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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**

9 In re GRAND JURY SUBPOENA TO LAS  
10 VEGAS REVIEW JOURNAL

Case No.

[MOTION TO INTERVENE, MOTION  
TO QUASH AND MOTION FOR  
PROTECTIVE ORDER]

11  
12 (JGD:RR:IRS:jr)(2009R00818)  
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15 **MOTION TO INTERVENE, MOTION TO QUASH AND MOTION FOR PROTECTIVE**  
16 **ORDER**  
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18 Pursuant to Rule 24 of the Federal Rules of Civil Procedure and Rules 6 and 17(c)(2) of  
19 the Federal Rules of Criminal Procedure, DOES 1, 2, and 3 hereby move to intervene in the  
20 matter of the subpoena listed above, and move to quash the subpoena issued to the Las Vegas  
21 Review-Journal. Fed. R. Civ. P. 24(a); Fed. R. Crim. P. 6 (rule governing grand jury  
22 subpoenas); Fed. R. Crim. P. 17(c) (2) (“[T]he court may quash or modify the subpoena if  
23 compliance would be unreasonable or oppressive.”). DOES 1, 2, and 3 also hereby move for a  
24 protective order. Fed. R. Civ. P. 57(b) (...in all cases not provided for by rule, the district judges  
25 and magistrates may regulate their practice in any manner not inconsistent with these rules or  
26 those of the district in which they act.”).  
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1 **I. BACKGROUND AND SUMMARY OF ARGUMENT**

2 Assistant United States Attorney J. Gregory Damm (AUSA Damm) issued a grand jury  
3 subpoena seeking information about each and every public comment about an article posted on  
4 the Review-Journal’s website<sup>1</sup> about a controversial ongoing federal tax trial in which he is  
5 serving as a prosecutor, *United States of America vs. Kahre et al.* (2:05-cr-121-DAE-RJJ)  
6 (“*Kahre Case*”).<sup>2</sup> Mr. Kahre, the lead defendant, paid people who worked for him in gold and  
7 silver coins, and believes that the I.R.S. should assess taxes based on the face value of the coins  
8 rather than on their market value. The article provoked much debate and comment, with many  
9 commenters noting agreement with Mr. Kahre’s position, great dislike of AUSA Damm, and  
10 more generally sharing their political opinions concerning the I.R.S. and the United States  
11 monetary system.<sup>3</sup> A few commenters instead noted agreement with the government. While  
12 many expressed their opinions in strong terms, not a single comment posted was criminal.  
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17 <sup>1</sup> DOES do not have a copy of the subpoena, but its nature and scope is described by an op-ed  
18 criticizing the subpoena written by Thomas Mitchell, the Editor of the *Review-Journal*, and  
19 published on Sunday, June 7, 2009. Mr. Mitchell quoted from the subpoena in part, explaining  
20 that it was issued during the week of June 1, 2009 and demanded that the Review-Journal turn  
21 over all records pertaining to the postings, including “full name, date of birth, physical address,  
22 gender, ZIP code, password prompts, security questions, telephone numbers and other identifiers  
23 ... the IP address.” See Exhibit 1, also available at <http://www.lvrj.com/opinion/47141327.html>  
24 (last checked June 14, 2009). In addition, AUSA Damm told the judge in the *Kahre Case* that he  
indeed issued such a subpoena (See Reporter Trans. Of Excerpt of Proceedings, June 9, 2009,  
Case 2:05-cr-121-DAE-RJJ, at 5:14-18: “We subpoenaed the information that the Review-  
Journal may have regarding IP addresses and any other identifiers for the commenters that  
responded to the RJ article [about the *Kahre case*.]” A copy of this transcript is attached as  
Exhibit 2.

25 <sup>2</sup> Joan Whitely, *Employer’s gold, silver payroll standard may bring hard time*, Las Vegas  
26 Review-Journal, May 26, 2009, <http://www.lvrj.com/news/46074037.html> (“LVRJ Article,”) attached as Exhibit 3.

27 <sup>3</sup> The Review-Journal posts its articles on its website and also allows member of the public to  
28 post comments.

1 While prosecutors have wide latitude to issue grand jury subpoenas, they must still  
2 operate within the bounds of the First Amendment. Here, the subpoena is an abuse of the grand  
3 jury process, and is a thinly veiled threat to prosecute people for criticizing the government.  
4 Regardless of one's opinion of the commenters' various points of view – or how they chose to  
5 express themselves – the comments, most of which question the U.S. government and its  
6 practices, are unquestionably protected speech. The value of anonymous political speech to our  
7 country is even older than the Constitution. The Federalist Papers were produced using a  
8 pseudonym, for example. The United States Supreme Court has explained:

10 . . . Anonymity is a shield from the tyranny of the majority. . . . It  
11 thus exemplifies the purpose behind the Bill of Rights, and of the  
12 First Amendment in particular: to protect unpopular individuals  
from retaliation . . . at the hand of an intolerant society.

13 *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). The central reason for the  
14 protection of anonymous speech is that speakers may fear retaliation by the government –  
15 *retaliation such as the threat of prosecution implicit in a grand jury subpoena from a prosecutor*  
16 *seeking your identity after you expressed criticism of the very same prosecutor*. Given that the  
17 comments are in fact protected political speech *and in no way revealing of any criminal activity*,  
18 it is impossible to imagine a legitimate purpose for the subpoena. This is highlighted by the fact  
19 that the subpoena is so broad that it asks for the identity of each and every commenter on the site  
20 – which would strangely include even the commenters who agree with the government's  
21 position. Instead, the only effect of the subpoena appears to be squelching public debate and  
22 disagreement with the government's position.

25 The fact that AUSA Damm is the prosecutor in the *Kahre* Case makes this even more  
26 problematic: by seeking a subpoena for the identities of his critics, he is sending the message that  
27 the government is considering punishing dissent. Even more dangerously, jurors that learn about  
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1 the subpoena could be intimidated by the action and fear not agreeing with AUSA Damm that  
2 Mr. Kahre and his co-defendants should be convicted.<sup>4</sup> Indeed, his subpoena was done in the  
3 most public way possible: he issued it to a newspaper, and of course would have known that it  
4 would immediately become public. The chilling effect of the subpoenas on the commenters and  
5 other potential speakers is undeniable: intentionally or not, the government is sending a message  
6 that the price of speaking out against a government prosecution is compelled disclosure of the  
7 speakers' identities and possible prosecution.  
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9 This type of reprisal for political speech is exactly what the First Amendment was  
10 designed to prevent, and this Court should not permit the use of the grand jury to chill speech.  
11 As the Ninth Circuit has explained, “[i]t would be a cruel twist of history to allow the institution  
12 of the grand jury that was designed at least partially to protect political dissent to become an  
13 instrument of political suppression.” *Burse v. U.S.*, 466 F.2d 1059, 1089 (9th Cir. 1992),  
14 *overruled in part on other grounds, In re Grand Jury Proceedings*, 863 F.2d 667, 669-70 (9th  
15 Cir. 1988). DOES respectfully request that the subpoena be quashed and that all necessary steps  
16 are taken to ensure that the public is free to engage in anonymous political speech.  
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## 19 **II. ARGUMENT**

