UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

TOM RICH and YVETTE RICH,

Plaintiffs,

vs. Case No. 3:09-cv-454-J-34MCR

CITY OF JACKSONVILLE, a Florida Municipal Corporation, ROBERT A. HINSON, STEPHEN W. SIEGEL, and ANGELA COREY, in her official capacity as STATE ATTORNEY FOR THE FOURTH JUDICIAL CIRCUIT,

Defendants.
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ORDER[1]

THIS CAUSE is before the Court on Defendants Stephen W. Siegel and Angela Corey's Motion to Dismiss Amended Complaint (Doc. No. 19; Motion) filed on July 17, 2009. In addition, Defendant Siegel filed two notices of supplemental authority. See Defendant Stephen W. Siegel's Notice of Supplemental Authority (Doc. No. 26; First Notice), filed July 22, 2009; Defendant Stephen W. Siegel's Notice of Supplemental Authority (Doc. No. 39; Second Notice), filed March 19, 2010. Plaintiffs Tom Rich and Yvette Rich oppose the Motion. See Plaintiff's [sic] Response to Defendant Stephen W. Seigel [sic] and Angela Corey's Motion to Dismiss Amended Complaint (Doc. No. 28; Response), filed August 7, 2009. Accordingly, the issues presented by the Motion are fully briefed and ripe for resolution.

[1] This is a "written opinion" under § 205(a)(5) of the E-Government Act and therefore is available electronically. However, it has been entered only to decide the motion addressed herein and is not intended for official publication or to serve as precedent.

I. Background Facts[2]

Prior to the events giving rise to this case, the Riches, Tom Rich and Yvette Rich, had been members of the First Baptist Church of Jacksonville, Florida (the Church) for approximately twenty years. See First Amended Complaint (Doc. No. 20; Amended Complaint) ¶¶ 4,5. In February 2006, after the previous pastor retired, the Church appointed Mac Brunson to be the new Senior Pastor. Id. ¶¶ 9-10. As Senior Pastor, Brunson serves as the spiritual and administrative leader of the Church. Id. ¶ 8. Following Brunson's appointment, Tom Rich noticed changes in the preaching style, fundraising and administration of the Church. Id. ¶ 12. Tom Rich disapproved of these changes, believing them to be "a departure from long standing Church practices" and "a serious threat to the integrity of [the] Church." Id. ¶13. As a result, Tom Rich began an "online chat forum" (blog) to discuss issues related to "Church doctrine, Church funding and Church administration." Id. ¶ 14. The blog included Tom Rich's "religious viewpoints, information and opinions pertaining to the Church and Mac Brunson's leadership." Id. ¶ 15. Tom Rich encouraged others to contribute to the blog as well. Id. ¶ 16. Although Tom Rich's blog was critical of Brunson, the Riches allege that it did not condone, incite, threaten, or describe violence against Church leaders, and that Tom Rich did not engage in any type of criminal conduct against the Church or its leaders. Id. ¶¶ 17, 23-26. Nevertheless, Tom Rich chose to maintain the blog anonymously, due to the "critical, controversial nature of the topic and his fear of retaliation from the Church." Id. ¶ 19. In addition, Tom Rich explains that he believed

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[2] In considering the Motion to Dismiss, the Court must accept all factual allegations in the Amended Complaint as true, consider the allegations in the light most favorable to the plaintiffs, and accept all reasonable inferences that can be drawn from such allegations. Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003); Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994).

anonymity would encourage an open and honest dialogue and thereby increase the "power and effectiveness" of the blog. Id. ¶ 21.

A member of the Church, Defendant Robert A. Hinson (Hinson), worked as a law enforcement officer employed by the Jacksonville Sheriff's Office and served on Brunson's security detail. Id. ¶¶ 28-30. On or before September 29, 2008, the Church contacted Hinson for purposes of obtaining the name of the blog's anonymous author (blogger). Id. ¶ 31. As a result, the Riches allege, Hinson opened a criminal investigation into the blog "for the sole purpose of obtaining the identity of the anonymous blogger." Id. ¶¶ 32, 34. As part of the investigation, Hinson sought and obtained subpoenas from Stephen Siegel (Siegel), an assistant state attorney employed by the Office of the State Attorney for the Fourth Judicial Circuit. Id. ¶ 35. At the time, Defendant Angela Corey (Corey) was the elected State Attorney for the Fourth Judicial Circuit of Florida. Id. ¶ 60. The Riches allege that despite the absence of "any legitimate evidence of related criminal conduct" Siegel issued subpoenas to Comcast, Inc. and Google, Inc. requesting the identity of the blogger, along with all other records pertaining to the blog. Id. ¶¶ 36, 71. According to the Amended Complaint, Siegel issued the subpoenas merely as an "errand of the Church," essentially acting as an "extension and enforcer" for the Church. Id. ¶ 81. On or before November 17, 2008, Google and Comcast provided the information requested in the subpoenas. Id. ¶ 37. Following receipt of that information, Hinson closed the investigation. Id. ¶ 38. Thereafter, either Hinson or Siegel notified the Church that Tom Rich was the author of the blog. Id. ¶ 39. As a result, the Church obtained trespass warnings against the Riches, forcing them to seek a new church. Id. ¶¶ 40-41.

On April 27, 2009, the Riches initiated this lawsuit in the Circuit Court for the Fourth Judicial Circuit, in and for Duval County, Florida. See Notice of Removal (Doc. No. 1). Defendants removed the case to this Court on May 21, 2009. Id. On July 17, 2009, the Riches filed their Amended Complaint asserting claims under 28 U.S.C. § 1983 against Siegel and Corey, in her official capacity as State Attorney. See Amended Complaint at Counts II-IV. Specifically, Tom Rich alleges that Siegel and Corey violated his rights under the First Amendment's Free Speech and Establishment Clauses. Id. at Counts II-III. In addition, Yvette Rich asserts a cause of action for loss of consortium. Id. at Count IV. Pursuant to 42 U.S.C. § 1983, the Riches seek declaratory and injunctive relief as well as damages and attorney's fees. Id. 8-9.

II. Summary of the Arguments

In the instant Motion, Siegel asserts that the doctrine of qualified immunity bars this lawsuit against him as a matter of law. See Motion at 3-12. Additionally, Corey argues that the Riches' claims for damages against her, in her official capacity, are barred by the Eleventh Amendment. Corey also contends that the Riches do not have standing to seek prospective relief against her, in that the Riches have not pled sufficient facts to state a claim for declaratory or injunctive relief. See id. at 13-14. Lastly, Siegel and Corey assert that Yvette Rich's consortium claim against them must also fail because it is contingent upon Tom Rich's ability to succeed in his § 1983 claims. See id. at 14.

