that "allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit," as required by Rule 202.4(a)(1)); ***In re Hewlett Packard***, 212 S.W.3d 356, 360 (Tex. App.--Austin 2006, orig. proceeding) (granting mandamus

because petitioner had not "established that the benefit of the requested depositions outweighs the potential burden or expense of the procedure as required by Rule 202"); ***In re Akzo Nobel Chemical Co***., 24 S.W.3d 919, 920 (Tex. App.--Beaumont 2000, orig. proceeding) (granting mandamus when the trial court ordered a form of pre-suit discovery under Rule 202 other than a deposition).

Rule 202 permits the taking of a deposition either to (i) perpetuate testimony or obtain testimony for use in anticipation of suit; or (ii) investigate a potential claim or suit. TEX. R. CIV. P. 202.1 (a)-(b); ***In re Alexander***, 251 S.W.3d 798, 799 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Rule 202 does not permit the issuance or enforcement of a subpoena duces tecum or any other form of discovery. ***In re Akzo Nobel Chemical***, 919 S.W.3d at 920; *see* TEX. R. CIV. P. 202. Even if it did, the Klein subpoena was unenforceable under both Rule 176.3(a)[7] or 176.8(b)[8]. It was a clear abuse of discretion for Respondent to deny the Blogs' motions to quash and order Google to comply with Klein's improper, pre-suit subpoena. **Tab A**.

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[7] The Klein subpoena, **Tab F**, recites that it was served in Dallas County, Texas, a county that the Court may take judicial notice is more than 150 miles away from Nederland, Texas, the place designated for production of the subpoenaed records. Thus, the Klein subpoena failed even to comply with the most basic requirements of a subpoena—here, the 150-mile limit of TEX. R. CIV. P. 176.3(a).

[8] The Klein subpoena served upon Google, **Tab F**, does not contain "proof by affidavit" that all fees due the witness by law were paid or tendered, as required by TEX. R. CIV. P. 176.8(b). No copy of the subpoena meeting this requirement appears of record. **Tab K**.

C. A Rule 11 Agreement Between Klein and Google Cannot Waive Procedural or Substantive Rights of Relators, Who Were Not Parties to the Agreement

The fact that there was a Rule 11 agreement between Klein and Google, **Tab E**, substituting a subpoena duces tecum for a pre-suit deposition does not change the analysis under Rule 202. Although parties are free to modify discovery procedures with Rule 11 agreements,[9] the suggestion that *some* parties may agree among themselves to dispense with the procedures and limitations of Rule 202 erected for the protection of *other* parties is inconsistent with Rule 202's express language protecting "all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit." TEX. R. CIV. P. 202.3(a). The enforceability of the Klein-Google Rule 11 agreement ends where Relators' rights to—

(i) the notice and hearing required by Rule 202.3(a);

(ii) the service required by Rule 202.3(b);

(iii) the specific trial court findings required by Rule 202.4(a); and

(iv) a trial court order complying with Rule 202.4(b);

begin. A Rule 11 agreement between Klein and Google purporting to extinguish Rule 202's several procedural protections of Relators' "interests adverse to the petitioner's" is no more enforceable against Relators than an agreement between Klein and Google purporting to extinguish Relators' constitutional right to a trial by jury. Parties may not use Rule 11 agreements to modify discovery limitations and procedures when this would be "prohibited by law." TEX. R. CIV. P. 191.1.

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9 *See* TEX. R. CIV. P. 191.1.

D. The Blogs' Failure to Appear at the January 15, 2010, Hearing on the Blogs' Motions to Quash Does Not Excuse Respondent's Abuse of Discretion

The fact that the Blogs did not appear at the January 15, 2010, hearing on their own motions to quash cannot be allowed to excuse Respondent's failure to analyze and apply Rule 202 properly. It also cannot allow Respondent to act without weighing the extremely serious consequences of his actions upon the constitutional rights of parties who were not even before the trial court.

Although two of the authors of the Blogs' content are before this Court as Relators, the universe of anonymous authors of the Blogs' content is potentially unlimited. *All* authors of the Blogs' content will lose their anonymity if Google should—as Respondent ordered Google to do—"[i]dentify all persons, parties or entities" who "provide contributions of … literary substance to these websites." **Tab F**. While the Blogs' failure to appear at the hearing on their own motions to quash might, under certain circumstances,[10] properly be treated by the trial court as a default by the Blogs, it cannot be treated as a default waiving the constitutional rights of any *other parties*—such as Relators. This is especially true when no service of Relators or other such parties with Klein's suit was ever attempted in the manner prescribed by Rule 202.3(b)(1).

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[10] Relators do not concede that such circumstances were present here. Aside from the fact that there had been no previous failure of the Blogs to appear on any occasion before January 15, 2010, for this Court to hold that a litigant cannot preserve his constitutional right to anonymous speech unless he commits an act that destroys the very anonymity he seeks to protect would produce an absurd and perverse result that courts historically do not countenance. *See, e.g.*, ***Entergy Gulf States, Inc. v. Summers***, 282 S.W.3d 433, 453 (Tex. 2009) (concurring opinion by Hecht, J.).

E. Respondent's Order Was "State Action" Depriving Relators of Their First Amendment Right to Anonymous Speech

There can be little doubt that the First Amendment protects against compelled identification of anonymous speakers. ***Watchtower Bible and Tract Soc. of New York v. Village of Stratton***, 536 U.S. 150, 166-67 (2002); ***Buckley v. American Constitutional Law Foundation, Inc***., 525 U.S. 182 (1999).