### 20 **A. DOES Should Be Allowed to Intervene to Challenge the Subpoena.**

21 This Court has supervisory authority over the grand jury, and thus has the authority to  
22 allow DOES to intervene because they have legal standing. *See, e.g., In re Grand Jury*  
23 *Proceedings*, 814 F. 2d 61, 71 (1st Cir. 1987). While the Federal Rules of Criminal Procedure  
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25 <sup>4</sup> An alternate juror in the *Kahre* Case trial has already learned about the subpoena. (See Ex. 2,  
26 June 9, 2009 trans. at 7:16-19.) While Judge Ezra, the judge who is presiding over the trial,  
27 decided that the alternate juror had not learned enough details and did not need to be excused,  
28 (Ex. 2 June 9, 2009 trans. at 34:7-8) the fact that one juror did hear about the subpoena highlights  
the potential danger.

1 do not address intervention, the Federal Rules of Civil Procedure provide for intervention of  
2 right when the applicant “claims an interest relating to the property or transaction that is the  
3 subject of the action, and is so situated that disposing of the action may as a practical matter  
4 impair or impede the movant’s ability to protect its interest.” Fed. R. Civ. P. 24(a). Courts have  
5 applied this rule in the grand jury context. *See, e.g., In re Grand Jury Proceedings, PHE, Inc.,*  
6 *640 F. Supp. 149, 151 (E.D.N.C. 1986)*. Here, the civil intervention standard is met: DOES have  
7 important First Amendment interests at stake. Regardless of whether the civil standard applies,  
8 this Court has authority to allow intervention and because of its authority over grand jury  
9 proceedings and its authority under Rule 57 of the Federal Rules of Criminal Procedure “[when]  
10 there is no controlling law ... [a] judge may regulate practice in any manner consistent with  
11 federal law”) provide for the granting of intervention.<sup>5</sup> The subpoena violates DOES’  
12 fundamental rights to engage in anonymous political speech, they have standing to assert those  
13 rights, and thus, they should be allowed to intervene in order to both vindicate their rights and  
14 prevent prosecutorial abuse.  
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18 A litigant has standing to challenge the validity of a subpoena issued to another where he  
19 has sufficiently important, legally-cognizable interests in the information sought. *See, e.g.,*  
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23 <sup>5</sup> Further, this Court need not even have a complainant with standing in order to act to prevent  
24 the abuse of the grand jury process detailed in this motion. *See Application of Iaconi*, 120 F.  
25 Supp. 589, 590 (D. Mass. 1954). At least one Circuit has similarly indicated that the focus of the  
26 court should first fall on the extent of the abuse of the grand jury process. Where the impropriety  
27 of the subpoena is egregious, that makes granting third party appropriate – even where third  
28 parties moving to quash were already under indictment. *In re Grand Jury Proceedings,*  
*Fernandez Diamante*, 814 F.2d 61, 67–68 (1st Cir. 1987) (Allowing indictees standing to quash  
because of “the scope and gravity of the specific claims” raised and “the factual grounds alleged  
to support them” and omitting analysis of protected constitutional interests).

1 *Gravel v. United States*, 408 U.S. 608, 609n.1 (1972) (Senator asserting constitutional privilege  
2 allowed to intervene to move to quash subpoena to his assistant).<sup>6</sup>

3 Courts have explicitly held that third parties have standing to quash subpoenas in order  
4 protect their First Amendment rights. *Local 1814, International Longshoreman's Ass'n, AFL-*  
5 *CIO v. The Waterfront Commission of New York Harbor*, 667 F.2d 267, 270-71 (2nd Cir. 1981)  
6 (union's standing to enjoin enforcement of a subpoena issued to another party was "beyond  
7 dispute" because it was attempting to protect its members' First Amendment rights implicated by  
8 a subpoena that cast a chill on associational rights); *United States v. Citizens State Bank*, 612  
9 F.2d 1091, 1094 (8th Cir. 1980) (the Eighth Circuit held that the alleged infringement of First  
10 Amendment rights may warrant limiting enforcement of an Internal Revenue Service bank  
11 subpoena under facts substantially similar to those in this case); *In re First Nat. Bank,*  
12 *Englewood, Colo.*, 701 F.2d 115, 117 (10th Cir. 1983) (holding that petitioners had standing to  
13 raise First Amendment claims of chilling of their associational rights, notwithstanding that the  
14 subpoena in question was directed to their bank).

15 Being the speaker of sought-after communications, where the government's attempt to  
16 obtain them runs afoul of the Constitution, meets the standing requirements. The Third Circuit  
17 held that victims of an illegal wiretap had standing to move to quash a grand jury subpoena  
18 issued to person who made the interceptions because further disclosure to the grand jury of the  
19 contents of the intercepted communications violated their right to privacy. *In re Grand Jury*, 111  
20 F.3d 1066, 1078-79 (3d Cir. 1997).

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26 <sup>6</sup> Third parties must be allowed to assert their rights because the person to whom the subpoena is  
27 issued cannot be expected to risk contempt in order to protect the interests of the person whose  
28 information or documents are targeted. *See In re Grand Jury Subpoena Served Upon Niren*, 784  
F.2d 939, 941 (9th Cir. 1986).

1           Nowhere is protection against government abuse and intimidation more critical than in  
2 the area of free speech, and in particular, anonymous political speech. The DOES should be  
3 allowed to act to protect their free speech rights.  
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5           **B. The DOES Should Be Able to Proceed Anonymously.**

6           DOES must be able to proceed anonymously in order to protect they very rights this  
7 Motion seeks to protect, and in order to avoid government retaliation. In the civil context, “a  
8 party may preserve his or her anonymity in judicial proceedings in special circumstances when  
9 the party's need for anonymity outweighs prejudice to the opposing party and the public’s  
10 interest in knowing the party’s identity.” *Does I–XXIII v. Advanced Textile Corp.*, 214 F.3d  
11 1058, 01068 (9th Cir. 2000) (reversing the district court’s order dismissing the complaint for  
12 failure to disclose plaintiffs’ true names, where immigrant-employee plaintiffs brought [Fair  
13 Labor Standards Act] claims against employer and tried to use pseudonyms to prevent  
14 termination and possible deportation).  
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17           Here, the need for anonymity unquestionably outweighs the public interest in knowing  
18 their identity. To determine whether to allow a party to appear as a “doe” and proceed  
19 anonymously, three factors are considered: (1) the severity of the threatened harm; (2) the  
20 reasonableness of the anonymous party’s fears; and (3) the anonymous party’s vulnerability to  
21 such retaliation. *Advanced Textile*, 214 F.3d at 1068.<sup>7</sup>  
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24 <sup>7</sup> This test has been applied in criminal cases. *See e.g., U.S. v. Stoterau*, 524 F.3d 988, 1013 (9th  
25 Cir. 2008) (“In sum, our precedents dictate that we grant criminal defendants a pseudonym only  
26 in the ‘unusual case, where there is a need for the cloak of anonymity.’”) (applying the balancing  
27 test from *Advanced Textile* and allowing accused sex offender to proceed anonymously, noting  
28 that “in exceptional cases where necessary to protect a person from injury or harassment, we  
have allowed the use of pseudonyms.”).