In their Response, the Riches assert that Siegel is not entitled to the benefit of qualified immunity because he was not acting within his discretion. See Response at 1-4. Moreover, the Riches argue that even if Siegel was acting within his discretion, he is not

entitled to qualified immunity because his conduct violated "clearly established constitutional rights." Id. at 4-14. Lastly, the Riches contend that Corey waived her Eleventh Amendment immunity by voluntarily consenting to the removal of this case to federal court. See id. at 15-16.

III. Standard of Review

In ruling on a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002); see also Lotierzo v. Woman's World Med. Ctr., Inc., 278 F.3d 1180, 1182 (11th Cir. 2002). In addition, all reasonable inferences should be drawn in favor of the plaintiff. See Omar ex. rel. Cannon v. Lindsey, 334 F.3d 1246, 1247 (11th Cir. 2003) (per curiam). Nonetheless, the plaintiff must still meet some minimal pleading requirements. Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1262-63 (11th Cir. 2004) (citations omitted). Indeed, while "[s]pecific facts are not necessary[,]" the complaint should "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Further, the plaintiff must allege "enough facts to state a claim that is plausible on its face." Twombly, 550 U.S. at 570. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556). A "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" Twombly, 550 U.S. at 555 (internal quotations

omitted); see also Jackson, 372 F.3d at 1262 (explaining that "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal") (internal citation and quotations omitted). Indeed, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions[,]" which simply "are not entitled to [an] assumption of truth." See Iqbal, 129 S. Ct. at 1949, 1951. Thus, in ruling on a motion to dismiss, the Court must determine whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face[.]'" Id. at 1949 (quoting Twombly, 550 U.S. at 570).[3]

IV. Discussion

A. The Riches' Claims Against Corey in her Official Capacity

The Court turns first to Corey's argument that the Riches' claims for damages are barred by the Eleventh Amendment. Pursuant to the Eleventh Amendment, states are immune from suits in federal court. See Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Com'n, 226 F.3d 1226, 1231 (11th Cir. 2000); Farrell v. Woodham, No. 2:01-cv-417-FTM29DNF, 2002 WL 32107645, at *2 (M.D. Fla. May 29, 2002). "This immunity extends to state agencies, but does not extend to independent entities, such as counties or municipalities." Miccosukee Tribe of Indians of Fla., 226 F.3d at 1231. Here, the Riches sue

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[3] Additionally, the Eleventh Circuit has established a heightened pleading standard applicable to § 1983 actions where "the defendants are individuals who may seek qualified immunity." See Amnesty Int'l, USA v. Battle, 559 F.3d 1170, 1179 (11th Cir. 2009). However, Amnesty was issued prior to the Supreme Court's ruling in Iqbal. At this time, the Court does not have occasion to determine Iqbal's affect on Amnesty and the Eleventh Circuit's precedent on the heightened pleading standard because Defendants do not argue that the Riches failed to plead sufficient facts to satisfy Amnesty's heightened pleading requirement. See generally Motion. Rather, Defendants argue that the Riches failed to state a claim for relief in that the facts alleged do not set forth a violation of Tom Rich's constitutional rights. See id. at 9-13.

Corey in her official capacity as the State Attorney for the Fourth Judicial Circuit of Florida. See Amended Complaint at 1. A lawsuit against a "government officer in [her] official capacity is the same as a suit against the entity of which the officer is an agent." Farrell, 2002 WL 32107645, at *2; see also Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such it is no different from a suit against the State itself."). Although Eleventh Amendment immunity is limited in that it does not "'reach lawsuits against municipalities and other discrete political subdivisions,'" Farrell, 2002 WL 32107645, at *2 (quoting Schopler v. Bliss, 903 F.2d 1373, 1378 (11th Cir. 1990)), the State Attorney is an "arm of the state" and thus falls within the ambit of the State's Eleventh Amendment immunity. See Perez v. State Attorney's Office, No. 6:08-cv-1199-Orl-31KRS, 2008 WL 4539430, at *2 (M.D. Fla. Oct. 8, 2008); Allen v. Moreland, No. 804-cv-2530-T17EAJ, 2005 WL 1572734, at *2 (M.D. Fla. June 30, 2005); Farrell, 2002 WL 32107645, at *3. Thus, Corey may properly invoke Eleventh Amendment immunity.

Nevertheless, the Riches argue that Corey has waived her Eleventh Amendment immunity by consenting to the removal of this case to federal court. See Response at 15-16. In Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002), the Supreme Court held that "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter . . . in a federal forum." Lapides, 535 U.S. at 624. However, Lapides addressed waiver only in the context of state law claims, in respect to which the state had explicitly waived its immunity from state-court proceedings. Id. at 617. Left unanswered by Lapides is the question of how waiver

might apply in the context of a federal § 1983 claim brought against a state and voluntarily removed to federal court. Hayden v. Ala. Dep't of Public Safety, 506 F. Supp. 2d 944, 949 n.3 (M.D. Ala. 2007). Nevertheless, just as in Lapides and Hayden, the Court need not address this issue because the § 1983 claims for damages against Corey can be disposed of on statutory grounds. See Lapides, 535 U.S. at 617-18; Hayden, 506 F. Supp. 2d at 948-49.

Section 1983 provides that a "person," acting under color of law, who deprives another of his or her constitutional or statutory rights can be held liable to the injured party. 42 U.S.C. § 1983. In Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989), the Supreme Court addressed the question of whether a State can be considered a "person" for purposes of § 1983 liability, and ultimately decided that "a State is not a person within the meaning of § 1983." Id. at 64. The Court further determined that "governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes," as well as state officials sued in their official capacity are also not considered "persons" within the meaning of § 1983. Id. at 70-71. Because the State Attorney is considered an "arm of the state," and therefore, not a "person" under the statute, she can not be held liable for damages under § 1983. Accordingly, Tom Rich's claims for damages against Corey in her official capacity as State Attorney are due to be dismissed.[4]

However, the Amended Complaint also includes a demand for declaratory and injunctive relief against Corey in her official capacity. See Complaint at 8-9. In Will, the Supreme Court noted that "a state official in his or her official capacity, when sued for

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[4] The Court will address Yvette Rich's derivative loss of consortium claim in Part IV.C.

injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" Will, 491 U.S. at 71 n.10 (quoting Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)). Thus, the Riches' request for declaratory and injunctive relief is not barred on statutory grounds, nor would it be barred on Eleventh Amendment grounds. Nevertheless, the Court finds that the Riches' allegations are insufficient to establish standing to pursue a claim for declaratory or injunctive relief.

