UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

TOM RICH and YVETTE RICH,

Plaintiffs,

CASE NO.: 3:09-cv-454-J-34MCR

vs.

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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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT, ROBERT A. HINSON

Plaintiffs, TOM and YVETTE RICH, pursuant to Rule 56 of the Federal Rule of Civil Procedure, file this Motion for Partial Summary Judgment as to liability against Defendant, Robert A. Hinson. In support of this motion, Plaintiffs submit evidence of the facts in the light most favorable to the non-moving party, Defendant, Hinson. This evidence is composed of the deposition testimony of Defendant Hinson, Defendant Siegel, and various other documentary evidence that has been produced throughout the course of discovery.

In Plaintiffs' Amended Complaint, Plaintiff, Tom Rich, alleges that Defendants violated his right to speak anonymously and the Establishment Clause of the First Amendment. All Defendants have denied these allegation and produced evidence and testimony in their defense. Plaintiff has discovered evidence which contradicts the evidence and testimony of the Defendants. That is, the material facts of this case remain in dispute. However, Plaintiff contends and argues, that the evidence and testimony produced by Defendant, Hinson, even if

accepted as true, violates the Plaintiffs rights. Furthermore, the conduct of Defendant Hinson, accepting his testimony as true, violates rights which were clearly established at the time of the events described in the Amended Complaint.

MATERIAL FACTS, EITHER UNDISPUTED OR AS SWORN TO BY DEFENDANT HINSON

1. Plaintiff, Tom Rich, is a longtime member of the First Baptist Church of Jacksonville (hereinafter Church).
2. In August of 2007, Plaintiff began a website, on which he wrote and published articles about the Church, Church leadership, the Southern Baptist Convention and politics generally. (Plaintiff has attached a compilation of relevant articles as Composite Exhibit A)
3. The articles speak for themselves and their content is not in dispute.
4. Generally, the articles were critical of what Mr. Rich saw as recent and substantial changes in Church leadership. However, the Plaintiff did praise the new leadership at times. (See generally Composite Exhibit A)
5. Plaintiff published these articles and the website under the pseudonym "FBC jax watchdog" or "watchdog." (See generally Composite Exhibit A)
6. Since the 1970's, Defendant Hinson has also been a member of the First Baptist Church of Jacksonville. (Hinson, p 8 ln 2-15, relevant excerpts from Hinson's deposition are attached as Composite Exhibit B).
7. Defendant Hinson was a Deacon (lay leader) of the Church.
8. Defendant Hinson was a part-time employee of the Church, performing private security

work for the Church on a weekly basis.

9. Concurrent to the events alleged in the Complaint, Defendant, Hinson, was a member of the Church's "Disciplinary Committee." (Blount p 54 ln 18-19, Relevant excerpts from Blount's deposition are attached as Composite Exhibit C).

10. One function of the Church Disciplinary Committee is to investigate, adjudicate and punish church misconduct. (See letter dated November 25, 2008 attached as Exhibit D)

11. The Disciplinary Committee viewed the articles published anonymously by the Plaintiff as sin and, therefore, church misconduct. (Exhibit D)

12. Defendant Robert Hinson is a detective employed by Jacksonville Sheriff's Office (hereinafter JSO) and at all times relevant to this action, was a detective in the Intelligence Unit.

13. On September 29, 2008, at the request of John Blount, a Church Administrative Pastor and co-member of the Disciplinary Committee (Exhibit D), Defendant Hinson opened a JSO investigation into the blog's authorship. (Hinson p138-141 attached as Composite Exhibit B)

14. Prior to the request of Blount, Hinson read all of the articles published on the website, but did not take any official law enforcement action. (Hinson p201 ln 11-16 attached as Composite Exhibit B)

15. At the time the investigation was opened, Hinson did not know the identity of the author. (Hinson p 84 ln 6 attached as Composite Exhibit B)

16. At the time the investigation was opened, the complainant did not know the identity of the author. (Blount p 46 ln 15-17 attached as Composite Exhibit C)

17. This investigation was not a criminal investigation. (See generally Defendant City of Jacksonville's response to interrogatories, attached as Exhibit E; see also Operational Order, attached as Exhibit F for definition of criminal investigations)

18. In a "criminal investigation," Hinson testifies that "you have articulable facts of a crime. You may know the person who did it, you may not, and you investigate the crime, violation of Florida Statutes. (Hinson p222 ln13-18 attached as Composite Exhibit B)