1 The DOES' information is being sought for an already active criminal investigation – and  
2 just the threat of a criminal investigation is severe enough to warrant anonymity. *See Advanced*  
3 *Textile*, 214 F.3d at 1071. The DOES' fears of retaliatory prosecution (Doe 1 Decl. at ¶ 7- 10)  
4 are reasonable.<sup>8</sup> The subpoena was issued by Greg Damm, the same prosecutor who is  
5 prosecuting the case that the DOES criticized and who is the subject of several comments. (Doe  
6 1 Decl. at ¶ 4; Doe 2 Decl. at ¶ 4; Doe 3 Decl. at ¶ 4.) DOES are extremely vulnerable because  
7 of the implicit threat of prosecution. Further, if DOES' identities are disclosed before the  
8 identities of the other commenters are discovered, then they will be extremely vulnerable to  
9 investigation by the government because they could be singled out for retaliation. *See Advanced*  
10 *Textiles*, 214 F.3d at 1072. In contrast, given the lack of potential use in any conceivable  
11 legitimate investigation, the government faces no possible prejudice and any interest in  
12 disclosing the DOES' identities are more than outweighed. The public interest lies in ensuring  
13 that the constitutional rights of commenters are protected from an over-zealous prosecutor bent  
14 on chilling political speech about his unpopular case.  
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18 **C. The Subpoena Should Be Quashed Because it Violates the Free Speech and**  
19 **Privacy Rights of Anonymous Commenters.**

20 This Court has the authority to regulate grand jury subpoenas issued by prosecutors. *See,*  
21 *e.g., Hoffman v. United States*, 341 U.S. 479, 485 (1951) (prosecutors and courts are both duty  
22 bound to ensure that prosecutors' investigative powers are not abused, and are exercised wisely  
23 and in compliance with the Constitution as well as other limits). Although grand jury subpoenas  
24 are normally afforded a presumption of regularity, the subpoena is anything but regular. It is  
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27 <sup>8</sup> Plaintiffs are not required to prove that defendants intend to carry out the threatened retaliation,  
28 just that a reasonable person would fear retaliation. *See Advanced Textile*, 214 F.3d at 1071.

1 nothing but a measure by AUSA Damm to harass critics and squelch public discourse on the  
2 Review-Journal's website. Despite prosecutors' wide latitude to issue grand jury subpoenas,  
3 they must still operate within the bounds of the First Amendment. *See, e.g., Branzburg*, 408 U.S.  
4 665, 708 (1972) ("Grand juries are subject to judicial control and subpoenas to motions to quash.  
5 We do not expect courts will forget that grand juries must operate within the limits of the First  
6 Amendment as well as the Fifth."); *Burse*y, 466 F.2d at 1082 ("No governmental door can be  
7 closed against the Amendment. No governmental activity is immune from its force. That the  
8 setting for the competition between rights secured by the First Amendment and antagonistic  
9 governmental interests is a grand jury proceeding is simply one of the factors that must be taken  
10 into account in striking the appropriate constitutional balance.").

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13 Where *any* governmental activity, including action taken under the auspices of a grand  
14 jury, "collides with First Amendment rights, the Government has the burden of establishing that  
15 its interests are legitimate and compelling and that the incidental infringement upon First  
16 Amendment rights is no greater than is essential to vindicate its subordinating interests." *Burse*y,  
17 466 F.2d at 1083. More specifically:

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19 When the collision occurs in the context of a grand jury  
20 investigation, the Government's burden is not met unless it  
21 establishes that the Government's interest in the subject matter of  
22 the investigation is "immediate, substantial, and subordinating,"  
23 that there is a "substantial connection" between the information it  
24 seeks ... and the overriding governmental interest in the subject  
25 matter of the investigation, and that the means of obtaining the  
26 information is not more drastic than necessary to forward the  
27 asserted governmental interest. The investigation must proceed  
28 "step by step . . . [and] an adequate foundation for inquiry must be  
laid before proceeding in such manner as" may inhibit First  
Amendment freedoms. [*Gibson v. Florida Legislative Investigation  
Comm.*, 372 U.S. 551, 557; *see also Shelton v. Tucker*, 364 U.S.  
479, 487-90 (1960)]... it is obliged to show that there is a  
substantial possibility that the information sought will expose

1 criminal activity within the compelling subject matter of the  
2 investigation.

3 *Id.* Other courts have held that a grand jury subpoena that invades First Amendment rights  
4 cannot stand unless justified by a compelling governmental interest. *See, e.g.*; *In re Grand Jury*  
5 *Proceedings*, 776 F.2d 1099, 1102-03 (2d Cir.1985); *In re Grand Jury Subpoena for*  
6 *Appearance of Patrick Faltico*, 561 F.2d 109, 111 (8th Cir. 1977); *In re Grand Jury Subpoena to*  
7 *Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 572 (W.D. Wis., 2007); *In re Grand Jury*  
8 *Subpoenas Duces Tecum*, 78 F.3d 1307, 1312 (8th Cir.1996).<sup>9</sup> *But see In re Grand Jury 87-3*  
9 *Subpoena Duces Tecum*, 955 F.2d 229, 232 (4th Cir.1992) (concluding that the above balancing  
10 test does not apply because the Supreme Court declined to apply this test in both *Branzburg* and  
11 *University of Pennsylvania v. EEOC*, 493 U.S. 182, 110 (1990) but also noting that test may  
12 apply where it alleged that the subpoena is issued in bad faith). Further the Supreme Court has  
13 applied a heightened test in the context of a legislative investigative subpoena that implicated  
14 fundamental speech rights. *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963) (“[I]t  
15 is an essential prerequisite to the validity of an investigation which intrudes into the area of  
16 constitutionally protected rights of speech, press, association and petition that the State  
17 convincingly show a substantial relation between the information sought and a subject of  
18 overriding and compelling state interest.”); *see also Pollard v. Roberts*, 283 F.Supp. 248, 256-57  
19 (D.E.D.Ark.), *Aff’d*, 393 U.S. 14, (1968) (per curiam) (Regarding a subpoena duces Tecum the  
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24 <sup>9</sup> Similarly, the heightened test has applied in the context of other forms of subpoenas that  
25 implicate fundamental expressive rights. *See, e.g.*, *United States v. Comley*, 890 F.2d 539, 544  
26 (1st Cir.1989); *In re First Nat’l Bank, Englewood, Colo.*, 701 F.2d 115, 118-19 (10th Cir. 1983);  
27 *Nat’l Commodity and Barter Ass’n (NCBA) v. United States*, 951 F.2d 1172, 1174 (10th Cir.  
28 1991); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1233 (11th Cir.1988); *Brock v. Local 375,*  
*Plumbers Int’l Union*, 860 F.2d 346, 350 (9th Cir.1988).