Standing is a jurisdictional requirement, and the party invoking federal jurisdiction has the burden of establishing it. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). In order to establish standing under Article III of the United States Constitution, a plaintiff must "allege such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Watts v. Boyd Properties, 758 F.2d 1482, 1484 (11th Cir. 1985) (quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975)). Specifically, a plaintiff must prove three elements in order to establish standing: (1) that he or she has suffered an "injury-in-fact," (2) that there is a "causal connection between the asserted injury-in-fact and the challenged action of the defendant," and (3) that a favorable decision by the court will redress the injury. See Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001) (internal citations omitted). "These requirements are the 'irreducible minimum' required by the Constitution for a plaintiff to proceed in federal court." Id. at 1081 (quoting Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 664 (1993)) (internal citations omitted). Additionally, in an action for injunctive relief, a plaintiff has standing only if the plaintiff establishes "a real and immediate–as opposed to a merely conjectural or

hypothetical–threat of future injury." See Wooden v. Bd. of Regents of Univ. Sys. of Ga., 247 F.3d 1262, 1284 (11th Cir. 2001). A complaint that includes "only past incidents" is insufficient to allege a real and immediate threat of future injury. See Shotz, 256 F. 3d at 1081.

A review of the Amended Complaint reveals that the Riches have not alleged any threat or fear of future injury. See generally Amended Complaint. Rather, all of the factual allegations in the Amended Complaint relate to past conduct. Id. Indeed, the only allegation which remotely suggests future injury states: "the actions of ASA Siegel and [the Office of the State Attorney] have prevented Tom Rich from speaking anonymously in the future, on the same topic and in the same manner." Id. ¶ 69. However, this allegation pertains only to the repercussions of the alleged past misconduct, and does not suggest any actual threat of future harm much less an imminent threat of future harm. Elend v. Basham, 471 F.3d 1199, 1207 (11th Cir. 2006) ("The binding precedent in this circuit is clear that for an injury to suffice for prospective relief, it must be imminent."). Nor are the Riches' allegations that Siegel and Corey were acting in accordance with "established [Office of the State Attorney] policy," sufficient to establish a threat of future harm. Amended Complaint ¶¶ 62, 87; see Elend, 471 F.3d at 1208-09. In Elend, the plaintiffs alleged that the Secret Service violated their First Amendment rights by instituting and enforcing a policy requiring demonstrators to remain in a "Protest Zone" outside the venue where the President was speaking. Elend, 471 F.3d at 1206. The Eleventh Circuit affirmed the dismissal of the plaintiffs' claims on standing and ripeness grounds. Id. at 1211-12. Despite the plaintiffs' stated intention to protest future appearances, the court held that "[g]iven the entirely speculative inquiry of whether Plaintiffs

will protest again and-even assuming that such a protest will take place-the unspecified details [regarding such a protest,]" the plaintiffs' pleadings were insufficient to establish standing for prospective relief. Id. at 1206-07, 1209.

Here, Tom Rich did not allege that he has any intention of maintaining an anonymous blog in the future. Nor did he provide any facts to support a finding that if he did so, any Defendant would interfere with his actions. See generally Amended Complaint; see Elend, 471 F.3d at 1209. The bare allegation that the wrongful conduct at issue here has "prevented Tom Rich from speaking anonymously in the future, on the same topic and in the same manner," does not "provide any limitation on the universe of possibilities of when or where or how" such speech might occur. Elend, 471 F.3d at 1209. Even interpreting this allegation to mean that Tom Rich does intend to maintain a blog on Church matters in the future, to find that this intention "somehow constitutes 'real and immediate' injury sufficient to confer standing would eviscerate the meaning of both words." Id.

Moreover, the Amended Complaint focuses solely on one allegedly wrongful incident. See generally Amended Complaint. Because, "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present, adverse effects,'" the allegations concerning the issuance of the subpoenas alone are not sufficient. Elend, 471 F.3d at 1207 (quoting Lyons, 461 U.S. at 102). The Riches have identified, and the Court independently can discern, no particularly alleged facts to suggest that "a future injury [will] likely occur in substantially the same manner as the previous injury." Id. at 1208. Thus, in the absence of any allegations setting forth a "credible threat that the injury would be repeated imminently," the Riches do not

satisfy the "injury in fact" element necessary for standing to seek declaratory or injunctive relief against Corey.[5] Id. at 1208. Accordingly, the Riches' claims for prospective relief against Corey in her official capacity are due to be dismissed.[6]

B. Tom Rich's Claims Against Siegel

The Court next turns to Siegel's assertion of qualified immunity. At the outset, the Court notes that Siegel, despite his position as an assistant state attorney, is not entitled to absolute prosecutorial immunity for his alleged conduct in this case. Generally, "[a] prosecutor is entitled to absolute immunity for all actions he takes while performing his function as an advocate for the government." Rowe v. City of Ft. Lauderdale, 279 F.3d 1271, 1279 (11th Cir. 2002). However, "the Supreme Court has made clear that [absolute] immunity may not apply when a prosecutor is not acting as an officer of the court but is instead engaged in certain investigative or administrative tasks." Hart v. Hodges, 587 F.3d 1288, 1296 (11th Cir. 2009) (alteration added) (citing Van de Kamp v. Goldstein, 129 S. Ct. 855, 861 (2009)). For example, a prosecutor "conducting investigative work before an arrest" is not protected by absolute immunity. Hart, 587 F.3d at 1296 (citing Buckley v.

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[5] The Court notes that "'the injury requirement is most loosely applied-particularly in terms of how directly the injury must result from the challenged governmental action-where first amendment rights are involved, because of the fear that free speech will be chilled even before the law, regulation, or policy is enforced.'" Elend, 471 F.3d at 1210 (quoting Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 760 (11th Cir. 1991)). However, even in the First Amendment context the injury-in-fact requirement cannot be ignored. Hallandale Prof'l Fire Fighters Local 22238, 922 F.2d at 760.

[6] For the reasons discussed above, the Court notes that the Riches may face challenges in establishing standing to assert any claim for declaratory and injunctive relief against Siegel. However, Siegel did not raise that argument in the Motion. See Motion at 13-14. Because the Court determines, as set forth below, that the Riches have alleged a claim for damages against Siegel sufficient to withstand a motion to dismiss it need not address sua sponte whether the Riches' have standing to seek prospective relief against Siegel.

Fitzsimmons, 509 U.S. 259, 275-76 (1993)); Hartman v. Moore, 547 U.S. 250, 262 n.8 (2006) ("An action could still be brought against a prosecutor for conduct taken in an investigatory capacity, to which absolute immunity does not extend."). Nevertheless, a prosecutor may be entitled to qualified immunity for his investigatory actions. Rowe, 279 F.3d at 1280 ("When a prosecutor steps out of the role of advocate and into the role of investigator, . . . he is performing a discretionary governmental function, and thus may be entitled to qualified immunity.").