19. This investigation was classified as "intelligence gathering" by Hinson and JSO. (Exhibit E)

20. Hinson testifies that "these investigations are different than other investigations." (Hinson p 167 ln 3-4).

21. According to Hinson, the purpose of the investigation was "to find out if this individual [the unknown author] could be possibly a threat to that congregation or the staff down there at the church." (Hinson p74 ln 8-11 attached as Composite Exhibit B)

22. According to Hinson, the decision to investigate was based solely on the content and tone of the articles anonymously written and published by the Plaintiff.[1] (Hinson p 70 ln 6-21, p. 197 ln 22-23, p.198 ln 1-22 attached as Composite Exhibit B; Hinson's Answer to

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[1]In April of 2009, JSO wrote a letter to Mr. Rich is response to an administrative complaint. In that response (attached as Exhibit O) Counsel for Hinson (representing the City of Jacksonville at the time) explained that the subpoena's were deemed "necessary" due to "suspicious activity involving the pastor and his wife." This suspicious activity was (1) an allegation of mail theft and (2) an episode of someone following the pastors wife. (Exhibit O) This explanation was false. According to Hinson, the allegation of mail theft occurred after the decision to compel the Plaintiff's identity and was not a factor in that decision (Hinson p 188 attached as Composite Exhibit B). The episode of following occurred over a year and a half prior to the investigation. Prior to the first publication of the website and was not "linked" to this investigation by any evidence or allegation (Hinson p 222-223 attached as Composite Exhibit B).

Interrogatories, attached as Exhibit G)

23. The website is composed of articles written by the author and postings, which are reader response and discussion of the particular issue or article. Hinson testified that he only read the articles, not the postings. (Hinson p 69 ln 20-24 attached as Composite Exhibit B)

24. Hinson cannot point to any one thing that led to the intelligence gathering but rather relies on his opinion that the "totality" of the content was "suspicious." (Hinson p134 ln 24-25 attached as Composite Exhibit B)

25. Hinson testifies that "I think the tone, the rhetoric -- the tone and the -- I don't want to use rhetoric as a word because -- the tone and the comments that were made by this unknown blogger, the fact that he was unknown, the fact that he had made the comments that he did, the facts that he had independent information that I thought wasn't commonly known about the residence, I think -- I think that all addressed issues for why I had warrant enough to ask for an investigative subpoena." (Hinson p84 ln 13-21 attached as Composite Exhibit B)

26. When questioned about the tone of the articles Hinson explained that unknown author was "calling members of the church sheeps [sic] or goats or something like that. And I might not be exactly accurate on that, but it was derogatory [sic] speaking of members that blindly followed." (Hinson p83 ln 25, p84 ln 1-3 attached as Composite Exhibit B)

27. Generally, Hinson felt that the publication of information regarding the Pastor that was "not generally known" combined with "derogatory" remarks about the congregation and staff justified the issuance of the investigative subpoena. (Exhibit G)

28. Whether or not the information was "generally known," Hinson acknowledges that not only could much of the information be obtained through the City of Jacksonville Property Appraiser's website, but that the Plaintiff's website contained links and hyperlinks to the Property Appraiser's website. (Hinson p72 ln15-23 attached as Composite Exhibit B)

29. Additionally, Hinson testified that the fact that the author was "unknown" contributed to the need for the investigation and subpoenas. (Hinson p 84 ln 6 attached as Composite Exhibit B)

30. Hinson acknowledges that the author never described violence or articulated a desire to harm anyone. (Hinson p136 20-25, p137 ln1-6 attached as Composite Exhibit B)

31. Hinson admits that the Plaintiff never committed a crime on his website. (Hinson p167 ln14; Hinson p 222 ln 8-10 attached as Composite Exhibit B)

32. Hinson never investigated the accuracy of the information contained in the articles. (Hinson p 79 ln 24 attached as Composite Exhibit B).

33. Despite these facts, Hinson was "concerned" (Hinson 141 ln 9-10 attached as Composite Exhibit B) about the content and tone of the website and came to the conclusion that there needed to be "some type of intervention in regards to a request for an investigative subpoena to find out what was going on and who this unknown individual was." (Hinson p106 ln 4-7 attached as Composite Exhibit B)

34. Hinson repeats this theme throughout his testimony stating that he felt that "there was possibly some criminal overtones that were there. There was something going on. I just didn't understand and I still don't to this day." (Hinson p 200 ln 6-8 attached as Composite Exhibit B)