1 Supreme Court stated that “disclosure of the identities of members of the group can be  
2 compelled only by showing that there is a rational connection between such disclosure and a  
3 legitimate governmental end, and that the governmental interest in the disclosure is cogent and  
4 compelling.”)

5 No matter what the precise contours of the test are, the government cannot come close to  
6 showing any legitimate reason to harass the Review-Journal and its commenters, let alone any  
7 heightened test. Indeed, it is impossible to imagine how the subpoena even meets threshold  
8 requirement of logical connection between subpoenaed information and possible charges that  
9 could be the basis of a grand jury investigation. *See, e.g., Bursey*, 466 F.2d at 1076.<sup>10</sup> The  
10 speech that is burdened appears to be the very activity the government believes is criminal.  
11 However, the comments, as detailed below constitute protected speech. They are in no way  
12 criminal, nor will they expose any criminal activity.  
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15 The United States Supreme Court has expressed explicit disapproval of grand jury  
16 subpoenas constituting such “official harassment of the press” and has made clear that the First  
17 Amendment limits the power to issue grand jury subpoenas:  
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19 Official harassment of the press undertaken not for purposes of law enforcement  
20 but to disrupt the reporter’s relationship with his news sources would have no  
21 justification. Grand juries are subject to judicial control and subpoenas to motions  
22 to quash. We do not expect courts will forget that grand juries must operate within  
23 the limits of the First Amendment as well as the Fifth.

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24 <sup>10</sup> Even if First Amendment claims were not at stake, this Court could properly require the  
25 government to reveal the subject of the investigation. Because each DOE, just like subpoena  
26 recipients, “cannot put his whole life before the court in order to show that there is no crime to be  
27 investigated” (*U.S. v. R. Enterprises, Inc.*, 498 U.S. 292, 301-202 (1991) (*quoting Marston’s Inc.*  
28 *v. Strand*, 114 Ariz. 260, 270, 560 P.2d 778, 788 (1977) (Gordon, J., specially concurring in part  
and dissenting in part)) this court is “justified in a case where unreasonableness is alleged in  
requiring the Government to reveal the general subject of the grand jury’s investigation before  
requiring the challenging party to carry its burden of persuasion.” *Id.* at 302.

1 *Branzburg*, 408 U.S. at 707-708(1972). The subpoena does not operate within the limits of the  
2 First Amendment. It disrupts the *Review-Journal*'s ability to host and promote open dialogue  
3 about current events and issues, including political dialogue regarding the government's actions,  
4 as well as the rights of anonymous commenters to participate in the free exchange provided by  
5 the *Review-Journal*. Worse, it sends the message to government critics that they will be  
6 criminally prosecuted for their dissent.  
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9 **1. The Comments Constitute Quintessential Political Speech, and Are  
Protected by the First Amendment.**

10 The government has the burden of showing that the speech at issue does not fall within  
11 the ambit of the First Amendment. "All speech, press, and associational relationships are  
12 presumptively protected by the First Amendment; the burden rests on the Government to  
13 establish that the particular expressions or relationships are outside its reach." *Burse*, 466 F.2d  
14 at 1082 (citing, among other cases, *Gooding v. Wilson* 405 U.S. 518 (1972))  
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16 The government could never make this showing here. The anonymous comments posted  
17 on the *Review-Journal* website are quintessential examples of political speech, and are therefore  
18 "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S.  
19 343, 365 (2003). These anonymous comments express a wide range of deeply-held convictions  
20 regarding political issues at the heart of the ongoing tax evasion retrial of Mr. Kahre. The  
21 majority of these anonymous commenters voice their support for Mr. Kahre and their outrage  
22 over the federal government's current taxation and monetary policies. For instance, on May 26  
23 at 10:48 am, a commenter posting under the pseudonym "RantNation" voices his disdain for the  
24 IRS and Federal Reserve by sarcastically suggesting that citizens "pay taxes on the value of the  
25 paper our paycheck is printed on." LVRJ article attached as Exhibit 3. On May 26 at 12:58 pm,  
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1 another commenter, posting under the name “Thomas Jefferson,” states his belief that “the  
2 banking institutions are more dangerous to our liberties than standing armies.” *Id.* A commenter  
3 using the name “Don’t protest at the court” urged readers to “Write those letters! PROTEST!”  
4 [sic] on May 26 at 11:51 am. *Id.* Not all comments are of a pro-Kahre or anti-government bent;  
5 on May 28 at 7:42 am, another commenter, using the nom de plume “Pay My Taxes” showed  
6 strong support for the prosecution, stating that “[t]he IRS and the US Department of Justice are  
7 the true heroes in this story.” *Id.*

9 Because political discourse tends to invite and evoke emotional responses, some  
10 commenters chose not restrain themselves to run-of-the-mill calls to change government policy.  
11 Some comments appear to postulate, fantasize about, or even advocate armed rebellion against  
12 the federal government. For instance, on May 27 at 12:15 am, “Ingvend Storrs” alluded to such  
13 rebellion by stating it’s “[t]ime for some 1776,” while a person using the pseudonym  
14 “Patrioit2012” wrote on May 26 at 12:17 am, that “the time will come for WAR against this  
15 criminal US Government . . . [the military] along with the Police and other criminal depts will be  
16 in the line of fire when we march!” *Id.* A commenter named “Mike” went so far as to say that  
17 “12 dummies on the jury who will convict [Kahre] . . . should be hung along with the feds[.]”  
18 *Id.*<sup>11</sup>

## 21 **2. The Comments At Issue Are Not Criminal, Nor Imaginably Relevant to** 22 **Any Potential Crime.**

23 While certain types of speech, such as incitements to criminal acts or true threats, are not  
24 necessarily protected by the First Amendment,<sup>12</sup> none of the comments rises to the level of  
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27 <sup>11</sup> As of June 16, 2009, this comment no longer appears on the Review Journal’s website.