In the instant action, Siegel is alleged to have issued the subpoenas at the request of Hinson pursuant to Hinson's investigation. See Amended Complaint ¶¶ 32, 35, 38. According to the facts alleged in the Amended Complaint, no charges had been filed and no arrests made at the time of filing. Indeed, the investigation was closed without the State ever bringing charges against Tom Rich. See generally Amended Complaint. Plaintiff appears to allege, and Siegel does not contest, that he was performing an investigative function when he issued the subpoenas, and thus he may be entitled only to qualified immunity for these actions. See Rehberg v. Paulk, ___ F.3d ___, 2010 WL 816832, at *8 (11th Cir. March 11, 2010) (finding that the former district attorney does "not receive absolute immunity for preparing and filing subpoenas during the investigation of [plaintiff]"); Liffiton v. Keuker, 850 F.2d 73, 76 (2d Cir. 1988) (finding that an assistant deputy attorney's act of causing a subpoena to be issued to the plaintiff's bank was an investigative activity for which only qualified immunity would be available); see also Motion at 7-9 ("Had ASA Siegel signed the subpoenas in connection with an ongoing prosecution, the claims against him would have been absolutely barred by the doctrine of prosecutorial immunity." (emphasis added)).

"Qualified immunity protects from civil liability government officials who perform discretionary functions if the conduct of the officials does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Nolin v. Isbell, 207 F.3d 1253, 1255 (11th Cir. 2000) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). As a result, the qualified immunity defense protects from suit "'all but the plainly incompetent or those who knowingly violate the law.'"[7] Carr v. Tatangelo, 338 F.3d 1259, 1266 (11th Cir. 2003). Indeed, as "'government officials are not required to err on the side of caution,' qualified immunity is appropriate in close cases where a reasonable officer could have believed that his actions were lawful." Lee v. Ferraro, 284 F.3d 1188, 1200 (11th Cir. 2002) (quoting Marsh v. Butler County, Ala., 268 F.3d 1014, 1031 n.8 (11th Cir. 2001)).

In order to be entitled to qualified immunity, Siegel must first establish that his conduct was within the scope of his discretionary authority. See Webster v. Beary, 228 F. Appx. 844, 848 (11th Cir. 2007) (per curiam); Lee, 284 F.3d at 1194. Siegel attempts to dispense with this burden merely by stating that "there is no dispute on this point." See Motion at 5. However, in their Response, the Riches argue that Siegel was not acting within the scope of his discretion because "the purpose of Siegal's activities was not to serve a legitimate job related goal . . . [and] Siegal's conduct was expressly outside of means that were within his power to utilize." See Response at 2-4.

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[7] In determining whether a defendant is entitled to qualified immunity, the court views the facts and all reasonable inferences in the light most favorable to the plaintiff to the extent supported by the record and then considers "the legal issue of whether the plaintiff's 'facts,' if proven, show that the defendant violated clearly established law." Priester v. City of Riviera Beach, Fla., 208 F.3d 919, 925 n.3 (11th Cir. 2000); Scott v. Harris, 550 U.S. 372, 381 n.8 (2007).

"'A government official acts within [his] discretionary authority if the actions were (1) undertaken pursuant to the performance of his duties and (2) within the scope of his authority.'" Jones v. City of Atlanta, 192 F. Appx. 894, 897 (11th Cir. 2006) (per curiam). To properly perform this analysis, it is critical that the Court accurately define the inquiry. See Harbert Internat'l, Inc. v. James, 157 F.3d 1271, 1282 (11th Cir. 1998). In Harbert Internat'l, the Eleventh Circuit stated that: "[t]he inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act. . . . Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties." Id. (citations and internal quotations omitted). The Harbert Internat'l court points to Rich v. Dollar, 841 F.2d 1558 (11th Cir. 1988) as an example of this principle. Harbert Internat'l, 157 F.3d at 1283. In Rich, the plaintiff alleged that an investigator employed by the state attorney's office violated the plaintiff's constitutional rights by filing an affidavit of probable cause when none existed, and thereby unlawfully initiated a criminal investigation against the plaintiff. Rich, 841 F.2d at 1561-62. The court concluded that the investigator was acting within his discretionary authority, "not because that authority included filing unfounded probable cause affidavits, but because his duties included writing and submitting probable cause affidavits." Harbert Internat'l, 157 F.3d at 1283 (citing Rich, 841 F.2d at 1564).

As explained in Herbert Internat'l, the appropriate inquiry here is not whether "an Assistant State Attorney has the discretion to investigate an anonymous private individual for no other reason than that the individual voices religious dissent and a local pastor complains of that dissent." See Response at 2. Rather, the question before this Court is

properly framed as whether an assistant state attorney has the discretion to participate in criminal investigations, if done for a proper purpose, and whether in doing so, he is authorized to issue investigatory subpoenas. Florida law makes clear that an assistant state attorney possesses such authority. See Fla. Stat. § 27.04 (2003); Fla. Stat. § 27.181(2) (2000) ("Each assistant state attorney appointed by a state attorney shall have all of the powers and discharge all of the duties of the state attorney . . . ."); see also Smith v. State, 95 So. 2d 525, 527 (Fla. 1957) ("The State Attorney has the power to subpoena witnesses to appear before him and have them testify before him concerning matters which he is investigating."). Consequently, the Court finds that Siegel was acting within his discretionary authority, and has therefore satisfied the threshold burden of invoking qualified immunity.

The burden thus shifts to the Riches to demonstrate that qualified immunity is not appropriate using the two-prong test established by the Supreme Court in Saucier v. Katz, 533 U.S. 194, 201 (2001). The first inquiry is, taken in the light most favorable to the non-moving party, "do the facts alleged show the officer's conduct violated a constitutional right?" Id.; see also Beshers v. Harrison, 495 F.3d 1260, 1265 (11th Cir. 2007) (quoting Scott v. Harris, 550 U.S. 372, 377 (2007)). If the court finds that a violation of a constitutional right has been alleged based on the plaintiff's version of the facts, then the next question is whether the right was clearly established at the time of the violation.[8] Saucier, 533 U.S. at 201; Scott, 550 U.S. at 377; Lee, 284 F.3d at 1194. The court must undertake this second

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[8] In Pearson v. Callahan, ___ U.S. ___, 129 S.Ct. 808 (2009), the Supreme Court modified the procedure mandated in Saucier permitting trial judges the discretion to determine which prong of the qualified immunity analysis should be resolved first. See Pearson, 129 S.Ct. at 818.

inquiry "in light of the specific context of the case, not as a broad general proposition." Saucier, 533 U.S. at 201.