35. Hinson states that "I didn't understand why suddenly this [the content published in the articles] was an issue with the blogger. So going back to the validity of what he was saying, I couldn't judge it. I could just judge that this unknown individual had an issue with what was going on down at the church." (Hinson p82 ln18-23 attached as Composite Exhibit B)

36. Again when asked if he had an understanding of why particular content was being posted about the Senior Pastor, Hinson responded that "I didn't - I didn't understand - I didn't understand any other reason other than someone would might want to do something they were not supposed to do to the Pastor, his family or someone down there at the church. I just didn't understand what the issue was. I still don't really understand that aspect of Mr. Rich's idea, but I'm not Mr. Rich. He obviously had issues with it." (Hinson p199 ln 5-13 attached as Composite Exhibit B)

37. Hinson continues that "I still don't understand why that's [the content published in the articles] an issue that had to get to this point with a blog or - I just don't understand other than there was some other agenda that was there." (Hinson p200 ln1-4 attached as Composite Exhibit B)

38. In deposition, when faced with evidence that Plaintiff published information regarding the size and grandeur of the Senior Pastor's Home to make the point that the pastor was a hypocrite (Hinson p207 ln 2-15 attached as Composite Exhibit B), Hinson asks rhetorically "does that completely tell me what Mr. Rich's intentions were? I don't think so. That's my only point. My only point is that I don't understand - - I understand what he's written. I don't understand why its such a large issue in regards to this much effort."

(Hinson p 209 ln1-7 attached as Composite Exhibit B)

39. Despite this lack of understanding, Hinson testifies that "it [the website] was always something about money, or what the Church did, or what the Church paid Dr. Brunson, or what Reverend Smyrl, or why they -- I mean, it was always something revolving around decisions or money or something along those lines. I'm not -- when I say the word 'always,' not every post, but it seemed to be significant. Maybe that's a better word to use." (Hinson p 255 ln18-24 attached as Composite Exhibit B)

40. In the months, weeks and days leading up to the events described in the Amended Complaint, Plaintiff's articles called for a boycott on tithing to the Church. (Hinson p 201 ln 25 attached as Composite Exhibit B)

41. John Blount is the most senior financial officer of the Church. (Blount p 28 ln 3-6 attached as Composite Exhibit C)

42. When asked if he ever inquired as to whether the Church had a financial motivation for asking for the investigation, Hinson responds that "I didn't get the impression it was that. I think if it would have been he would have told me. But, I didn't ask him point blank." (Hinson p 256 ln 7-10 attached as Composite Exhibit B)

43. When ask why he did not open the investigation before being asked by Blount, Hinson responds, "I guess I could have. I don't - I don't have an answer to that." (Hinson p 191 ln 17-20 attached as Composite Exhibit B)

44. On September 29, 2008, Hinson completed a JSO Offense and Incidence Report. (Exhibit H)

45. The only information contained in the Offense and Incident Report regarding the

complaint is that there was "an ongoing internet incident with possible criminal overtones." (Exhibit H)

46. No crime is described in this report and a criminal statute is not provided. (Exhibit H)

47. In fact, Hinson has testified that there was never anything other than "possible criminal internet overtones." (Hinson deposition p 222 ln 8-10 attached as Composite Exhibit B)

48. Additionally, Hinson testifies that there was never a "criminal nexus" with any information in the investigation. (Hinson p 248 ln 11-15 attached as Composite Exhibit B)

49. On September 29, 2008, Hinson made the decision to compel production of the Plaintiff's identity through the use of investigative subpoenas. (Hinson p 155 ln 23-25, p 156 ln 1 attached as Composite Exhibit B)

50. Hinson requested several investigative subpoenas directed to internet providers for the purpose of obtaining the unknown author's identity. (Exhibit I)

51. The subpoenas were requested from Defendant Stephen Siegel (an Assistant State Attorney) through the use of subpoena request forms.[2] (Exhibit J)

52. Hinson stated that the reason for the first subpoena request stated on the form was "something to the effect of possible criminal internet activity." (Hinson p165 ln 7-8 attached as Composite Exhibit B)

53. Siegel executed the subpoenas in question. (Siegel p48, relevant excerpts from Siegel's deposition are attached as Composite Exhibit K)

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[2]The completed form has been destroyed by both Hinson and the Office of the state attorney.