28 <sup>12</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (“[n]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot . . .”); *Lovell v.*

1 criminal liability and nor they reveal possible criminal activity that would be an appropriate  
2 target of a grand jury investigation. The Ninth Circuit has held that “speech that can reasonably  
3 be characterized as political rhetoric or hyperbole, particularly such speech not directed at  
4 specific individuals, is protected.” *Fogel v. Collins*, 531 F.3d 824, 830 (9th Cir. 2008). To  
5 determine whether a given expression is an unprotected “true threat” or protected political  
6 rhetoric, the court applies both an objective and subjective standard. *Id.* at 831. The “objective  
7 standard asks whether it is reasonably foreseeable to a speaker that the listener will seriously take  
8 his communication as an intent to inflict bodily harm.” *Id.* (quoting *Planned Parenthood of the*  
9 *Columbia/Willamette, Inc. v. Am. Coal. Of Life Activists*, 290 F.3d 1058, 1076 (9th Cir. 2002))  
10 (internal quotation marks omitted). The subjective standard applied by the Ninth Circuit requires  
11 “proof that the speaker subjectively intended the speech as a threat” in order to find that the  
12 speaker’s expression is an unprotected “true threat.” *Fogel*, 531 F.3d at 831 (quoting *United*  
13 *States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005)). For both tests, the court examines the  
14 “totality of the message. . . in light of the full context available to someone observing [the  
15 expression].” *Fogel*, 531 F.3d at 831.  
16  
17  
18

19 With respect to incitements, the First Amendment prohibits states from criminalizing  
20 speech advocating the use of force or lawless acts unless such advocacy is directed toward  
21 inciting or producing imminent lawless action and is likely to instantly incite or produce such  
22 action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Constitution requires that the  
23 speech be *aimed at causing an unlawful act* **and** that the speech is *likely to cause an imminent*  
24 *unlawful act*, because abstractly advocating for the necessity of force and violence is not the  
25 same as preparing a group for violent action and steeling it to such action. *Id.* at 448 (emphasis  
26  
27  
28 *Poway Unified School Dist.*, 90 F.3d 367 (9th Cir. 1996) (holding that high schooler’s threat to  
“shoot someone” in front of a guidance counselor was not protected speech).

1 added). The former without the latter is fully protected speech and cannot be punished or  
2 censored by the state. The former, if it is a “true threat,”<sup>13</sup> combined with the latter creates a  
3 “clear and present danger” and is not protected by the First Amendment. *Id.* at 448-49.  
4

5 i. Commentary criticizing trial proceedings are protected speech.

6 Unless such commentary about judges, trials, jurors, or lawyers constitutes a “true threat”  
7 or “clear and present danger,” it is protected and is not criminal. In *Bridges v. California*, 314  
8 U.S. 252, 263, 270-71 (1941), the Court made clear that the First Amendment limited a court’s  
9 power to hold speakers in contempt, and that out-of-court publications were to be governed by  
10 the clear and present danger standard. The Court described the “clear and present danger”  
11 standard as ‘a working principle that the substantive evil [behind the speech] must be extremely  
12 serious and the degree of imminence extremely high before utterances can be punished’ (*id.* at  
13 263) because restrictions on speech concerning pending judicial proceedings are likely to impede  
14 discussion of important public issues “at the precise time when public interest in the matters  
15 discussed would naturally be at its height.” *Id.* at 268. Furthermore, the “clear and present  
16 danger” must be to the fair administration of justice itself, and not the public’s opinion of  
17 administration of justice. See *Pennekamp v. State of Florida*. 328 US 331, 347, 349 (1946)  
18 (finding that the associate editor of the Miami Herald could not be held in contempt of court for  
19 publishing two editorials criticizing the administration of criminal justice in certain cases  
20 pending before the court).  
21  
22  
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25  
26 <sup>13</sup> See e.g., *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“True Threats” are statements where the  
27 speaker means to communicate a serious expression of an intent to commit an act of unlawful  
28 violence to a particular individual or group of individuals.) But see *Watts v. United States*, 394  
U.S. 705, 708, (1969) (“Political hyperbole” is not a true threat.)

1 The United States Supreme Court further elaborated on this rule in *Wood v. Georgia*, 370  
2 U.S. 375, 384-85(1962), when it held that a court may not punish out-of-court statements critical  
3 of judicial actions, absent special circumstances showing an extremely high likelihood of serious  
4 interference with the administration of justice and that the statements presented a clear and  
5 present danger of such interference. In *Wood*, the town Sheriff wrote an editorial in the local  
6 newspaper criticizing a judge's decision to convene a grand jury to investigate block voting by  
7 the African-American community. He also sent a copy to the grand jury room. His editorial  
8 stated:  
9

10 Whatever the Judges' intention, the action ...will be considered  
11 one of the most deplorable examples of race agitation to come out  
12 of Middle Georgia in recent years. At a time when all thinking  
13 people want to preserve the good will and cooperation between the  
14 races in Bibb County, this action appears either as a crude attempt  
15 at judicial intimidation of negro voters and leaders, or, at best, as  
16 agitation for a 'negro vote' issue in local politics...Negro people  
17 will find little difference in principle between attempted  
18 intimidation of their people by judicial summons and inquiry and  
19 attempted intimidation by physical demonstration such as used by  
20 the K.K.K.

21 *Id.* at 380. The U.S. Supreme Court found that by holding the Sheriff in contempt of court for  
22 expressing his personal ideas (however unprofessionally) on a matter that was presently before a  
23 grand jury, the lower court had abridged his liberty of free speech as protected by the First  
24 Amendment because his comments did not constitute an imminent threat to the administration of  
25 justice. *Id.* at 394-95 (the Court even took into consideration the fact that the Mr. Wood  
26 identified himself as the Sheriff in the copy sent to the grand jury room).

27 The First Amendment also protects the right to speak out publicly against a criminal  
28 prosecution or against the government in general. *See e.g., In re First Nat'l Bank, Englewood,*  
*Colo.*, 701 F.2d 115, 117 (10th Cir. 1983) (reversing district court's denial of motion to quash

1 subpoena seeking bank records of two anti-tax organizations that had espoused dissident views  
2 on the federal income tax system. The Ninth Circuit follows this reasoning as well. *See, e.g.,*  
3 *Turney v. Pugh*, 400 F.3d 1197, 1204 (9th Cir. 2005) (noting in dicta that it would “intrude into  
4 the realm of protected expression” to criminalize an “advertisement supporting a particular  
5 outcome in a pending case (*e.g.*, ‘OJ Was Framed!’”).  
6

7 ii. The comment regarding jurors is neither a true threat, nor an  
8 incitement to violence.

9 The transcript from the criminal trial shows that Mr. Damm is particularly concerned  
10 about one specific blog comment indicating that jurors “should be hung” if they find for the  
11 government and Mr. Damm. (Ex. 2 at 9:16-23.)<sup>14</sup> The first and most obvious issue is the  
12 extreme overbreadth of the subpoena and its inclusion of an incredible swath of protected  
13 speech. Therefore, the subpoena should be quashed for overbreadth alone, and highlights the  
14 lack of legitimate purpose for all the private information AUSA Damm is seeking, including IP  
15 addresses.  
16

17 But even the comment of apparent concern to AUSA Damm is not a true threat and does  
18 not indicate any clear and present danger. It does not constitute jury tampering<sup>15</sup> no way rises to  
19

20  
21 <sup>14</sup> One commenter stated that the “12 dummies on the jury who will convict [Kahre] . . . *should*  
22 be hung along with the feds.” It appears that this article was later removed from the website. (Ex.  
23 3 (LVRJ Article) (emphasis added).)

