UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 11116275	No. 1:11-mc-00527 (RCL) FILED UNDER SEAL PURSUANT TO LCrR 6.1

MOTION TO INTERVENE AND TO QUASH GRAND JURY SUBPOENA NO. 11116275

Pursuant to Rule 24 of the Federal Rules of Civil Procedure and Rules 6 and 17(c)(2) of the Federal Rules of Criminal Procedure, the Twitter user who tweets under the *nom de plume* "Atticus Guevara" at the address "@RUretarted" hereby moves to intervene in the matter of a subpoena issued by a federal grand jury sitting in the District of Columbia seeking testimony and documents related to his or her identity, and further moves to quash that subpoena on the ground that it seeks information protected by the First Amendment right to engage in anonymous speech.

BACKGROUND

On August 5, 2011, a federal grand jury sitting in the District of Columbia issued a subpoena to Twitter, Inc.[1] The subpoena demands that Twitter appear and bring "any and all records pertaining to the identity of user name @RUretarted Atticus Guevara," including the user's cell phone number and subscriber information, and the IP address

[1] Twitter is an online social networking and microblogging service that enables its users to send and read text-based messages of up to 140 characters, known as "tweets." It was launched in 2006 and had 200 million users by 2011. Twitter, Inc., the company that operates the service and its associated website, is based in San Francisco. *See* http://en.wikipedia.org/wiki/Twitter.

pertaining to a "tweet that was posted at 9:32 PM EST August 2nd, 2011." The subpoena indicates, however, that Twitter need not appear if it "promptly provid[es] the requested documents by fax" to the United States Capitol Police. A copy of Subpoena No. 11116275 is attached to this motion as Exhibit A.

Twitter informed its customer – the author of the specified tweet – of the subpoena, and indicated that it would comply with the subpoena unless the author promptly filed a motion to quash. The author contacted the American Civil Liberties Union, which concluded that the subpoena presented a threat to the important right of anonymous expression on the Internet, and therefore agreed to represent the author in seeking to quash the subpoena.

FACTS

The tweet identified in Subpoena No. 11116275 expresses a violent fantasy about a Member of Congress. As will be seen below, it is a clear example of absurdist political criticism – a frequent feature of this author's tweets – that cannot justify the identification of an anonymous author through use of a grand jury subpoena.

The author whose identity is sought by Subpoena No. 11116275 has posted thousands of tweets.[2] The messages are often crude, with many vulgar references to body parts and bodily functions. A review of the tweets reveals that the author uses Twitter to make provocative and fantastical comments about whatever comes to mind. Tweets have expressed the author's unabashed and generally negative opinions about various politicians, media figures, current events, and other Tweeters.

[2] The author's Twitter page currently reflects more than 5,900 postings. *See* http://twitter.com/#!/RUretarted (last visited September 14, 2011).

An examination of the Twitter account shows that the author posted more than forty tweets on August 2, 2011, including several "re-tweets" (postings of another author's tweets). Most of those posts were rude or crude and many used sexually metaphoric language, including the tweet that is identified in the subpoena, which stated: "I want to fuck Michelle Bachman in the ass with a Vietnam era machete." The same day, the author also tweeted: "Give me a second I'm attaching my point of view to my cock so I can ram it up your Ass." Additional tweets posted by the author that day included: "The Medias (fox networks) manipulation Of the politically ignorant Goes to prove the people really are as dumb as they look .."; "Your corrupt moralistic ideologies and canker sores are the only reason I follow you. its certainly not your pizza box shaped ass"; and "There's a 50/50 shot you may have drunk piss! If you have ever refreshed yourself with a cold beverage from McDonalds #fuckMcdonalds".[3] The author also re-tweeted: "Dumbass Congressman who called Obama 'tar baby' needs to lose his seat in the house ASAP #racist." *See* http://twitter.com/#!/RUretarted.[4]

ARGUMENT

I. The Author Has a Right to Intervene to Protect His or Her First Amendment Rights

It is well established in this Circuit that a person whose information is sought from a third party has a right to intervene to protect his or her interest in non-disclosure.

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[3] A word or phrase in a tweet that is preceded by the symbol "#" is a link to a collection of tweets by many authors on the indicated topic. All quotations of tweets in this motion reproduce the original spelling, punctuation and spacing.

[4] After receiving notice of the subpoena but before consulting counsel, the author deleted the tweet referring to Michele Bachmann, reasoning that someone must have found it offensive, so deleting it would be a good idea. That tweet therefore no longer appears on the author's Twitter page.

Although the Federal Rules of Criminal Procedure do not address intervention, "Federal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings." *United States v. Hubbard*, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980) (collecting cases).

Subsequent to *Hubbard*, this Court has at least twice granted motions to intervene to challenge grand jury subpoenas. In the first, a political committee moved to intervene when a grand jury sought documents in the possession of its attorney. This Court's order permitting intervention is unreported, but the court of appeals noted that the motion was granted, *see In re Sealed Case*, 46 F.3d 881, 883 (D.C. Cir. 1998), and held that the intervenor also had standing to appeal this Court's order enforcing the subpoena – thus necessarily finding the intervention proper. *Id*.