54. Siegel has no recollection of executing the subpoenas and does not know the reason why they were issued. (Siegel p 6 ln 9; p 40 attached as Composite Exhibit K)

55. Siegel reviewed no evidence prior to issuing the subpoenas (Siegel p 56 ln 8-12 attached as Composite Exhibit K) and testified that he would have relied on the information contained in the subpoena request form or the Offense and Incident Report provided by Hinson. (Siegel's Answers to interrogatories, attached as Exhibit L)

56. When asked why he signed the subpoenas Siegel testified that "I do not have the investigative subpoena request form. I signed the subpoenas based on my review of the materials provided for me in October of 2008, and I believe those materials to be satisfactory for the purpose of issuing the subpoenas." (Siegel p 148 ln 12-16 attached as Composite Exhibit K)

57. Unfortunately, Siegel testified that the "materials" have been destroyed (Siegel p 148 ln19-20 attached as Composite Exhibit K)

58. Siegel does not remember what information was contained in the "materials" that would have supported the request. (Siegel p 30 ln 11-14 attached as Composite Exhibit K)

59. Siegel testified that "ongoing internet incident with possible criminal overtones" would probably not be enough to justify the issuance of a subpoena if Siegel had never worked with the requesting officer. (Siegel p52 9-25; p53 1-23 attached as Composite Exhibit K)

60. However, Siegel testified that if he had seen Hinson's name on the request, he would rely on Hinson (due their past professional relationship) and would have issued the subpoena given that same information. (Siegel p52 9-25; p53 1-23 attached as Composite Exhibit K)

61. Siegel testified that he did not know of Hinson's relationship with the church at the time he issued the subpoenas. (Siegel p128 attached as Composite Exhibit K)

62. Upon receiving the response to the various subpoenas, Hinson obtained the name of the Plaintiff as the subscriber to the internet service on which the website was published. (Hinson p156 ln13-19 attached as Composite Exhibit B)

63. Hinson never verified that the Plaintiff was, in fact, the author of the content in question. (Hinson p266-267 attached as Composite Exhibit B)

64. Hinson then produced Plaintiff's name to John Blount, complainant and co-member of the Church's Disciplinary Committee. (Hinson p157 ln 4-8 attached as Composite Exhibit B)

65. Blount told Hinson that he knew Mr. Rich and that he did not think he was a security threat. (Hinson p 157-158 attached as Composite Exhibit B)

66. Hinson closed the subject JSO intelligence file on November 13, 2008, solely based on the response of Blount. (Hinson p158-161 attached as Composite Exhibit B)

67. Despite closing the investigation, Hinson testified that he still had "the same concerns" about Mr. Rich. (Hinson p158 attached as Composite Exhibit B)

68. Hinson goes on the explain that "I now knew who this individual was. And if the church and the leadership of the church didn't feel that this was no [sic] longer a criminal issue now that they knew who this individual was, my investigation was over at that point in time." (Hinson p158 attached as Composite Exhibit B)

69. Hinson continues that "there was no threat . . . If I have a complainant [John Blount] that tells me he's [Tom Rich] an active church member and they know his wife and that he's

not a threat, where does that go?"(Hinson p160 ln13-25; p161 ln 1-10 attached as Composite Exhibit B)

70. After disclosing the Plaintiff's identity to Blount, Hinson interviewed no one else or conducted any further investigation. (Hinson p 266-267 attached as Composite Exhibit B)

71. When asked why he did not contact or interview Mr. Rich, Hinson responded, under oath, that "he hadn't committed a crime. What was I going to interview him on, being a good church member." (Hinson p167 ln13-16 attached as Composite Exhibit B)

72. Hinson was the sole JSO detective involved in this investigation. He was responsible for the decision to open the file, request the subpoenas and close the file. No other JSO employee had first hand knowledge of the investigation. (Hinson p241 attached as Composite Exhibit B)

73. Immediately after obtaining the identity of the Plaintiff, Blount scheduled a meeting of the Church's Disciplinary Committee. (Blount p 50 ln 3-6 attached as Composite Exhibit C)

74. Within a week of providing the name to Blount, Hinson was summoned by Blount to a Church Disciplinary Committee meeting and questioned about the investigation by other members of the Committee. (Hinson p 264 ln.12-22 attached as Composite Exhibit B)

75. Thereafter, a letter was drafted by the Disciplinary Committee and sent to the Plaintiffs accusing them of sixteen (16) sins, none of which described the making of threats or violence. (Exhibit D)

76. Plaintiffs are asked to contact John Blount to begin the disciplinary process. (Exhibit D)

77. On November 19, 2008, Hinson destroyed the entire investigative file. (Exhibit E)

78. In deposition, Hinson testified that he destroyed the file pursuant to JSO policy. Hinson cites the JSO Intelligence Unit Operational Order to support the destruction of the file: "Information obtained in violation of the law may not be stored." (Hinson p232 ln 3-4 attached as Composite Exhibit B) and that keeping the file would have violated Mr. Rich's "civil rights." (Hinson p232 ln12-23 attached as Composite Exhibit B).