1. Whether Siegel's Conduct Violated Tom Rich's First Amendment Rights

Addressing the first prong of Saucier, the Court must determine whether the facts as alleged demonstrate a violation of Tom Rich's First Amendment rights under the Free Speech Clause and the Establishment Clause. See Amended Complaint at Counts II, III. The Court must make this determination with regard to each claim independently. See Lee, 284 F.3d at 1197. Thus, the Court will address each of these claims in turn.

a. Free Speech Clause

The Riches allege that by "issuing subpoena [sic] without any legitimate evidence of related criminal conduct" and then "[b]y disclosing [Tom Rich's] identity to the Church," Siegel violated Tom Rich's right to free speech. Amended Complaint ¶¶ 66,71. Additionally, the Riches argue that Siegel's conduct in investigating, discovering and disclosing the author of the anonymous blog violated Tom Rich's First Amendment rights by destroying his ability to speak anonymously. See Response at 10. Taking the factual allegations in the Amended Complaint as true, Siegel issued the subpoenas based solely on the fact that the blog was "critical" of Senior Pastor Mac Brunson, and without any evidence of related criminal conduct. See Amended Complaint ¶¶ 17, 23-26, 71-72. Thus, to determine whether Siegel is entitled to qualified immunity, the Court must determine, "whether ASA Siegel, relying on the information provided by a law enforcement investigator that the pastor at a local church was being the subject of criticism by an anonymous blogger, violated clearly established law

by issuing an investigative subpoena" to determine the blogger's identity and thereafter revealing the identity to the Church.[9] Motion at 9.

The Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. The First Amendment applies to state and state-created entities by way of the Due Process Clause of the Fourteenth Amendment. Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1268 (11th Cir. 2004) (citing Near v. Minnesota, 283 U.S. 697, 707 (1931) and W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

The protections of the Speech Clause are not limited to written or oral statements and other forms of expression, but also extend to the right of an individual to speak anonymously. In McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), the Supreme Court recognized that, "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." McIntyre, 514 U.S. at 342 (finding that a statute prohibiting the distribution of anonymous campaign literature abridges the freedom of speech under the First Amendment). The Court explained that an author may choose to speak anonymously out of fear of retaliation or social ostracism, or merely out of the desire to preserve one's privacy. McIntyre, 514 U.S. at 341-42. Additionally, the Court noted the "honorable tradition"

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[9] In the Motion, Siegel argues that to prevail on the qualified immunity issue the Riches must show that Siegel was not entitled to rely on Hinson's representations or request. Motion at 12. However, accepting as true the allegations in the Amended Complaint and all reasonable inferences therefrom, Siegel issued the subpoenas knowing that Hinson was conducting the investigation solely to determine the identity of an anonymous blogger criticizing the Church. See Amended Complaint ¶¶ 64, 70-71, 73, 81, 84. Whether Hinson misrepresented the purpose of his investigation to Siegel and whether Siegel was entitled to rely on such statements are questions not before the Court at this time.

of anonymous pamphleteering in our society, stating that it "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation–and their ideas from suppression–at the hand of an intolerant society." Id. at 357.

Such a principle is not of new vintage. More than thirty years earlier, in Talley v. State of California, 362 U.S. 60 (1960), the Supreme Court found an ordinance prohibiting the distribution of anonymous handbills unconstitutional, stating:

> there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. [See Bates v. City of Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. State of Alabama, 357 U.S. 449, 462 (1958).] The reasons for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. [The ordinance prohibiting anonymous handbills] is subject to the same infirmity.

Talley, 362 U.S. at 65. The Supreme Court has also recognized the right to anonymous speech to be a component of the First Amendment Free Speech Clause in other circumstances. See Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton, 536 U.S. 150, 166-67 (2002) (holding invalid a municipal ordinance requiring persons engaging in door-to-door advocacy to first obtain a permit, in part because the registration provision would require individuals to forgo their right to speak anonymously); Buckley v. Amer. Constitutional Law Found., 525 U.S. 182, 200 (1999) (invalidating a statute that required political petitioners to wear identification badges on the grounds that it violated the First Amendment). Accordingly, this Court determines that Tom Rich has a First Amendment right to speak anonymously. See Peterson v. Nat'l Telecomm'n & Information Admin., 478 F.3d 626, 632 (4th Cir. 2007) ("The First Amendment protects anonymous speech in order

to prevent the government from suppressing expression through compelled public identification."); Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("A component of the First Amendment is the right to speak with anonymity. This component of free speech is well established."); see also Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128, 131 (D.D.C. 2009) ("Generally speaking, the First Amendment protects the right to speak anonymously."); McMann v. Doe, 460 F. Supp. 2d 259, 266 (D. Mass. 2006) ("First Amendment protection includes protection of anonymous speech."); Best Western Internat'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *3 (D. Ariz. July 25, 2006).

In considering whether the use of subpoena power in the manner alleged in the Amended Complaint violated Tom Rich's constitutional right to speak anonymously, the Court recognizes that "the power of government, whether federal or State, to use the subpoena power in connection with investigations of suspected law violations is a broad one . . . ." Pollard v. Roberts, 283 F. Supp. 248, 255 (E.D. Ark.) aff'd mem., 393 U.S. 14 (1968).[10] However, that power is not without its limits, particularly when it conflicts with important First Amendment rights. Id. at 256 ("[T]he use of the subpoena power must not be unreasonable or fundamentally unfair."); Ealy v. Littlejohn, 569 F.2d 219, 226 (5th Cir. 1978)[11] ("The powers of a grand jury are not unlimited, however; nor are the rights to associate and speak freely. In the face of a clear collision between First Amendment freedoms and the broad

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[10] The Supreme Court summarily affirmed the judgment of the three-judge district court in Pollard. Roberts v. Pollard, 393 U.S. 14 (1968) (per curiam). The Eleventh Circuit instructs that "without doubt a summary affirmance is a judgment on the merits, preventing 'lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.'" In re Grand Jury Proceeding, 842 F.2d 1229, 1233-34 (11th Cir. 1988).

[11] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

powers of a grand jury, [the court] must be careful to protect the interests underlying each."); see also Branzburg v. Hayes, 408 U.S. 665, 708 (1972) ("[G]rand juries must operate within the limits of the First Amendment as well as the Fifth."); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 558 (1963) ("It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas."). Accordingly, the Supreme Court has set forth a framework for determining whether an investigatory subpoena violates an individual's First Amendment rights. See Gibson, 372 U.S. at 546 ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").

Although Gibson dealt specifically with the exercise of legislative subpoena power, the Eleventh Circuit has cited Gibson as setting forth the applicable test for determining the validity of a grand jury subpoena which invades constitutionally protected First Amendment rights. In re Grand Jury Proceeding, 842 F.2d 1229, 1233 (11th Cir. 1988). The court articulated the test as follows:

> it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.

Id. (quoting Gibson, 372 U.S. at 546).[12] A state prosecutor, as a "one man grand jury" is no less restricted in the use of his investigative subpoena power. See Pollard, 283 F. Supp. at 256-57 (discussing the limits of the subpoena power in a case where a prosecuting attorney issued the subpoena in question); see also White v. State, 171 So. 809 (Fla. 1937) (referring to a prosecuting attorney as a "one man grand jury").