Similarly, in *In re Grand Jury Proceedings*, 201 F. Supp. 2d 5 (D.D.C. 1999), this Court explained that

> Even though the grand jury subpoenas sought to be quashed are directed to the [law] firm and not to [the movant for intervention,] any asserted attorney-client privilege attaching to these documents would be held by [the movant] as the client. Where an individual's interest in protecting privileged materials from compelled disclosure is threatened, and it is clear that [the subpoena's addressee] will not risk a contempt citation in order to safeguard that interest, "a paradigmatic case of entitlement to intervention as of right" exists. *In re Katz*, 623 F.2d 122, 124 (2d Cir. 1980). Therefore, the Court will grant [movant's] motion to intervene.

Id. at 9.

The D.C. Circuit discussed these principles at length in *In re Sealed Case*, 237 F.3d 657, 663-665 (D.C. Cir. 2001), where it held that the subject of a confidential Federal Election Commission (FEC) investigation had a right to intervene in the FEC's subpoena enforcement action against a third-party where the subject had a legally cognizable interest

in maintaining the confidentiality of documents that the FEC sought to disclose. The Court noted the similarity between FEC investigations and grand jury proceedings, noting that both are entitled to a strong presumption of secrecy. *Id.* at 667. In allowing intervention, the Court emphasized the importance of allowing the real party in interest to seek to protect its rights. *See id.* at 664-665.

In re Sealed Case was a civil proceeding, and intervention rested on Federal Rule of Civil Procedure 24. Other courts have explicitly applied Rule 24(a) in the grand jury context, *see, e.g., In re Grand Jury Subpoena*, 274 F.3d 563, 570 (1st Cir. 2001); *In re Grand Jury Proceedings, PHE, Inc.*, 640 F. Supp 149, 151-52 (E.D.N.C. 1986) ("the grand jury proceeding is an 'action' in which intervention is allowed if the movant can demonstrate a sufficient interest"). And our Circuit has made it clear that the form of the motion is not dispositive: even if Rule 24 is not available, third parties can "bring a simple motion to preserve their rights as contemplated in *United States v. Hubbard*, 650 F.2d 293 (1980)." *In re Sealed Case*, 237 F.3d at 664. Additionally, this Court has supervisory power over the grand jury, *see United State v. Calandra*, 414 U.S. 338, 346 n.4 (1974) ("The grand jury is subject to the court's supervision in several respects. In particular, the grand jury must rely on the court to compel production of books, papers, documents, and the testimony of witnesses, and the court may quash or modify a subpoena on motion if compliance would be unreasonable or oppressive.") (internal quotation and citations omitted), and thus has inherent authority to allow a third party to intervene if the information sought by a subpoena impinges on the third party's legitimate interest. *See In*

re Grand Jury Proceedings, 814 F.2d 61, 66-67 (1st Cir. 1987); *In re Grand Jury (Schmidt)*, 619 F.2d 1022, 1026-27 (3d Cir. 1980). *See also Gravel v. United States*, 408 U.S. 606, 608-09 (1972) (noting that the district court had granted Senator Gravel's motion to intervene in grand jury proceedings to seek to quash a subpoena directed to one of his aides).

Numerous courts have joined this Court in holding that third parties have standing to move to quash a grand jury subpoena in order to protect their First Amendment rights. *See In re First National Bank, Englewood, Colo*., 701 F.2d 115, 117-118 (10th Cir. 1983) (anti-tax organization had standing to challenge grand jury subpoena directing its bank to produce its records based on claims that the subpoena chilled its rights under the First Amendment); *Int'l Longshoreman's Ass'n v. Waterfront Commission*, 667 F.2d 267, 270-72 (2d Cir. 1981) (union had standing to move to enjoin enforcement of subpoena issued to third party to protect its members' First Amendment rights); *United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980) (advocacy organization had right to intervene in action to enforce IRS subpoena on ground that production of documents would violate its First Amendment rights).

As shown below, the author has an important First Amendment interest in speaking anonymously on the Internet that will not be protected unless he or she is allowed to intervene. Intervention should therefore be granted.

II. The Subpoena Should be Quashed Because it Seeks to Infringe the Author's First Amendment Right of Anonymous Political Speech

A. The First Amendment Limits the Investigative Powers of the Grand Jury

Although the grand jury is entitled to a wide range of information in performing its function of determining whether there is probable cause to believe that a crime has been committed, its "power is not unlimited." *United States v. Calandra*, 414 U.S. at 346. In particular, a grand jury's investigative powers "are constrained by any valid privilege, whether established by the Constitution, statute, or the common law." *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 706 F. Supp. 2d 11, 13 (D.D.C. 2009).

The First Amendment privilege is one of the privileges constraining the power of the grand jury, and prosecutors must operate within its bounds. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 708 (1972) ("Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."); *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir. 1992) ("No governmental door can be closed against the [First] Amendment. No governmental activity is immune from its force. That the setting for the competition between rights secured by the First Amendment and antagonistic governmental interests is a grand jury proceeding is simply one of the factors that must be taken into account in striking the appropriate constitutional balance.").