24 <sup>15</sup> Jury tampering is prohibited under 18 U.S.C. 1503 which states in pertinent part: “whoever  
25 corruptly, or by threats or force, or by any threatening letter or communication, endeavors to  
26 influence, intimidate, or impede any grand or petit juror . . . in the discharge of his duty . . . shall  
27 be punished...”. (emphasis added) Jury tampering is a specific intent crime and the prosecution  
28 must show that a person acted willfully, knowingly and with specific intent to influence a juror.  
*See United States v. Russell*, 255 U.S. 138, 143 (1921) (explaining the importance of the word  
“endeavor” as: “The word of the section is ‘endeavor,’ ... it describes any effort or essay to  
accomplish the evil purpose that the section was enacted to prevent.”); *U.S. v. Guzzino*, 810 F.2d  
687, 696 (7th Cir. 1987)(“To prove a violation of section 1503, the government must show that

1 the level of criminal speech, and is fully-protected political rhetoric that cannot meet the “clear  
2 and present danger” standard required for criminalizing speech that represents a threat to the  
3 judicial process. *Pennekamp v. State of Fla.*, 328 U.S. 331, 332-33 (1946).

4 The language used, while crude, does not imply any further action from the commenter,  
5 which means there is no proof of his subjective intent to threaten. Simply because the  
6 commenter states that something bad *should* befall jury members who convict Mr. Kahre and his  
7 co-defendants does not mean that the commenter plans on setting in motion. Unlike in cases in  
8 which the court found a “true threat,” the language used by the commenter merely expresses a  
9 fantasy to the readers of the article, which no reasonable person could interpret as an actual  
10 threat to do harm. See *Watts v. United States*, 394 U.S. 705 (1969) (holding that the phrase “if  
11 they ever make me carry a rifle the first man I want in my sights is [then-president] L.B.J.”  
12 spoken at a political rally is protected political speech rather than a threat); *Fogel*, 531 F.3d 824,  
13 827, 831 (9th Cir. 2008) (finding that the words “I AM A FUCKING SUICIDE BOMBER  
14 COMMUNIST TERRORIST!” among other statements painted on appellant’s van did not  
15 constitute true threats); *Cf.*, *United States v. Stewart*, 420 F.3d 1007, 1015 (9th Cir. 2005)  
16 (holding that expressing a desire to “string [a specific judge] up and cut her throat . . . and make  
17 it like a copycat so that people would do the same thing” is a threat in the context of attempting  
18 to set up a “hit.”). The juror comment is surrounded by similarly fiery political speech, and is  
19 not directed at any particular person, it is clear from the context that no reasonable reader would  
20 take it as a true threat.  
21  
22  
23  
24

25 As the United States Supreme Court noted in laying out the First Amendment test for  
26 interference with judicial process:

27  
28 each defendant knew of the pending judicial proceeding and specifically intended to impede its  
administration.”). None of the comments is jury tampering.

1 This essential right of the courts to be free of intimidation and  
2 coercion was held to be consonant with a recognition that freedom  
3 of the press must be allowed in the broadest scope compatible with  
4 the supremacy of order. A theoretical determinant of the limit for  
5 open discussion was adopted from experience with other  
6 adjustments of the conflict between freedom of expression and  
7 maintenance of order. This was the clear and present danger rule.  
8 The evil consequence of comment must be ‘extremely serious and  
9 the degree of imminence extremely high before utterances can be  
10 punished.

11 *Pennekamp v. Florida*, 329 U.S. 331, 334 (1946).

12 Other cases construing the clear and present danger standard have generally reiterated the  
13 “true threat” standard, and made plain that criminalization of speech, even when intimidation is  
14 alleged, must meet the exacting and high standards for an imminent and direct threat. *See, i.e.*,  
15 *U.S. v. Cassel*, 408 F.3d 622, 636 (9th Cir. 2005) (analyzing statute criminalizing interference  
16 with federal land sale by intimidation under true threat standards). *See also Caribbean Intern.*  
17 *News Corp. v. Fuentes Agostini*, 12 F. Supp. 2d 206, 218-22 (D. P. R. 1998) (analyzing  
18 application of jury intimidation rules to critics in the press). The Supreme Court has noted that  
19 such commentary is punishable only if the risk of an unfair administration of justice is  
20 “extremely serious and the degree of imminence [is] extremely high.” *Landmark*, 435 U.S. at  
21 845 (quoting *Bridges*, 314 U.S. at 263). In borderline cases courts should rule in favor of  
22 allowing the commentary and preserving the freedom of public expression. *Pennekamp*, 328 U.S.  
23 at 347.

24 Indeed, in the *Cassel* case, the Ninth Circuit noted that not only must a threat be  
25 imminent and direct; it must be a clear threat of action *by the Defendant*:

26 For while the jury instruction correctly stated that “intimidation” involves  
27 “words and conduct that would put an ordinary, reasonable person in fear  
28 or apprehension,” it failed to specify that the statute requires “fear or  
apprehension” of injury inflicted *by the defendant*. Whether the threat is of  
injury to person or property, there is no doubt that it must be a threat of

1 injury brought about-rather than merely predicted-by the defendant.  
2 Indeed, the First Amendment requires as much.

3 *Cassel*, 408 F.3d at 636-37 (internal citation omitted).

4 It is clear that the blog comment wishing that jurors “should be hung” in no way meets  
5 the high threshold for a true threat. Not only is this a *conditional* wish, which by definition  
6 cannot be imminent, but it is clear that the speaker has no intent to carry it out – only hopes, via  
7 hyperbolic rhetoric, that it would occur. Thus, none of the comments on the LVRJ Article rise  
8 to a level punishable under jury intimidation statutes, and the entirety of the communications  
9 sought are fully protected under the First Amendment.  
10

11  
12 iii. The comments about 1040 forms are protected.

13 The comments to the LVRJ Article, for example, which urged readers to not to file a  
14 1040 tax form, constitute protected speech. They are not a true threat, and nor do they create a  
15 clear and present danger of imminent unlawful action. Those comments are mere political  
16 hyperbole, or at worst, an abstract advocacy for the necessity of unlawful action in order to  
17 combat the speaker’s perceived inequities of the U.S. tax code.  
18

19 In sum, none of comments left by the anonymous comments rises to the level required by  
20 the Supreme Court which would allow either the government or this Court to punish the  
21 speakers. They are not criminal and nor could they reveal potential crimes. Instead, they are  
22 protected political commentary, and protected by the First Amendment.  
23

24 **3. Anonymous Speech Is Protected.**

25  
26 The fact that the political commentary was made anonymously in no way changes the  
27 analysis. Partly in recognition of the tremendous role anonymous speech has played throughout  
28

1 the history of the United States, both the Ninth Circuit and the Supreme Court have long held  
2 that “an author’s decision to remain anonymous, like other decisions concerning omissions or  
3 additions to the content of a publication, is an aspect of the freedom of speech protected by the  
4 First Amendment.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995). See also  
5 *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999) (striking down a Colorado  
6 law requiring petition circulators to wear identification); *Am. Civil Liberties Union of Nevada v.*  
7 *Heller*, 378 F.3d 979, 1002 (9th Cir. 2004) (invalidating Nevada statute that required certain  
8 election publications to reveal the names and addresses of the publication’s financial backers).