Here, Tom Rich has alleged sufficient facts to establish that exposing his identity impinged on his First Amendment rights by subjecting him to some level of reprisal. See In re Grand Jury Proceeding, 842 F.2d at 1235-36; see also U.S. v. Citizens State Bank, 612 F.2d 1091, 1094 (8th Cir. 1980). Specifically, he has alleged that after his identity was revealed to the Church a trespass warning was issued against him and his wife, he and his family were forced to seek another church, and his ability to speak anonymously on issues concerning the Church was destroyed. See Amended Complaint ¶¶ 40-41, 51. As such, Siegel's use of the subpoena power is alleged to have invaded Tom Rich's First Amendment rights and deterred him from what he argues were "perfectly peaceful discussions of public matters of importance." Talley, 362 U.S. at 65.

In light of the implication of Tom Rich's constitutional right to invoke the benefit of qualified immunity, Siegel must demonstrate an overriding and compelling interest in obtaining the material at issue in the subpoena.[13] Citizens State Bank, 612 F.2d at 1094;

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[12] The Court recognizes that these cases involved situations where the disclosure of a person's identity would chill the First Amendment right to freedom of association. In re Grand Jury Proceeding, 842 F.2d at 1232; Gibson, 372 U.S. at 543; Pollard, 283 F. Supp. at 256. However, the Supreme Court has determined that the same concerns regarding the impact of disclosure on associational rights apply to the impact of disclosure on free speech rights. Talley, 362 U.S. at 65.

[13] Demonstration of a sufficient interest does not require that Siegel show probable cause that criminal conduct has occurred, that is, a prosecutor "does not have to show the result of an (continued...)

see also Local 1814, Internat'l Longshoremen's Assoc. v. Waterfront Comm'n of New York Harbor, 667 F.2d 267, 272 (2d Cir. 1981) ("Whether the chilling effect is an unconstitutional impairment of non-disclosure rights depends on an assessment of the weight of the asserted governmental interest and the degree of impairment of protected rights."). In many instances the need to investigate potential criminal conduct may satisfy the "compelling state interest" requirement. See In re Grand Jury Proceeding, 842 F.2d at 1236 ("A good faith criminal investigation into possible evasion of reporting requirements . . . is a compelling interest."); Branzburg, 408 U.S. at 700. However, for purposes of the Motion to Dismiss, the Court must accept as true Tom Rich's allegation that Siegel had no good faith interest in conducting a criminal investigation when he issued the subpoenas and, as such, Siegel can not demonstrate, at this stage in the proceedings, a legitimate governmental interest, much less a compelling one. See Amended Complaint ¶¶ 71, 72; see also DeGregory v. Attn'y Gen. of State of N.H., 383 U.S. 825, 829 (1966) ("[T]he First Amendment prevents use of the power to investigate enforced by the contempt power to probe at will and without relation to existing need."); Pollard, 283 F. Supp. at 257-58 (stating that the government's interest in conducting investigations does not extend so far as to permit impingement on First

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[13](...continued)
investigation to justify conducting it." Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972). "However, [the prosecutor] is obliged to show that there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation." Id.; see also State of Fla. v. Investigation, 802 So. 2d 1141, 1144 (Fla. 2d DCA 2001) ("[T]he State cannot be required to prove that a crime has occurred before it can issue an investigative subpoena because the entire purpose of the investigative subpoena is to determine whether a crime occurred."); Imparato v. Spicola, 238 So. 2d 503, 507 (Fla. 2d DCA 1970). Here, however, the subpoena is alleged to have been issued without any connection to a legitimate investigation, and therefore, for the purposes of resolving the Motion to Dismiss, the Court must accept that there was no compelling interest in discovering and disclosing to the Church the identity of the blogger. Ealy, 569 F.2d at 227 ("[T]he First Amendment can serve as a limitation on the power of the grand jury to interfere with a witness' freedoms of association and expression. And that limitation is defined in terms of relevancy to the crime under investigation.").

Amendment rights on the "mere suspicion that the information sought may constitute or lead to evidence" of criminal activity); Branzburg, 408 U.S. at 707 ("[G]rand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."). Although upon further development of the record, the evidence in the case may ultimately show otherwise, for purposes of determining Siegel's entitlement to the protection of qualified immunity at this, the motion to dismiss stage of the proceedings, the Court finds that the conduct as alleged in the Amended Complaint would be a violation of Tom Rich's constitutional right to speak anonymously.[14]

b. Establishment Clause

The Establishment Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. Through the Due

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[14] In the Second Notice, Siegel brings to the Court's attention the recent Eleventh Circuit decision of Rehberg v. Paulk, ___ F.3d ___, 2010 WL 816832, at *8 (11th Cir. March 11, 2010). Although similar, the instant action is distinguishable from the Rehberg case. In Rehberg, the defendant prosecutor issued subpoenas to plaintiff's telephone and internet service providers to obtain plaintiff's telephone and email records. Rehberg, 2010 WL 816832, at *1. The Eleventh Circuit determined that because plaintiff had no privacy interest in these records, the issuance of the subpoenas did not violate plaintiff's Fourth Amendment rights. Id. at *8-*9, *12. As such, the court determined that "[b]ecause [the prosecutor's] issuance of the subpoenas did not violate [plaintiff's] constitutional rights," the prosecutor's retaliatory animus itself "does not create a distinct constitutional tort." Id. at *12 (emphasis added). Additionally, the court determined that even if the retaliatory investigation, standing alone, was a violation of the plaintiff's constitutional rights, "the right to be free from a retaliatory investigation is not clearly established," thus the prosecutor was entitled to qualified immunity. Id.

In contrast, the Court here determines that the allegations of the Amended Complaint– the issuance of the subpoenas and the subsequent exposure of Tom Rich's identity, in the absence of a compelling governmental interest–are sufficient to allege a violation of the First Amendment. See supra at IV.B.1.a. It is not retaliation against Tom Rich for speaking out that constitutes the alleged violation, indeed, a "retaliatory animus" towards Tom Rich is not critical to the Court's reasoning, rather it is the alleged exposure of Tom Rich's identity, under color of law, in the absence of a compelling government interest, that states a claim for a violation of his First Amendment rights. Thus, the Court does not address whether an individual has a "right to be free from a retaliatory investigation," but rather finds that one has a right to speak anonymously, and that use of governmental subpoena power to expose the identity in the absence of a compelling governmental interest can state a claim for a violation of that right. For the same reasons, the Rehberg case is distinguishable from the Court's analysis of the alleged Establishment Clause violation in Part IV.B.1.b.