Thus, this Court has determined that "[i]n order to survive a First Amendment challenge" to a grand jury subpoena *duces tecum*, "the government must show that they

have a compelling interest in the sought-after material and that there is a sufficient nexus between the subject matter of the investigation and the information they seek." *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 706 F. Supp. 2d 11, 18 (D.D.C. 2009); *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc., Nos. 98-MC-135-NHJ, 98-138-NHJ*, 26 Med. L. Rptr. 1599, 1600 (D.D.C. Apr. 6, 1998). The federal circuits that have addressed this issue have applied the same standard. *See In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1312 (8th Cir. 1996) (government must "demonstrate a compelling interest in and a sufficient nexus between the information sought and the subject matter of its investigation"); *National Commodity and Barter Ass'n v. United States*, 951 F.2d 1172, 1174 (10th Cir. 1991) ("government must show a compelling need to obtain the documents . . . [and] that the records sought bear a substantial relationship to this compelling interest"); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1233 (11th Cir. 1988) (government must "'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest'") (*quoting Gibson v. Florida Legislative Investigation Comm*., 372 U.S. 539, 546 (1963)); *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-03 (2d Cir. 1985) ("the interests of the state must be 'compelling,'" and "there must be some 'substantial relation' between the governmental interest and the information required to be disclosed") (citations omitted); *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972) (government must establish that its "interest in the subject matter of the investigation is 'immediate, substantial, and subordinating' [and] that there is a 'substantial connection'

between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation") (quoting *Gibson v. Florida Legislative Investigation Comm*., *supra*) (overruled in part on other grounds by *In re Grand Jury Proceedings*, 863 F.2d 667, 670 (9th Cir. 1998)).

A subpoena for material protected by the First Amendment that cannot meet this standard is necessarily "unreasonable or oppressive" under Fed. R. Crim. P. 17(c)(2), and therefore should be quashed.[5] As discussed below, the identity of an anonymous Internet speaker is strongly protected by the First Amendment. A subpoena seeking the author's identity must therefore be quashed unless the government can demonstrate that the grand jury has a compelling interest in obtaining the author's identity and that there is a sufficient nexus between the author's identity and a legitimate investigation into possible criminal activity. No such demonstration will be possible here.

B. The First Amendment Protects the Right to Speak Anonymously

[5] The only circuit that has articulated a different standard is the Fourth, which stated in *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229 (4th Cir. 1992), that a court should "balance the government's need for documents against the possible constitutional infringement . . . without placing any special burden on the government." *Id.* at 234. This Court rejected that standard in *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 706 F. Supp. 2d at 18-19, noting that the Fourth Circuit's "reading of Supreme Court precedent is incorrect . . . because neither case [relied upon by the Fourth Circuit] held a First Amendment right was implicated by the subpoenas being reviewed, and as such neither court considered whether the substantial relationship would be the appropriate standard of review for a subpoena implicating First Amendment interests." *Id.* at 19.

Robust protection for the right to engage in anonymous communication – to speak, read, view, listen, and/or associate anonymously – is fundamental to a free society. As the Supreme Court explained in *Talley v. California*, 362 U.S. 60 (1960):

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Id. at 64-65.

The Court has repeatedly reaffirmed the importance of the right to speak anonymously. *See, e.g., Watchtower Bible & Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 166-168 (2002) (striking down ordinance requiring identification for door to door canvassing; noting that "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible" (internal quotation marks and citation omitted)); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) (striking down state law prohibiting distribution of anonymous campaign literature; observing that "[a]nonymity is a shield from the tyranny of the majority," that "exemplifies the purpose" of the First Amendment "to protect unpopular individuals from retaliation . . . at the hand of an intolerant society."); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (striking down requirement that petition circulators wear nametags).

The Supreme Court has been equally protective in cases presenting the closely

related issue of disclosure of a person's identity as a member of an organization that exercises First Amendment rights. Thus, in *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court held that the First Amendment protected the identity of the NAACP's members from compelled disclosure under a state court order, noting that "compelled disclosure of affiliation . . . may constitute [an] effective . . . restraint on freedom of association." *Id.* at 462. In *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982) (sustaining an as-applied challenge to campaign finance reporting requirements), the Supreme Court presaged this Court's standard for First Amendment challenges to grand jury subpoenas: "The right to privacy in one's political associations and beliefs will yield only to a 'subordinating interest of the State that is compelling,' and then only if there is a 'substantial relation between the information sought and [an] overriding and compelling state interest.'" *Id.* at 91 (citations omitted). *Accord NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982) ("forced disclosure of one's political associations is, at least in the absence of a compelling state interest, inconsistent with the First Amendment's guaranty of associational privacy"); *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) ("when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.") (plurality opinion).

The First Amendment's protection of anonymous speech emphatically extends to

speech on the Internet, which has largely taken over the role of pamphlets, leaflets and soapboxes as the means by which ordinary people can communicate their views to the public. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First amendment protection applied to" the Internet); *USA Technologies, Inc. v. John Doe, A.K.A. "Stokklerk"*, 713 F. Supp. 2d 901, 906 (N.D. Cal. 2010) (recognizing the "Constitutional protection afforded pseudonymous speech over the internet"); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."); *Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (the "ability to speak one's mind" on the Internet "without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate."); *Solers, Inc. v. Doe*, 977 A.2d 941, 951 (D.C. 2009) ("'Anonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering[,]' which the Supreme Court has noted 'is . . . an honorable tradition of advocacy and of dissent.'") (*quoting Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) (in turn *quoting McIntyre*, 514 U.S. at 357) (brackets in original)).