#### 10 **4. Speech Conveyed Via the Internet Is Protected Like Any Other Speech.**

11  
12 The internet is a new form of communication, but the right to free speech is no less  
13 protected on the Internet than it is in the world of ink and paper. See *Reno v. Am. Civil Liberties*  
14 *Union*, 521 U.S. 844, 870 (1997) (“our cases provide no basis for qualifying the level of First  
15 Amendment scrutiny that should be applied to [the Internet]”). And, the right to speak  
16 anonymously on the Internet deserves the same level of protection that it receives in the physical  
17 world. Federal courts, often invoking the crucial role anonymous speech played in the formation  
18 of the Constitution, have recognized that unmasking anonymous Internet speakers via the  
19 discovery process in civil lawsuits impermissibly infringes on speakers’ First Amendment rights.  
20 One federal court has stated that “the constitutional rights of Internet users, including the First  
21 Amendment right to speak anonymously must be carefully safeguarded.” *Doe v. 2TheMart.com*  
22 *Inc.*, 140 F.Supp.2d 1088, 1097 (W.D. Wash., 2001).

23  
24 As the Electronic Frontier Foundation explains:

25  
26 Many people don’t want the things they say online to be connected with their  
27 offline identities. They may be concerned about political or economic retribution,  
28 harassment, or even threats to their lives. Whistleblowers report news that

1 companies and governments would prefer to suppress; human rights workers  
2 struggle against repressive governments; parents try to create a safe way for  
children to explore; victims of domestic violence attempt to rebuild their lives  
where abusers cannot follow.

3 Instead of using their true names to communicate, these people choose to speak  
4 using pseudonyms (assumed names) or anonymously (no name at all). For these  
individuals and the organizations that support them, secure anonymity is critical.  
5 It may literally save lives.

6 <http://w2.eff.org/Privacy/Anonymity/> (last checked June 11, 2009).

### 7 8 **5. The Subpoena Should Be Quashed In Order to Protect These Important Free Speech Rights.**

9  
10 Courts have acted to limit grand jury powers in order to protect First Amendment rights.  
11 In *Bursey*, 466 F.2d at 1083, the Ninth Circuit found that, even where a threat to kill the  
12 President was involved, grand jury inquiries into peripheral subjects infringed witnesses' rights  
13 of associational privacy and had an impermissibly chilling effect upon freedom of the press. Just  
14 as is the case here, the grand jury sought, in part, the identity of people responsible for certain  
15 anonymous statements. *Id.* at 1085.<sup>16</sup> The Court noted that “[a]nonymous pamphlets, leaflets,  
16 brochures and even books have played an important role in the progress of mankind. Persecuted  
17 groups and sects from time to time throughout history have been able to criticize oppressive  
18 practices and laws either anonymously or not at all.” *Id.* at 1085 (quoting and citing from *Talley*  
19  
20

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21 <sup>16</sup> *Bursey* involved an investigation of the Black Panther Party launched when, in 1969, a  
22 member of the Black Panther Party stated “We will kill Richard Nixon” during a large public  
23 speech. *Id.* at 1065. The Black Panther Party then reprinted the speech in its weekly newspaper,  
24 also printed a pamphlet allegedly inciting mutiny in Vietnam. A grand jury investigation was  
25 launched to determine who the “we” that planned to kill the President was, and extended to an  
26 investigation as to the people involved with the creation and distribution of the newspaper and  
27 pamphlet. *Id.* at 1066-1071. Arguing, among other things, that the Black Panther Party  
28 advocated for the direct overthrow of the government by force and violence, the government  
repeatedly questioned two members of the staff of the newspaper and moved to compel them to  
answer detailed questions about the publications and the organization that they refused to  
answer, claiming both First and Fifth Amendment protection. *Id.*

1 v. *California*, 362 U.S. at 64-65.) The Ninth Circuit held that First Amendment forbade  
2 requiring the witnesses to disclose who was involved with the creation of the newspaper article  
3 and pamphlet because the mere existence of the statements did not support an inference of any  
4 criminal intent. *Id.* at 1087-88

5 More recently, in cases involving facts and circumstances very similar to those at hand,  
6 courts have also granted motions to quash subpoenas on First Amendment grounds. For  
7 example, in *U.S. v. Citizens State Bank*, 612 F.2d 1091, 1093 (8th Cir. 1980), the Eighth Circuit  
8 considered a challenge by the United States Taxpayer's Union (USTA), a tax-opposition group  
9 and one of its officers, to an I.R.S. subpoena issued to their bank. After seeing a newspaper  
10 article listing the name of a spokesperson for the "Liberty Amendment," an attempt to change the  
11 U.S. taxation system and recognizing him as a tax protestor, an I.R.S. agent launched an  
12 investigation of the spokesperson, and issued a subpoena for the bank records of UTSA and the  
13 spokesperson. *Id.* at 1093. Citizens' Bank refused, the I.R.S. moved to enforce the subpoena,  
14 and UTSA and its spokesperson intervened, claiming that the release of the documents would  
15 violate their First Amendment right to free association because it called for documents such as  
16 membership information. *Id.* at 1093. The district court ordered enforcement, and the Eighth  
17 Circuit reversed, holding that the district court erred in refusing to consider the First Amendment  
18 claim, noting the "vital relationship" between First Amendment rights to association and privacy.  
19 *Id.* at 1094. (citing and quoting *NAACP v. Alabama*, 357 U.S. 449 (1958). The Eighth Circuit  
20 remanded, directing that But if appellants' First Amendment rights would be infringed by forcing  
21 the bank to divulge certain documents, compelled disclosure is permissible only if the  
22 government makes the requisite showing of compelling need. *Id.* at 1094-95.  
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1            *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570 (W.D.  
2 Wis., 2007) involved a similar request for private information: a grand jury subpoena was issued  
3 to Amazon.com in a tax evasion and mail/wire fraud investigation involving the sale of books.  
4 *Id.* at 571. The grand jury initially sought the identities of thousands of customers, but later  
5 reduced the scope to a representative sample. *Id.* Amazon refused to identify any customers,  
6 arguing that the customers had a First Amendment right to maintain the privacy of their reading  
7 choices. *Id.* at 572. The court agreed, and found that it “must consider this right when  
8 determining whether to require Amazon to comply with the grand jury subpoena.” *Id.* at 572. It  
9 described the issue at hand:  
10

11            This presents a legitimate First Amendment concern. The subpoena is troubling  
12 because it permits the government to peek into the reading lists of law-abiding  
13 citizens while hunting for evidence against somebody else. In this era of public  
14 apprehension about the scope of the USAPATRIOT Act, the FBI’s (now-retired)  
15 “Carnivore” Internet search program, and more recent highly-publicized  
16 admissions about political litmus tests at the Department of Justice, rational book  
17 buyers would have a non-speculative basis to fear that federal prosecutors and law  
18 enforcement agents have a secondary political agenda that could come into play  
19 when an opportunity presented itself.