Process Clause of the Fourteenth Amendment, this restriction has been made applicable to the states, state-created entities, and their employees. Holloman, 370 F.3d at 1284 (citing Cantwell v. Conn., 310 U.S. 296, 303 (1940)). The Establishment Clause applies not only to state statutes, but also to the acts and decisions of individual government actors as well. Id. Where a government official makes a decision, "this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute [had decreed it]." Lee v. Weisman, 505 U.S. 577, 587 (1992).

Where an individual challenges government actions as a violation of the Establishment clause, the Court must carefully examine the challenged government conduct to ascertain "whether it furthers any of the evils against which that Clause protects. Primary among those evils have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Comm. for Public Ed. & Rel. Liberty v. Nyquist, 413 U.S. 756, 772 (1973). The Establishment Clause is not a "precise, detailed provision in a legal code capable of ready application." Lynch v. Donnelly, 465 U.S. 668, 678 (1984). As such, each inquiry "calls for line drawing; no fixed, per se rule can be framed." Id.

To assist in this line-drawing, the Supreme Court has set forth a three-prong test for assessing the permissibility of government actions under the Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Though often criticized, both the Supreme Court and the Eleventh Circuit continue to use the Lemon test, therefore, this Court will apply the Lemon framework for its analysis in this case. Glassroth v. Moore, 335 F.3d 1282, 1295-96 (11th Cir. 2003) ("What the Supreme Court said ten years ago remains true today: 'Lemon, however frightening it might be to some, has not been overruled.'" (quoting Lamb's Chapel

v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 n.7 (1993))). The three prongs of Lemon are as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." Lemon, 403 U.S. at 612-13 (internal citations and quotations omitted). The Supreme Court refined this test in Agostini v. Felton, 521 U.S. 203, 233 (1997) by folding the "excessive entanglement" analysis into the "primary effect" analysis. See Holloman, 370 F.3d at 1284-85 ("'[T]he factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.' . . . [I]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect.'" (quoting Agostini, 521 U.S. at 233)).

"A government official violates the Establishment Clause if [he] lacks a 'secular legislative purpose' for [his] actions." Holloman, 370 F.3d at 1285. According to the well-pled allegations in the Amended Complaint, Siegel was "prosecuting an errand of the Church" when he issued the investigatory subpoenas. See Amended Complaint ¶ 81. As alleged, Siegel used the subpoena power, at the behest of the Church and Hinson, in order to discover the identity of the blogger for the sole reason that the blogger was antagonistic to the Church's pastor. See generally Amended Complaint; Response at 14. These allegations are sufficient to state a claim for a violation of the Establishment Clause as they suggest that the state actor lacked a "secular purpose" for his actions, indeed he is alleged to have taken action specifically for the purpose of aiding the Church. Such "active involvement of the sovereign" in the internal affairs of a church, namely a dispute between

a congregant and his pastor on matters of church doctrine and administration, would violate the very essence of the First Amendment. See Nyquist, 413 U.S. at 772.

Siegel's alleged conduct, if proven, would also fail the primary effect/excessive entanglement prong of Lemon. Exercising the prosecutor's subpoena power at the behest of the Church can be seen as having a primary effect of advancing religion. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125-26 (1982) ("[T]he mere appearance of a joint exercise of [government] authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.") (finding that a statute which gives churches the power to effectively veto applications for liquor licenses within a 500 foot radius of the church violates the Establishment Clause of the First Amendment). Likewise, using the subpoena power to enforce the wishes of the Church "enmeshes churches in the exercise of substantial governmental powers contrary to [the Supreme Court's] consistent interpretation of the Establishment Clause; 'the objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other.'" Id. at 126 (quoting Lemon, 403 U.S. at 614). It is against the very core of the Establishment Clause to share important, discretionary governmental powers with religious institutions. Id. at 126-27. Thus, the conduct in which Tom Rich alleges Siegel engaged - allowing the Church's wishes to dictate his use of the subpoena power-would constitute a violation of the Establishment Clause. In consideration of the foregoing, for purposes of determining whether Siegel is entitled to dismissal of the Amended Complaint on the basis of qualified immunity, the Court determines that the allegations of the Amended Complaint are sufficient to state a claim for a violation of Tom Rich's constitutional rights.

2. Were These Rights Clearly Established?

The Court's determination that the allegations of the Amended Complaint are sufficient to set forth a constitutional violation is not dispositive, however, because the Court must also address the second prong of Saucier, whether the rights discussed above were "clearly established" at the time of the violation. The Supreme Court explains:

> [f]or a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

Hope v. Pelzer, 536 U.S. 730, 739 (2002) (citation omitted) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). For purposes of this analysis the critical question is whether the state of the law gave the government actor "fair warning" that his alleged treatment of the plaintiff was unconstitutional. Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002) (quoting Hope, 536 U.S. at 741); see also Marsh, 268 F.3d at 1031 ("[F]air and clear notice to government officials is the cornerstone of qualified immunity."). The Eleventh Circuit recognizes three sources of law that would provide a government official adequate notice of statutory or constitutional rights: "specific statutory or constitutional provisions; principles of law enunciated in relevant decisions; and factually similar cases already decided by state and federal courts in the relevant jurisdiction." Harper v. Lawrence County, Ala., 584 F.3d 1030, 1037 (11th Cir. 2009) (quoting Goebert v. Lee County, 510 F.3d 1312, 1330 (11th Cir. 2007)). Thus, where the words of the federal statute or federal constitutional provision are specific enough "to establish clearly the law applicable to particular conduct and circumstances," then the plaintiff can overcome the qualified immunity privilege, even in the

absence of case law. Vinyard, 311 F.3d at 1350. In this type of "obvious clarity" case "the words of the federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful." Id.

Alternatively, where the conduct alleged is not so egregious as to violate a statutory or constitutional right on its face, courts look to case law to determine whether the law is "clearly established." Id. at 1351. If the case law contains "some broad statements of principle" which are "not tied to particularized facts," then it may be sufficient to clearly establish the law applicable in the future to different facts. Id. However, to provide officials with sufficient warning, the case law must establish a principle such that "every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." Id. Last, in the absence of broad statements of principle, precedent can clearly establish the applicable law where "the circumstances facing a government official are not fairly distinguishable, that is, are materially similar," to the particularized facts of prior case law. Id. at 1352. Such precedent must be found in decisions from the Supreme Court, the controlling circuit court of appeals, or the pertinent state supreme court. Id. at 1351. However, such a case "on all fours" with materially identical facts is not required to establish "fair warning" to government officials. Holloman, 370 F.3d at 1277 (discussing the impact of Hope on Eleventh Circuit precedent).