> **[A]n author is generally free to decide whether or not to disclose his or her true identity…. [A]n 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.**

McIntyre v. Ohio Elections Comm., 514 U.S. 334, 341-42. (1995). "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent." *Id*. at 356. Thus—even apart from Respondent's action without reference to the guiding rules and principles of TEX. R. CIV. P. 176.3(a), 176.8(b), 202.1, 202.3(a), 202.3(b), or 202.4 (and this Court's jurisprudence in ***In re Akzo Nobel Chemical***)—Respondent's precipitate amputation of Relators' First Amendment rights subjects Respondent's order to additional limitations with constitutional timbre.

It is also well-settled that anonymous speech on the Internet is afforded the same protections as anonymous "pamphleteering." ***Reno v. ACLU***, 521 U.S. 844, 853 (1997); *see also* ***ApolloMedia Corp. v. Reno***, 19 F. Supp. 1081 (N.D. Cal. 1998) (protecting anonymous denizens of www.annoy.com, a website "created and designed to annoy" legislators), *aff'd by* ***ApolloMedia Corp. v. Reno***, 526 U.S.

1061 (1999). And since a court order—even when issued at the behest of a private party—constitutes state action, Respondent's order is subject to constitutional limitations. ***New York Times v. Sullivan***, 364 U.S. 254, 265 (1964). Because compelled identification affects the First Amendment right of anonymous speakers to remain anonymous, justification for an incursion upon that right requires proof of a compelling interest. ***McIntyre***, 514 U.S. at 347. And beyond that, the restriction must also be narrowly tailored to serve that compelling interest. *Id*.

Some federal courts apply a three-part test for the compelled disclosure of the sources of allegedly defamatory speech that recognizes a qualified privilege against disclosure of anonymous speakers. The person seeking to discover the identity of the anonymous speaker has the burden to show:

(i) The issue on which discovery is sought is not just relevant, but goes to the heart of the plaintiff's case;

(ii) Disclosure of the identity of the anonymous speaker is necessary because the party seeking disclosure is likely to prevail on all other issues in the case; and

(iii) The party seeking disclosure has exhausted all other means.

See ***United States v. Caporale***, 806 F.2d 1487 (11th Cir. 1986); ***Miller v. Transamerican Press***, 621 F.2d 721, 726 (5th Cir. 1980). However, a comprehensive review and application of federal law and constitutional balancing tests is not necessary for this Court to decide Relators' petition for writ of mandamus. For purposes of the instant petition, it is enough that Respondent considered no such standards or principles before issuing the challenged order.

Klein argues generally that the speech of Relators and others published on the Blogs is "pure defamation" and, therefore, "not constitutionally protected." **Tab I**. Klein offers no examples of such "pure defamation"—only conclusions and subjective interpretations. These include that Relators have "unambiguously and falsely imputed a crime" to Klein—that of "sexual intercourse with an animal." *Id*. This is apparently a reference to a parody of the cover of *Dog Fancy* magazine depicting Philip Klein and his dog under the caption, "Fat Men Who Love Their Dogs Too Much." Such an argument fails to consider well-settled authority that satirical parody—as contradistinguished from "unambiguous and false imputation of a crime"—is protected speech.

> **Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate … [and] undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.**

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 54-55 (1988) (holding that a satirical parody of a known Compari advertisement that depicted the Reverend Jerry Falwell having sex with his mother in an outhouse was protected speech). As the U.S. Supreme Court has also opined:

> **[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, *that consequence is a reason for according it constitutional protection*. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.**

FCC v. Pacifica Foundation, 438 U. S. 726, 745-46 (1978) [emphasis added]. Whatever showing may ultimately be required for Klein to prevail in his argument that Relators' anonymity must be destroyed to call Relators to account for their attacks on him, Klein's vague, conclusory, and unsupported claims that Relators' speech is "pure defamation" are not it.

Not only did Klein fail to establish that the benefit of any requested pre-suit deposition of Google outweighed the burden of the procedure—here, the destruction of Relators' constitutionally protected anonymity—Respondent never made any such finding. Such a finding is required before pre-suit discovery may be ordered. TEX. R. CIV. P. 202.4(a); ***In re Hewlett Packard***, 212 S.W.3d 356, 360 (Tex. App.—Austin 2006, orig. proceeding). Respondent never made such a finding because Respondent never held the required hearing for Klein to make the required showing—a hearing of which "all persons the petitioner expects to have interests adverse to petitioners" were entitled to at least 15 days' notice. TEX. R. CIV. P. 202.3(a). Worse, yet, Respondent did not even order the pre-suit deposition contemplated by Rule 202. Instead, Respondent enforced Klein's even *more* improper pre-suit subpoena duces tecum, the purpose of which was to obtain documents that would reveal the Relators' constitutionally protected identities.

PRAYER

For these reasons, Relators ask that the Court grant a writ of mandamus ordering Respondent to vacate his January 29, 2010, order compelling Google to comply with Klein's subpoena duces tecum. The Court should order Respondent to conduct all further proceedings strictly in accordance with the procedures and limitations set forth in Rule 202.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 05-18, 2010, a true and correct copy of the foregoing was sent by mail, in accordance with TEX. R. APP. P. 9.5 to the following:

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NO._____

IN RE JOHN DOES 1 AND 2,

RELATORS

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

Relators John Does 1 and 2 submit these documents in support of their petition for writ of mandamus.

LIST OF DOCUMENTS