C. The Grand Jury Has No Compelling Interest in Obtaining The Author's Identity

As this Court has recognized, expressive material is presumptively entitled to First Amendment protection. *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 706 F. Supp. 2d at 17; *Boggs v. Merletti*, 987 F. Supp. 1, 6 n.2 (D.D.C. 1997)

("Boggs Bills" – illustrations of United States currency – are presumptively protected by the First Amendment). *See also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989); *In re Subpoena Duces Tecum*, 829 F.2d 1291, 1296 n.5 (4th Cir. 1987). The tweet involved here is entitled to that presumption, for even crude expressions of frustration, anger or hostility toward political figures constitutes "[c]riticism of government" and thus "is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

Speech on public issues or about public officials need not be articulate or polite to be constitutionally protected. Indeed, "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *Bridges v. California*, 314 U.S. 252, 270 (1941) (footnote omitted).[6] Crude and fiery political speech must be examined against the "background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Where the government seeks to chill political speech – as with the subpoena at issue here – courts must be especially vigilant, so that "public debate will not suffer for lack of [the] 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally

[6] In the omitted footnote, the Court quoted Thomas Jefferson's description of "the putrid state into which our newspapers have passed, and the malignancy, the vulgarity, and mendacious spirit of those who write them." 314 U.S at 270 n.16. Mr. Jefferson might have characterized the tweet involved in this case in much the same way. Jefferson continued, however, to say that such newspapers are "an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost." *Id*.

added much to the discourse of our Nation." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

Thus, as in *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, to overcome the presumption of constitutionality and pierce the speaker's right of anonymity, the government must show that the speech it wishes to investigate is not protected by the First Amendment. 706 F. Supp. 2d at 17. It cannot make that showing here.

The government may argue that it can overcome the presumption because the tweet identified by the subpoena constitutes, or may constitute, a threat to Michele Bachmann. Protecting a Member of Congress from a true threat of serious physical harm would be a compelling government interest. But if that is the government's theory, it should be rejected here because the tweet in question did not cross the line from crude humor or caustic political speech to a "true threat" that may be subjected to criminal punishment. Put another way, the government has no compelling interest – indeed, no legitimate interest – in investigating political criticism, however nasty. This court can and should so rule, as a matter of law.

1. The True Threat Doctrine

The government can criminalize speech only "in a few limited areas," *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010), including speech that constitutes a true threat: "True threats encompass 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).

While our Circuit has not addressed the true threat doctrine in more than forty

years, there is consensus among the other circuits that a communication is not a true threat unless a reasonable person would view it as expressing a serious intention to cause harm. *See, e.g., United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009) ("Statements constitute a true threat if an ordinary reasonable recipient who is familiar with their context would interpret those statements as a threat of injury.") (quotation marks and citations omitted); *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (defining "threat" as "'a serious expression of an intention to inflict bodily harm'") (*quoting Roy v. United States*, 416 F.2d 874, 877-78 (9th Cir. 1969)); *accord United States v. Fulmer*, 108 F.3d 1486, 1490-91 (1st Cir. 1997); *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997); *United States v. Malik*, 16 F.3d 45, 51 (2nd Cir. 1994); *United States v. Manning*, 923 F.2d 83, 85-86 (8th Cir. 1991); *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990); *United States v. Callahan*, 702 F.2d 964, 965 (11th Cir. 1983); *United States v. Rogers*, 488 F.2d 512, 514 (5th Cir. 1974); *United States v. Hart*, 457 F.2d 1087, 1090-91 (10th Cir. 1972). This is an objective test; it does not require interrogation or investigation of the speaker, as the leading Supreme Court case makes clear.[7]

In *Watts v. United States*, 394 U.S. 705 (1969), this Court convicted Robert Watts of threatening the President when, after receiving his 1-A draft classification, he told a crowd of anti-war demonstrators gathered at the Washington Monument, "If they ever

[7] A number of the cases cited in the text, and others, have specifically applied the "true threat" standard to cases arising under 18 U.S.C. § 115 and similar federal statutes. *See Kosma, Roy, Manning, Rogers, Hart, Callahan, Malik, and Khorrami, supra; see also United States v. Hoffman*, 806 F.2d 703, 706-707 (7th Cir. 1986); *United States v. Davilla*, 461 F.3d 298, 304-05 (2d Cir. 2006); *United States v. Roberts*, 915 F.2d 889, 890 (4th Cir. 1990); *Martin v. United States*, 691 F.2d 1235, 1240 (8th Cir. 1982); *United States v. Alaboud*, 347 F.3d 1293, 1296-97 (11th Cir. 2003).

make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The court of appeals affirmed the conviction over Judge Skelly Wright's dissent, 402 F.2d 676 (D.C. Cir. 1968), but the Supreme Court reversed, holding that this Court had erred in denying a motion for acquittal made by the defendant at the close of the government's case. *Id.* The Court held, as a matter of law, that "the kind of political hyperbole engaged in by petitioner" could not be considered a true threat. *Id.* at 708. "We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context . . . we do not see how it could be interpreted otherwise." *Id.*

Watts made clear that a conviction could not be based on an isolated word or phrase but required an examination of the speaker's communication as a whole, including its context. *Id.; accord Virginia v. Black*, 538 U.S. at 367 ("The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut."); *United States v. Morales*, 272 F.3d 284 (5th Cir. 2001), *cert. denied*, 536 U.S. 941 (2002) (communication is a true threat only if "in its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor."); *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994) ("'[w]ritten words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published'") (*quoting United States v. Prochaska*, 222 F.2d 1, 2 (7th Cir. 1955) (alteration

by the *Malik* court).[8]