a. Free Speech

In examining the free speech claim at issue here, the Court finds that the law regarding investigatory subpoenas and the constitutional right to speak anonymously was

clearly established and sufficiently specific as to give "fair warning" that the conduct alleged was constitutionally prohibited. Considering the egregious nature of the alleged conduct and the broad principles of law set forth in McIntyre, Gibson, Pollard, and In re Grand Jury Investigation, no case with identical particularized facts is necessary for the Court to determine that the relevant law was "clearly established." Vinyard, 311 F.3d at 1350. No reasonable official could have believed that using the government's subpoena power to discover the identity of an anonymous blogger, for no reason other than that the blogger was critical of a prominent church leader, would be a constitutional exercise of this power. The Supreme Court has clearly established that the government's investigatory subpoena power should not be used to infringe on First Amendment rights in the absence of an "overriding and compelling" government interest, and that such an infringement can occur by discovering and disclosing the identity of an anonymous speaker. See supra Part IV.B.1.a. At this stage in the proceedings, where no legitimate government interest is before the Court, the Court determines that the conduct as alleged in the Amended Complaint would constitute a violation of clearly established constitutional principles. See Elend, 569 F.2d at 230. As the Eleventh Circuit explained in Holloman:

> [w]hile we have not traditionally called upon government officials to be "creative or imaginative" in determining the scope of constitutional rights, neither are they free of the responsibility to put forth at least some mental effort in applying a reasonably well-defined doctrinal test to a particular situation. Our precedents would be of little value if government officials were free to disregard fairly specific statements of principle they contain and focus their attention solely on the particular factual scenarios in which they arose.

Holloman, 370 F.3d at 1278. Accordingly, the Motion to Dismiss on the basis of qualified immunity as it pertains to the free speech claim against Siegel is due to be denied, and the

claim will be permitted to continue to the next stage of litigation, wherein the Riches will have to produce evidence to support their claims.

b. Establishment Clause

In the realm of Establishment Clause jurisprudence, the law has necessarily developed in a fact-specific way. "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." Glassroth, 335 F.3d at 1288 (citation omitted). As such, in this context, it is particularly difficult to determine whether the law is "clearly established" in the absence of cases with materially similar particularized facts. The Court has not found, nor have the parties cited, any case which squarely corresponds with the facts of the instant action.

Nevertheless, the Court must also inquire whether Siegel's alleged conduct "'lies so obviously at the very core of what the [First Amendment] prohibits that the unlawfulness of the conduct was readily apparent to [him], notwithstanding the lack of fact-specific law.'" Vinyard, 311 F.3d at 1355 (quoting Lee, 284 F.3d at 1199). In describing the Establishment Clause, the Supreme Court stated in Sch. Dist. of Abington Township, Penn. v. Schempp, 374 U.S. 203, 294-95 (1963): "[w]hat the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; [or] (b) employ the organs of government for essentially religious purposes . . . ." Schempp, 374 U.S. at 294-95. Put another way,

> '[t]he manifest object of the men who framed the institutions of this country, was to have a State without religion, and a Church without politics-that is to say, they meant that one should never be used as an engine for any purpose

> of the other, and that no man's rights in one should be tested by his opinions about the other.'

Id. at 304 (quoting Essay on Religious Liberty, in Black, ed., Essays and Speeches of Jeremiah S. Black (1866), 53)). Given Tom Rich's version of the events, no factually particularized, pre-existing case law was necessary for it to be obvious to every objectively reasonable prosecutor that the alleged conduct would violate the Establishment Clause. Specifically, no objectively reasonable prosecutor could believe that a prosecutor could issue a subpoena solely for the purpose of providing a local church with the identity of a blogger, who while committing no criminal activity, expressed criticism of the church's pastor. Indeed, the facts alleged in the Amended Complaint appear to violate the very essence of the First Amendment. Accordingly, the Motion to Dismiss on the basis of qualified immunity as it pertains to the Establishment Clause claims against Siegel is due to be denied.

To conclude the qualified immunity analysis, the Court emphasizes that in making the determination that Siegel is not entitled to qualified immunity, the Court is not commenting on the ultimate merits of the Riches' claims. Rather, the Court determines only that the Riches' Amended Complaint contains sufficient allegations to allow the case to proceed to the next stage. In this case, it is a better course to consider the merits of these claims at summary judgment, wherein the record and arguments are more fully developed and the parties can no longer rely on their mere allegations of fact.

C. Yvette Rich's Consortium Claims

The spouse with a cause of action for loss of consortium has a claim that is derivative of the injured spouse's claim. Faulkner v. Allstate Ins. Co., 367 So. 2d 214, 217 (Fla. 1979) ("Mrs. Faulkner's claim for loss of consortium is derivative in nature and wholly dependent

on her husband's ability to recover."); Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971) (stating that a wife's loss of consortium claim "is a derivative right and she may recover only if her husband has a cause of action against the same defendant"); accord Stone v. United States, 373 F.3d 1129, 1132 (11th Cir. 2004) (holding that the district court did not err by dismissing parents' loss of consortium claim when child's claim was dismissed). Accordingly, Yvette Rich's loss of consortium claim can not survive against Corey in light of the dismissal of Tom Rich's causes of action against this defendant. Therefore, Yvette Rich's claim against Corey is due to be dismissed. See Mandel v. McNesby, No. 3:08-cv-49-RV/MD, 2008 WL 5427738, at *5 (N.D. Fla. Dec. 29, 2008). However, because the Motion will be denied as it pertains to the claims against Siegel, so to the Motion is due to be denied as it pertains to the derivative loss of consortium claim against Siegel.

V. Conclusion

At this stage of the proceedings, Siegel's qualified immunity defense fails because the limited record before the Court does not support a finding that Siegel had any legitimate law enforcement interest in issuing the investigatory subpoenas. While the Court questions whether the Riches may be able to offer the evidence necessary to prove their claims, the allegations herein are sufficient to survive Siegel's request for dismissal of the action at this time. The Court emphasizes, however, that Siegel retains "'the right to assert the qualified-immunity defense at the next stage of the proceedings (and, for that matter, throughout the proceedings) as more facts are developed.'" Oladeinde v. City of Birmingham, 230 F.3d 1275, 1285 (11th Cir. 2000) (quoting Oladeinde v. City of Birmingham, 963 F.2d 1481, 1487 (11th Cir. 1992)). Accordingly, after due consideration, it is

ORDERED:

Defendants Stephen W. Siegel and Angela Corey's Motion to Dismiss Amended Complaint (Doc. No. 19) is **GRANTED**, in part and **DENIED**, in part.

A. The Motion is **GRANTED** to the extent that this case is **DISMISSED** as to Defendant Angela Corey, in her official capacity.

B. In all other respects, the Motion is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida on March 31, 2010.

MARCIA MORALES HOWARD
United States District Judge

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Copies to:

Counsel of Record
Pro Se Parties