79. Hinson unequivocally takes the position in his deposition that he had enough information to compel production of Plaintiff's identity and disclose the identity to the Church, but not enough information to preserve the investigative file. (Hinson p232 attached as Composite Exhibit B)

80. That same document contains a "Purge and Destruction" policy which states that files should be destroyed after 5 years in addition to a finding that the file is obsolete or irrelevant. (Exhibit F)

81. On December 12, 2008, Defendant, City of Jacksonville, at the request of Church administration, trespassed the Plaintiffs from Church property. The JSO trespass warning cities "church misconduct" as the reason for police action. (Exhibit M)

82. Thereafter, the Deacons of the Church passed a resolution forbidding members of the church from engaging in "criticism" of the Church on the internet. (Exhibit N)

83. That resolution contained a finding that such activities "have the potential of causing financial and spiritual risk and damage to the church . . ." (Exhibit N)

MEMORANDUM OF LAW

I. Summary Judgement Standard

The facts presented by Plaintiffs in this Motion are sufficient for the Court to grant partial

summary judgement in favor of the Plaintiffs as to Defendant, Hinson. Summary judgement must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that parties case and on which that party will bear the burden of proof at trial." Harris Corp. v Federal Express Corp, 2010 U.S. District LEXIS 3424 (M.D. Fla., 2010) citing Celotex Corp. V. Catrett, 477 U.S. 317 (1986). Plaintiff contends, that the undisputed facts establish the Plaintiff's right to speak anonymously was burdened. Under such circumstances, the burden shifts to the government to show that the actions which burdened the speech are constitutionally permitted. In re grand Jury Proceedings, 842 F. 2d 1229, 1233 (11th Cir 1988) Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark). Plaintiff argues that the Defendant, Robert Hinson, has failed to making a showing to meet that burden. Therefore, Plaintiff asks the Court to grant partial summary judgement as to liability against Defendant, Hinson.

II. Plaintiff's Right to Speak Anonymously was Burden by the Conduct of Defendant Hinson.

A. Plaintiff's right to free speech was burdened.

Plaintiff has the right to speak anonymously. See generally: Talley v. California, 362 U.S. 60 (1960); McIntyre v. Ohio Elections Comm'n, 115 S.Ct. 1511 (1995); Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark), summarily affirmed at 393 US 14 (1968). This right is not new and its protections are well established. Id. The undisputed facts of this case are that Plaintiff, Tom Rich, authored and published articles on a website of his own creation: www.fbcjaxwatchdog.com. It is undisputed that he published these articles under a pseudonym. Although a few family members knew that Mr. Rich was the author, neither the complainant, John Blount, nor Defendants knew the author's identity prior to the issuance of the subpoenas in

question.

It is undisputed that the Defendants, Hinson and Siegel, issued subpoenas which compelled the identity of the website's author. Furthermore, it is undisputed that Hinson produced the Plaintiff's name to the Church.

As a result of this conduct, Plaintiffs and their family were expelled from the church and have suffered damages as a result of the Defendants' actions.

B. Defendant Hinson has failed to establish a compelling law enforcement in compelling and disclosing Plaintiff's identity.

Where a Plaintiff shows a violation of his right to speak anonymously, the burden of proof shifts to the government to "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." In re grand Jury Proceedings, 842 F. 2d 1229, 1233 (11th Cir 1988), Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark), summarily affirmed at 393 US 14 (1968). Here, Defendant Hinson has failed to produce evidence of an overriding and compelling state interest.

Plaintiff concedes that the City of Jacksonville has a compelling governmental interest in conducting criminal investigations; however, the subpoenas in question were not issued in the course of a criminal investigation.[3] The subpoenas were issued in the course of "intelligence gathering." Plaintiff can find no authority to support the contention that the City of Jacksonville has an overriding and compelling interest in "intelligence gathering. " Moreover, Hinson and

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[3]The facts show that due to his tenure and status with JSO's intelligence unit, Hinson had the *de facto* authority to issue subpoenas. Siegel testifies that he relied on Hinson judgement and that if Hinson requested a subpoena for "an ongoing internet incident with possible criminal overtones," regardless of the facts of the particular case, Siegel would approve the subpoena request.

JSO use the term "intelligence gathering" synonymously with what is commonly referred to in legal parlance as a fishing expedition.