Courts have consistently rejected efforts to treat a statement as a true threat when its language does not take the form of a threat and its context does not make clear that the language conveys a real threat. *See, e.g., New York ex rel. Spitzer v. Operation Rescue National*, 273 F.3d 184, 196-197 (2d Cir. 2001) (statement that "killing babies is no different than killing doctors," made to an abortion doctor soon after the murder of another doctor at her clinic, was not a threat but a statement of a political opinion); *United States v. Landham*, 251 F.3d 1072, 1083-1084 (6th Cir. 2001) (messages left for ex-wife by ex-husband calling her offensive names and saying "You're going to lose Rachel Gail as well as Priscilla. You better talk to me now. . . . They're going to take them away from you and they're going to convict you so you just watch out" were protected speech; context made clear father was referencing a custody battle, and not threatening to kidnap the kids); *Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008) (slogans stating "I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST," "PULL ME OVER! PLEASE, I DARE YA," and "ALLAH PRAISE THE PATRIOT ACT . . . FUCKING JIHAD ON

[8] A few months after *Watts*, the D.C. Circuit held that "merely idle talk or jests" could no longer be criminalized as a true threat. *Alexander v. United States*, 418 F.2d 1203, 1205-06 (D.C. Cir. 1969). That was our Circuit's last case involving the "true threat" doctrine. In *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999), the Court of Appeals held that 47 U.S.C. § 223(a)(1)(C), which criminalizes making a telephone call without disclosing one's identity and "with intent to annoy, abuse, threaten, or harass any person at the called number" violated the First Amendment as applied to calls made to a federal official calling him a "whore" and a "criminal with cold blood," and accusing him of "mak[ing] a violent crime against me, violating the rights in court of the white people." *Id.* at 673-74. In *United States v. Syring*, 522 F. Supp. 2d 125 (D.D.C. 2007), Judge Kollar-Kotelly denied a motion to dismiss an indictment for making threats, holding that the facts alleged in the indictment presented a jury question as to whether the harassing telephone calls at issue included true threats. The defendant then accepted a plea bargain and the case never went to trial. *See United States v. Syring*, No. 07-cr-204, Doc. 45 (terms of plea bargain).

THE FIRST AMENDMENT! P.S. W.O.M.D. ON BOARD!" painted on a van are protected speech that a reasonable observer would see as "an obviously satiric or hyperbolic political message.")

In a particularly instructive case, the Ninth Circuit held that a college professor's statement that "I, for one, have etched the name of . . . and others of her ilk on my permanent shit list, a two-ton slate of polished granite which I hope to someday drop in [sic] [the new college president's] head," was protected speech. *Bauer v. Sampson*, 261 F.3d 775, 780 (9th Cir. 2001). The professor also wrote a fantasy description of the funeral of one of the school's trustees at which the other trustees and the university president died of asphyxiation, and included cartoons depicting beheadings and a man pointing a rifle. *Id.* The court stated, "We agree with the district court's holding that although Bauer's writings have some violent content, they 'are hyperbole of the sort found in non-mainstream political invective and in context . . . are patently not true threats.' Under the reasonable speaker test, these writings would not be perceived as 'true threats.' They were made in an underground campus newspaper in the broader context of especially contentious campus politics." *Id.* at 783-784 (emphasis and ellipsis in original).

By contrast, most cases where courts have allowed criminal prosecutions (or civil suits) for threatening statements involve explicit statements of intent to do physical harm, where the statements are directed to the intended victims, and where the context confirms the intention. *See, e.g., United States v. Wolff*, 370 Fed. Appx. 888, 891 (10th Cir. 2010) ("this will be a standoff at the property in question, and which I will give my life if need

be, but which I will take any that will try to come against me" mailed to 240 individuals including a judge and an IRS agent); *United States v. Sutcliffe*, 505 F.3d 944, 951 (9th Cir. 2007) ("If I ever see you near my family again, and I know how to stalk too, I will kill you. That's my offer."); *United States v. Santos*, 131 F.3d 16, 18 (1st Cir. 1997) (defendant wrote to the President, "you have upset me to the point that I feel I should assassinate you which would enable me to go down in the history books and if the Secret Service gets in my way they will get it too"); *United States v. Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997) (telephone calls to Allstate agents saying "Allstate had better stop messing with me or else I'm going to blow up their building"); *United States v. Dinwiddie*, 76 F.3d 913, 917 (8th Cir. 1996) ("Patty, you have not seen violence yet until you see what we do to you"); *United States v. Malik*, 16 F.3d at 48 ("What the Court is telling the Plaintiff in his eyes is to deal with each of these defendants family and them physically upon his soon prison discharge"); *United States v. Kosma*, 951 F.2d at 550 ("21 guns are going to put bullets through your heart & brains"); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1264 (9th Cir. 1990) ("You're going to get your ass kicked, punk"); *United States v. Hoffman*, 806 F.2d 703, 704 (7th Cir. 1986) ("Resign or You'll Get Your Brains Blown Out.").

But even facially threatening statements directed at specific individuals are protected speech if the context shows them to be political hyperbole rather than true threats. Thus, in *Claiborne Hardware*, the Supreme Court held that the statement "If we

catch any of you going in any of them racist stores, we're gonna break your damn neck," 458 U.S. at 902, delivered to a rally of several hundred people, was protected by the First Amendment. The Court recognized that "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." *Id.* at 928.