Hinson cites no evidence of potential or possible criminal conduct other than the content and tone of the articles published by Mr. Rich to support his investigation, the subpoenas or the disclosure of Mr. Riche's identity. Hinson points to information published on the website that was not "commonly known" as a justification for the investigation. There is no evidence that the information published on the website was obtained illegally. Hinson did not even check to see if the info was accurate. Such testimony flies in the face of the constitution as "disclosing and publishing information obtained elsewhere is precisely the kind of speech that the First Amendment Protects." Bartnicki v. Vopper 532 US 514, 527 (2001); Sheenan v. Gegoire 272 F.Supp. 2d 1135 (W.D. Washington 2003). The fact that Hinson did not know the information published on the website or his impression that other people did not know the information published on the website does not support a compelling law enforcement interest in compelling the author's identity.

Likewise, law enforcement does not have a compelling interest in determining who is writing "derogatorily" or with "disdain" about a local pastor. Hinson points to the "derogatory" nature of the speech as a justification for the issuance of the subpoenas. By inference, Hinson links "derogatory" speech to "possible criminal overtones." This is an unconstitutional leap. It is well established that the "First Amendment protects speech that others might find offensive or even frightening. Speech may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with the conditions as they are, or even stirs people to anger. Speech is often provocative and challenging." Terminiello v. City of Chicago, 337 U.S. 1,4

(1949); Fogel v. Collins, 531 F.3d 824 (9th Cir 2008).

Lack of understanding and confusion cannot substantiate any compelling law enforcement interest. Hinson repeatedly states that he did not understand why the Plaintiff was writing the articles in question. Because he could not understand the reason behind the writing, Hinson testifies that he inferred that something bad was going on. Hinson, in his own words, issues the subpoenas in an effort to "understand" why the unknown author published certain content or wrote with a certain "tone." Investigative subpoenas are not a tool to satisfy the curiosity of law enforcement officers nor is it appropriate that they be issued to clarify the "intentions" of a unknown author. Pollard, at 256-58. Stated otherwise, "thought-policing is not a compelling state interest recognized by the First Amendment." Sheenan v. Gegoire, 272 F.Supp. 2d 1135 (W.D. Washington 2003). Likewise, suppression of speech as an effective police measure is an old, old, devise, outlawed by our constitution." Watts v. United States, 394 US 705 (1969), J. Dougas, concurring.

C. Subpoenas were not necessary and/or narrowly tailored to forward a compelling interest

Even if Hinson's testimony established a compelling interest which motivated the investigation of the website in question, compelled production of the Plaintiff's identity and disclosure of that identity to the Church was not necessary or narrowly tailored to forward that interest. As stated by the Court, "the government's interest in conducting investigations does not extend so far as to permit impingement on the First Amendment rights on the 'mere suspicion that the information sought may constitute or lead to evidence' of criminal activity." Order (denying Defendant Siegel's Motion to Dismiss) p24, citing Pollard, 283 F Supp. at 257-58. The

First Amendment can serve as a limitation on the power of a 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." Ealy, 569 F.2d at 227. Here, there was no "crime under investigation." There was nothing more that Hinson's "suspicion" and his impression of "possible criminal overtones."

Hinson has suggested that he was investigating "possible internet crimes." Threatening statements and cyber-stalking are crimes in the State of Florida. However, the commission of such a crime is ascertainable by the face of the statements published on the internet. The Plaintiff's identity would not have been necessary to determine if such a crime had been committed. Hinson concedes that no such crime was committed, and therefore, the investigative subpoenas were in no way calculated to discover evidence of an internet crime.

Hinson has failed to offer evidence of an "overriding and compelling state interest" to justify his conduct. Moreover, he has failed to articulate that the Plaintiff's identity was necessary and sufficiently tailored to forward that interest. Therefore, Plaintiff request an Order granting partial summary judgement in favor of Plaintiff.

D. Plaintiff's speech was not threatening and did not constitute a "true threat."

Defendant concedes that this was not an investigation into a criminal matter separate and apart from the speech of the Plaintiff. Rather, Hinson insists that the subpoenas and investigation were necessary due to the content and tone of the articles published by the Plaintiff. At least in this respect, the conduct described by Hinson is different from the facts presented in Pollard, 283 F Supp. at 257-58.