Like Internet postings, rap music often contains "violent imagery" and metaphor. *Latour v. Riverside Beaver School Dist.*, 2005 WL 2106562 at *2 (W.D. Pa. 2005). It is therefore instructive that in a case involving rap music that was "published on the internet," *id.*, the court found that that violent metaphors about killing people were not true threats but "just rhymes," or, as one witness put it, reflected the composer "flexing [his] lyrical muscle." *Id.*

In another instructive case, *J.S. ex rel. H.S. v. Bethlehem Area School Dist*., 807 A.2d 847 (Pa. 2002), the Pennsylvania Supreme Court considered material on a student's website that asked readers to state why a particular teacher should die, showed a picture of the teacher's head severed from her body, and solicited funds to hire a hit man. The court noted that "the statements regarding solicitation of a hitman and the questions as to why Mrs. Fulmer should die were stated unconditionally and unequivocally." *Id.* at 859. Nevertheless, the court concluded that "the web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm." *Id*. at 658.

2. There Was No True Threat Here

As noted above, Subpoena No. 11116275 seeks the identity of the person who tweeted "I want to fuck Michelle Bachman in the ass with a Vietnam era machete." The comment is of course absurdist. It is no more realistic than if the author had said "I want

to give Michele Bachmann a kick in the ass that will send her all the way to Mars," or "I want to put Michele Bachmann in a time machine and send her back to the middle ages where she belongs." Read in context – in the context of the other tweets posted that same day, in the context of the author's Twitter comments as a whole, and in the context of how people express themselves in the world of Twitter – this phrase is an obviously outlandish and crude attempt at expressing contempt or disgust about a political figure, not a warning of any actual intent to do physical harm. No reasonable person could think otherwise.

First, the use of the phrase "I want to" denotes not a plan but a fantasy-like desire. "I want to . . ." or "I'd like to . . . " are fundamentally different statements from "I plan to . . ." or "I am going to . . . ." Undersigned counsel want to be tall and thin, but there is no danger of that happening. They want to be nominated to the Supreme Court, but that also is not a true threat.[9]

Second, the peculiar choice of a "Vietnam era machete" as the instrument of this fantasy-tweet shows that it is a political message rather than a literal threat. The precise nature of the political message is not clear – a format limited to 140 characters does not lend itself to elaboration – but a person who simply intended to harm Ms. Bachmann would have no reason to imagine such an unlikely instrument.

Third, the author's other tweets that day make it unmistakably clear that this was just a crude variety of political expression. Most notable is the tweet that reads: "Give me a second I'm attaching my point of view to my cock so I can ram it up your Ass." This is

[9] A recent piece in the Washington Post Magazine provided another good example, quoting a golf coach who said, "Sometimes someone will come to me for lessons because they say they *want to be on the senior tour*. And I'm thinking, 'Yeah, and I *want to be Miss America*.'" Gene Weingarten, *The bogey man*, The Washington Post Magazine 33 (August 14, 2011) (emphasis added).

similarly absurdist and uses the same imagery of rape to make a crude rhetorical point. Metaphorical expression need not be sophisticated – or suitable for mixed company – to be recognizable as metaphorical.

Fourth, the context of the author's tweets as a whole shows that crude and obviously fictitious political expression is the style of choice for "Atticus Guevara." With apologies for exposing the Court to such material, here are a few typical examples from the days immediately before and after the tweet quoted in the subpoena:[10]

> So I visited the westboro baptist church.. And took a massive shit on the pulpit.. To my surprise no one was offended .. [July 28, 2011]
>
> @ConfusedLush the only #jesusfact we need to know is that he is gay and was happily married to Santa Claus last week in the Bronx [July 28, 2011]
>
> "@seanhannity: Unlike when Obama speaks @SpeakerBoehner is on time. We'll air it live." ~does boehner pay you every time you blow him? [July 25, 2011]
>
> Why does Jesus only communicate With Republicunts and Crazy people? #redundant [July 22, 2011]
>
> Marcus Bachmann is sponsoring a scavenger hunt in his home-town In the hopes someone finds his Heterosexuality . [July 21, 2011]
>
> @loograt you can only stab non-whites in Texas 4per week And you are allowed to drag at least one black person behind your truck per month [July 19, 2011]

Many of the author's tweets are non-political, but equally crude, and equally plainly fictitious:

> Godamn I smacked my wife with my Dick ... Now she has a cock shaped bruise on her face... Take that take that take that [Aug. 6, 2011]
>
> @siburke939 that is an awesome side-burn I must admit. (I'm actually considering shaving a side-burn on my balls) [Aug. 4, 2011]

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[10] All spelling, punctuation and spacing is *sic*. When a tweet begins with "@" it is responding to a tweet from that address.

> My dick testified in court today in the case against my left hand "He beat me,your honor every day for 25 years" [Aug. 3, 2011]
>
> Besides putting my Dick in your mothers 3foot deep belly button. How the fuck else am I supposed to get your attention. [Aug. 1, 2011]
>
> Alternate use for semen Homemade (liquid skin) for when bandaids are just not an option [July 30, 2011]
>
> @baconNmeggs @annajonzin Fuckballs are really good dipped in sweet&sour sauce too. [July 26, 2011]
>
> sheep keep doing what they do .. Having already gotten used to being fucked they wander around oblivious to everything questioning nothing [July 23, 2011]

Responding to a tweet that said, "Kelly Bundy is the sweetest jailbait ever,"[11] the author tweeted: "I fucked her... I make shit up sometimes" [July 30, 2011].