The First Amendment generally prevents the government from proscribing speech, or

even expressive conduct because of disapproval of the ideas expressed. R.A.V. v City of St. Paul, 505 U.S. 377 (1992); Virginia v. Black, 538, U.S. 343, 359 (2003); Sheenan v. Gegoire, 272 F.Supp. 2d 1135 (W.D. Washington 2003); Brayshaw v City of Tallahassee, — F supp.2d - - -, 2010 WL 1740832 (N.D. Fla. 2010); see also Texas v. Johnson, 491 U.S. 397, 406 (1989). As stated in Street v. New York:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.
>
> 394 U.S. 576, 593 (1969).

Hinson, by his own testimony, admits that his investigation was the result of his lack of understanding the motivations or reasoning behind the Plaintiff's speech. Hinson acknowledges that the subpoenas were issued because the speech, in Hinson's opinion, was "derogatory."

In order to prevail, where speech is burdened because of the content or ideas express therein, a government actor must show that speech itself was not protected by the First Amendment. Fogel v. Collins, 531 F.3d 824 (9th Cir 2008) "The First amendment permits 'restrictions upon the content of speech in a few limited areas, which are of "such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Virginia v Black, 538 US 343 (2003), citing R.A.V. v City of St. Paul, 505 U.S. 377 (1992).

The First Amendment does not protect certain modes of speech or expression, including true threats, fighting words, incitements to imminent lawless action and classes of lewd and

obscene speech. Virginia v. Black, 538 US 343; Sheenan v. Gegoire, 272 F.Supp. 2d 1135 (W.D. Washington 2003); Brayshaw v City of Tallahassee, — F supp.2d - - -, 2010 WL 1740832 (N.D. Fla. 2010). 'True threats' encompasses those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538, U.S. 343, 359 (2003). Furthermore, "[i]ntimidation, in the constitutional proscribable sense of the word is a type of true threat, where the speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. " Id. at 360.

Law enforcement does have a compelling interest in investigating "true threats." Fogel v. Collins, 531 F.3d 824 (9th Cir 2008); Sheenan v. Gegoire, 272 F.Supp. 2d 1135 (W.D. Washington 2003). In fact, Florida statutes make it a crime to communicate threats. However, Hinson has produced no evidence that he was investigating a true threat. The threshold to a finding of true threats is a literal description of violence or an act that communicates impending violence. Virginia v. Black, 538 US 343, 359 (2003). "Even ostensibly threatening statements directed at specific individuals can be protected . . . where the speech "can reasonably be characterized as political rhetoric or hyperbole." Fogel v. Collins, 531 F.3d 824 (9th Cir 2008) citing Watts. "The 'textual context' of how the speech is communicated is key." Id. A review of the articles published by Plaintiff establish that the Plaintiff never expressed an intent to physically harm anyone. Where the statements are not in controversy, the determination of whether the speech is protected can be one of law for the Court to decide. Id.

Despite Hinson's acknowledgment that the Plaintiff never discussed violence or literally threatened anyone, Hinson goes to great lengths to fabricate a threatening tone. In order to

create this tone, Hinson assembles individual bits of content and information published by the Plaintiff over a period of time in the context of many articles. In his interrogatory answers, Hinson sinisterly lists his impressions and interpretations of the content. By combining the disparately published information of the pastor's homes, deeds to property, cars and pictures, Hinson attempts to create an a tone that is not present in the Plaintiff's articles. In short, Hinson has created his own narrative of suspicion and fear. Plaintiff asks the Court to read the publications themselves and rule as a matter of law that they do not constitute a threat of violence.

Prior to the issuance of subpoenas in this case, the Ninth Circuit ruled on a similar issue involving police burdening of speech. In Fogel v. Collins, 531 F.3d 824 (9th Cir 2008), the court ruled on the arrest of an individual who had painted literal threats of violence and terrorism on his van. The van had language written on it indicating that the owner was a "terrorist" and "weapons of mass destruction" were on board. Despite the literal threats of violence the court ruled that the police violated the individual's right to speech by arresting him and forcing him to remove the offensive speech, because in the context of other statement on the van, it was clear that the statements of violence were political hyperbole. *Id.* The court's analysis does not contain any balancing test or otherwise subject the police officer's actions to a level of constitutional scrutiny. The only question presented is whether the speech was protected. *Id.*

Because the Plaintiff's published speech is protected, Hinson had no authority to compel the Plaintiff's identity or to disclose his identity to the Church. As such, he is liable to Plaintiff for the damages that have resulted from that violation.

II Hinson's Conduct Violated the Core Rational Underlying the Establishment Clause of the First Amendment.

A. Hinson allowed the Church to dictate his use of important discretionary government power.

Hinson's conduct violated the establishment clause of the First Amendment. As stated previously by the Court, "active involvement of the sovereign in religious activity" violates the Establishment Clause. Comm. For Publis Ed. & Rel. Liberty v. Nyquist, 413 US 753. Although such cases are handled on a case-by-case basis, where the government allows a church to dictate its use of important discretionary powers, the government violates the constraints of the First Amendment. Furthermore, compelling and disclosing the identity of an anonymous author, where there is no evidence that a crime has or will be committed, violates the very essence of the Establishment Clause.

Hinson, by his own testimony, has given the Church the benefit of his professional discretion and surrendered his professional judgement to the will of the Church. This investigation was opened at the request of the Church Administration and Disciplinary Committee. This investigation was closed when the church decided that this was no longer a "criminal issue." Important decisions, such as opening and closing an investigation are the core function of a detective. Here, Hinson testifies that he closed the investigation based on the Church's interpretation of criminality. Most importantly, this interpretation was contrary to Hinson's professional judgement as he testified that he "still had the same concerns" regarding the website's author even after the file was closed. This testimony reflects not only a sharing of power, but a submission of that power to the will of the Church. As the Court has previously noted, "it is against the very core of the Establishment Clause to share important, discretionary

powers with religious institutions." Larkin v. Grendel's Den, Inc 459 U.S. 116, 126-127 (1982).

B. The primary effect of Hinson's conduct was to forward a religious purpose.

In addition to this sharing of power, the effect of Hinson's conduct was primarily religious in nature. Where the effect of government action is primarily religious, that action violates the Establishment Clause. Holloman v. Harland, 370 F 3d 1252 (11th Cir 2004); Larkin v. Grendel's Den, Inc., 459 US 116 (1982). The facts, at bar, present a clearly documented religious dispute. The Church's Disciplinary Committee viewed the website as "sin" and "subversive." As evidenced by their response to the information obtained from Hinson, the Committee was ready and willing to investigate and adjudicate what it viewed as impermissible religious conduct. There is no dispute, that the information provided by Hinson facilitated the Church's disciplinary goals. Conversely, there is no similarly documented or articulated secular statutory purpose or effect in the compelling and disclosing of Mr. Rich's identity. As stated in Holloman, a government actor's "mere testimonial avowal of secular purpose is not sufficient to avoid conflict with the Establishment Clause." 370 F 3d 1252 (11th Cir 2004). Rather, if the primary effect of the government's conduct is advancing a religious purpose, the conduct violates the constitution. Here, the only effect was to forward a religious function and therefore, Hinson has violated the Establishment Clause.

C. Hinson conduct impermissibly entangled governmental and religious functions.

Finally, Hinson's relationship with the Church constitutes an unnecessary and impermissible entanglement between law enforcement and ecclesiastical discipline. As stated in Larkin, "the core rationale underlying the Establishment Clause is preventing a fusion of

governmental and religious functions." 459 U.S. 116, 126-127 (1982). The court goes on to explain that "the potential for conflict" and the "mere appearance of joint exercise" government and religious functions run contrary to the restraints of the Establishment Clause. Id. The facts, taken in a light most favorable to Hinson, reveal a symbiotic relationship between Hinson and the Church. In fact, it is undisputed that Hinson is literally both a law enforcement officer and an enforcer of Church discipline. He is an employee of the Church, a member of the Church and a leader of the Church.

It is hard to imagine a situation more fraught with the potential for conflict. Hinson's dual position as law enforcement officer and Church leader underscores the purpose of the Establishment Clause: to prevent "a fusion of governmental and religious functions." Larkin v. Grendel's Den, Inc., 459 US 116. Here, the functions of church and state are so entangled that Hinson himself asks (even if sarcastically) "what was I going to interview him on, being a good church member?" Such a remark belies the problem of Hinson's situation and cut to the heart of his constitutional quandary.

Defendant Hinson's testimony conflicts with core values of the First Amendment and the Establishment Clause. He has shared important governmental power with the Church. He has surrendered his professional judgement to the will of the Church. His acts have facilitated the solely religious function of ecclesiastical discipline. Finally, his relationship with the Church unnecessarily entangles government and religious functions.

WHEREFORE, for the above reasons, Hinson has violated both Plaintiff's right to speak anonymously and the establishment clause. Therefore, Plaintiffs request an Order granting partial summary judgment.

Dated this 18th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Certificate of Interested Persons has been provided to all counsel of record through the Court's CM/ECF system this 18th day of October 2010.

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