Indeed, even the address that the author chose for a Twitter account, "@RUretarted" ("are you retarded") expresses the author's contempt for those who may not have the same views, or perhaps for the whole world. Whether that is the author's real attitude or just a *persona* adopted for Twitter, this context further illuminates the tweet at issue. Any reasonable person following this author on Twitter,[12] and any reasonable person who perused the author's Twitter account rather than focusing on a single, isolated tweet, would understand that the author's tweets have no relation to the real world, cannot be taken literally, and certainly do not express any sort of plans or threats.

As previously explained, a "true threat" requires "a *serious* expression of an intent to commit an act of unlawful violence..." *Virginia v. Black*, 538 U.S. at 359. As is clear from its language and context, the tweet at issue was not any such serious expression but,

[11] Kelly Bundy is the name of a stereotypical dumb blonde character in the television situation comedy *Married... with Children*.

[12] A person who subscribes to another's tweets is said to "follow" the tweeter.

rather, was "a kind of very crude offensive method of stating a political opposition" to Representative Bachman. *Watts*, 394 U.S. at 708. Further, as in *J.S. ex rel. H.S. v. Bethlehem Area School Dist.*, 807 A.2d at 658, the totally of tweets "taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at [criticism]. However, it did not reflect a serious expression of intent to inflict harm." *Id*.

The crude and violent imagery of some of the tweets quoted above is typical not only of this particular author, but of many tweeters and others who vent on the Internet. *See* Matt Zoller Seitz, *Why I like vicious, anonymous online comments*, Salon.com (August 3, 2010), online at http://www.salon.com/life/feature/2010/08/03/in_defense_of_ anonymous commenting;[13] Clark Hoyt, *Civil Discourse, Meet the Internet*, N.Y. Times, November 4, 2007, online at http://www.nytimes.com/2007/11/04/opinion/04pubed.html.

As our Circuit observed in a related context, "it is in part the settings of the speech in question that makes [*sic*] their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them." *Moldea v. New York Times Co*., 22 F.3d 310, 314 (D.C. Cir.) (noting that readers of a book review understand that it contains subjective evaluations), *cert. denied*, 513 U.S. 875 (1994).

The Internet, including Twitter, allows people to vent their feelings, just as journals or handbills or conversations at the barbershop once did, and it is unsurprising that tweets often contain exaggerated language and highly critical or vulgar thoughts –

[13] As the article explains, "You see this phenomenon all over the Internet, including Salon, which, despite having some of the smartest and most articulate commenters on the Web, has also attracted its fair share of vitriol. And it's not just in articles about lightning-rod public figures such as Barack Obama or Rush Limbaugh, whom you would expect to inspire heated, sometimes obscene or hateful comments, but in the comments threads of online material that is, in the great scheme, inconsequential, as deserving of bile, profanity and wanton viciousness as a smiley-face button or a paper flower." *Id.*

especially when people understand that they are speaking anonymously, through *personas* they have adopted for the purpose. If the definition of true threats were expanded to include hyperbole and absurdist or fantasy comments like those found on this Twitter account, the government would have cause to prosecute thousands of people every day.[14] Indeed, those who might be subject to prosecution would include some of our elected officials themselves: in a comment strikingly similar to the one that attracted the attention of the Capitol Police here, New Jersey State Senate President Steven Sweeney was quoted as stating that he wanted "to punch [N.J. Governor Chris Christie] in the head." Tom Moran, *Sweeney unleashes his fury as N.J. budget battle turns personal*, The Star Ledger, July 3, 2011, online at http://blog.nj.com/njv_tom_moran/ 2011/07/democrats_cry_foul_at_gov_chri.html. For his part, Governor Christie told reporters that they should "take a bat" to N.J. State Senator Loretta Weinberg. *See* Megan DeMarco, *Governor Christie on Loretta Weinberg*, The Star Ledger, April 13, 2011, online at http://videos.nj. com/star-ledger/2011/04/gov_christie_on_loretta_weinbe.html.[15]

Representative Bachmann herself has said, "I want people in Minnesota *armed and dangerous* on this issue of the energy tax because we need to fight back. Thomas Jefferson told us 'having a revolution every now and then is a good thing,' and the people

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[14] In an earlier instance of what appears to be the same dragnet investigation of Internet political commentary, a D.D.C. Grand Jury subpoena was sent to the blog host WordPress seeking the identity of an anonymous blogger who used metaphorical language in calling for the defeat of certain U.S. Senators. That subpoena was withdrawn after the ACLU filed a motion to intervene and quash. *See In re Grand Jury Subpoena No. 10218019*, No. 11-mc-362 (filed June 23, 2011).

[15] Three days after the Michele Bachmann tweet, "Atticus Guevara" also commented on Governor Christie: "NJ governor Chris Christie was captured off the coast of Alaska by Japanese Fisherman.. It was a Big Mistake" [Aug. 5, 2011].

– we the people – are going to have to fight back hard if we're not going to lose our country." Kate Galbraith, *Michele Bachmann Seeks 'Armed and Dangerous' Opposition to Cap-and-Trade*, N.Y. Times, March 25, 2009, online at http://green.blogs.nytimes.com/2009/03/25/michele-bachmann-seeks-armed-and-dangerous-opposition-to-cap-and-trade/ (emphasis added).[16]

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[16] The "widespread, casual use of violent and militaristic language and themes on the campaign trail" was widely noted during 2010 election campaigns. *See, e.g.,* Alex Isenstadt, *Campaigns equate guns, strength*, POLITICO, Jan. 11, 2011, online at http://www.politico.com/news/stories/0111/47397.html.

In one well-known example, Sarah Palin posted a map on her Facebook page showing the districts of Representatives she wanted to defeat with gunsight-type crosshairs superimposed on them. *See* John Beerman, *Sarah Palin's 'Crosshairs' Ad Dominates Gabrielle Giffords Debate*, ABC News, Jan. 9, 2011, online at http://abcnews.go.com/Politics/sarah-palins-crosshairs-ad-focus-gabrielle-giffords-debate/story?id=12576437&page=1. The map remains on Ms. Palin's Facebook page as of September 14, 2011, online at http://www.facebook.com/notes/sarah-palin/dont-get-demoralized-get-organized-take-back-the-20/373854973434.

Republican congressional candidate Brad Goehring proclaimed on his campaign Facebook page, "If I could issue hunting permits, I would officially declare today opening day for liberals. The season would extend to November 2 and have no limits on how many taken, as we desperately need to 'thin' the herd." *Republican candidate in Facebook flap*, online at http://www.upi.com/Top_News/US/2010/05/12/Republican-candidate-in-Facebook-flap/UPI-17941273702759/.

Tea Party-affiliated congressional candidate Rick Barber ran a television ad in which a person dressed as George Washington listened to an attack on the Obama agenda and proclaimed, "Gather your armies." Matt Bai, *A Turning Point in the Discourse, but in Which Direction?*, N.Y. Times, Jan. 8, 2011, online at http://www.nytimes.com/2011/01/09/us/politics/09bai.html. And in his successful 2010 congressional campaign, Rep. Allen West (R-Florida) urged supporters "to get your musket, to fix your bayonet, to charge into the ranks" and "fight with me to take back America!" Dan Eggen and W.T. Farnam, *Michele Bachmann, others raise millions for political campaigns with 'money blurts,'* Washington Post, June 29, 2011, online at http://www.washingtonpost.com/politics/michele-bachmann-others-raise-millions-for-political-campaigns-with-money-blurts/2011/06/16/AGROkubH_story.html.

And just recently, Texas Governor Rick Perry said of Federal Reserve Board Chairman Ben Bernanke, "If this guy prints more money between now and the election, I don't know what y'all would do to him in Iowa, but we would treat him pretty ugly down in Texas." Philip Rucker, *Perry takes aim at Bernanke*, The Washington Post (August 15, 2011), online at http://www.washingtonpost.com/blogs/political-economy/post/perry-takes-aim-at-bernanke/2011/08/15/gIQAXwqIIJ_blog.html.

Whether it is positive or negative for our society that people letting off steam on the Internet use violent imagery or make crude, sophomoric attempts at humor is beside the point. We may all wish that such language were not used, but the First Amendment protects such forms of expression and does not allow the government to use grand jury subpoenas to unmask the identity of anonymous speakers just because they speak in such a style.

D. Failure to Quash the Subpoena May Have Severe Consequences

The government may argue that its subpoena need not be quashed because the author will not be harmed unless he or she is indicted. That is not necessarily true, and this Court should understand the harm that may be caused by disclosure of an anonymous Internet author's name and address to the U.S. Capitol Police.

Presumably the Capitol Police want the author's name and address in order to conduct an investigation. Federal law enforcement officers showing up at a person's workplace and neighborhood, asking unsettling questions about whether the person has made threatening statements, has criminal proclivities, has alcohol or drug problems, or is mentally unstable, could easily have drastic consequences including the loss of employment and social ostracism for the person and the person's family, even if no indictment ever issues. If the person's connection to an Internet *nom de plume* is disclosed, things that were written in jest, or as fiction, or to blow off steam in a safe place about supervisors, teachers, co-workers, family members, friends or neighbors will be discovered and, again, the personal consequences may be drastic.

Indeed, the very issuance of Subpoena No. 11116275 has already had a chilling effect on the author's speech, as can be seen by the greatly diminished volume of postings

on the author's Twitter page since the author became aware that federal police are monitoring his or her tweets.

A grand jury subpoena is not a toy. A subpoena should not be issued simply because a citizen says coarse things about politicians on the Internet. Subpoenas issued on that basis should be quashed.

CONCLUSION

Because the tweet that triggered Grand Jury Subpoena No. 11116275 is speech that cannot plausibly be viewed as a true threat, the author's identity is protected by the First Amendment privilege for anonymous speech. And because the tweet cannot plausibly be viewed as a true threat, the government cannot demonstrate that it has a compelling interest in overcoming that privilege, as required by this Court's ruling in *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*. The subpoena is therefore "unreasonable or oppressive" under Fed. R. Crim. P. 17(c)(2), and the motion to intervene should be granted and the subpoena quashed.

Respectfully submitted,

/s/ *Arthur B. Spitzer*

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September 20, 2011

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Motion to Intervene and to Quash on

Frederick Yette, Esq.
Assistant United States Attorney for the District of Columbia
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by hand delivery to the Docket Clerk at the office of the United States Attorney for the District of Columbia, this 20th day of September, 2011.

/s/ *Arthur B. Spitzer*

Arthur B. Spitzer