20 *Id.* at 572-73. To ensure that the government would never learn the identities of the customers  
21 who did not want their identities revealed, the court developed a process for seeking volunteer  
22 customers to aid in the genuine investigation, after that it required the grand jury to demonstrate  
23 given the First Amendment rights at stake. *Id.* at 572-74. The court thus balanced the First  
24 Amendment rights with the government’s legitimate need.

25            Here, as in *Amazon* and in *Citizens’ Bank*, the subpoena allows the government to pry  
26 into protected First Amendment territory. The commenters’ identities, just like the identities of  
27  
28

1 Amazon's readers and the information about UTSA were protected.<sup>17</sup> This includes IP  
2 addresses. Further, while the First Amendment is not an absolute right and may be balanced  
3 against legitimate purposes behind grand jury actions, here there is *no* legitimate purpose that  
4 could possibly outweigh the important First Amendment claims at stake. Indeed, the very free  
5 speech the subpoena infringes upon appears to be the very same imaginary "crime" that the  
6 government is investigating.<sup>18</sup>  
7

8  
9 <sup>17</sup> While the Supreme Court, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), rejected attempts by  
10 reporters to refuse to reveal the identity of confidential sources to a grand jury in order to protect  
11 their newsgathering ability and based on First Amendment arguments (668-71), the case is  
12 entirely distinguishable. First, its holding is limited to the proposition that the First Amendment  
13 does not allow a reporter to refuse to answer valid grand jury questions about the criminal  
14 conduct of his source, or evidence thereof. *Id.* at 697, 708-709. Second, *Branzburg* did not  
15 foreclose First Amendment claims, even under similar circumstances. Indeed, as noted and  
16 quoted above, the *Branzburg* decision, its outcome notwithstanding, makes abundantly clear that  
17 grand juries operate within the limits of the First Amendment and are subject to judicial control.  
18 *Id.* at 707. Third, *Branzburg* did not involve the same type of First Amendment rights at issue  
19 here, rights of anonymous speakers criticizing the government. Fourth, unlike here, there was no  
20 evidence of harassment or any other improper purpose by the government, and the *Branzburg*  
21 court noted that "grand jury investigations if instituted or conducted other than in good faith,  
22 would pose wholly different issues for resolution under the First Amendment." *Id.* at 707. Fifth,  
23 finally, and perhaps most importantly, as detailed above, here there is no crime that the  
24 government could possibly be seeking to investigate.

25 <sup>18</sup> In the civil context, a number of courts have granted motions to quash subpoenas seeking  
26 similar information specifically to protect the free speech rights of anonymous speakers. In *Doe*  
27 *v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088, 1097-98 (W.D. Wash., 2001), a federal district court  
28 granted a motion to quash a subpoena which would reveal the identities of a company's  
anonymous critics. The court expressed its concern that stripping Internet users of their  
anonymity "would have a significant chilling effect on Internet communications and thus on  
basic First Amendment Rights." *Id.* at 1093. Similarly, the New Jersey Superior Court  
emphatically stated that "people who have committed no wrong should be able to participate  
online without fear that someone who wishes to harass or embarrass them can file a frivolous  
lawsuit and thereby gain the power of the court's order to discover their identity." *Dendrite*  
*International, Inc. v. Doe No. 3*, 775 A.2d 756, 767 (N.J. Super. Ct. App. Div., 2001) (ruling that  
discovery process could not be used to unmask anonymous Internet commenters absent a  
showing of actual harm). Likewise, the Supreme Court of Delaware reversed an order  
compelling the release of an anonymous blogger's identity in part due to fears that "[a]fter  
obtaining the identity of an anonymous critic through the compulsory discovery process, a  
defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to . . .

1 Protecting anonymity is especially important in the arena of political speech, as it both  
2 allows a controversial opinion to be evaluated on its merits without being tainted by the mere  
3 identity of the opinion-holder, and it allays “fear of economic or official retaliation [and] ...  
4 concern about social ostracism[.]” *McIntyre*, 514 U.S. at 341-42. This fear is being borne out  
5 here. The commenters not only face the threat of being unmasked, but also the threat of criminal  
6 charges, simply for strongly expressing their views regarding the Federal Reserve, taxation, and  
7 *Kahre* trial. The subpoena threatens to chill the very type of controversial speech that the First  
8 Amendment is designed to protect, and it should be quashed.

10  
11 **D. The Subpoena Constitutes Abuse of the Grand Jury Process, and Should Also Be**  
12 **Quashed On Those Grounds.**

13 The subpoena seeks identifying information about each and every commenter on the  
14 LVJR Article. Given this breadth, it is impossible to see the subpoena as anything but an attempt  
15 to squelch criticism and dissent. AUSA Damm’s role as prosecutor in the *Kahre* Case and the  
16 fact that he is criticized in many comments is an “indicative sequence of events demonstrating an  
17 irregularity” that calls for this Court to intervene. *United States v. Jackson*, 863 F. Supp. 1449,  
18 1453 (D. Kan. 1994) (citation and internal quotation marks omitted). Given the breadth of the  
19 subpoena, and lack of relationship to any conceivable legitimate end, this is especially so.  
20  
21

22 simply seek revenge or retribution.” *Doe v. Cahill*, 884 A.2d 451, 457 (Del. Supr. 2005)  
23 (holding that a defamation plaintiff must show that his claim could survive summary judgment  
24 before being allowed to use discovery process to reveal the identities of his anonymous  
25 defendants). Grand jury subpoenas presents no less of a threat to the right to speak  
26 anonymously. Indeed, they pose a much greater threat. After all, the targets of this subpoena  
27 may find themselves subject to criminal charges and imprisonment. Because none of the  
28 comments found on the *Journal-Review* website could possibly be construed as threats or  
incitement to violence that do not merit constitutional protection, the authors of those comments  
are entitled to the fullest protection of the First Amendment, which includes the protection of  
their identities and their IP addresses.

1 While “mere inconvenience not amounting to harassment does not justify judicial  
2 interference with the functions of the grand jury,” courts do have “inherent power over their  
3 process to prevent abuse, oppression and injustice.” *United States v. Gurule*, 437 F.2d 239, 241  
4 (10th Cir. 1970) (citation and internal quotation marks omitted); *see also Hoffman v. United*  
5 *States* (1951) 341 U.S. 479, 485 (1951) (prosecutors and courts are both duty bound to ensure  
6 that prosecutors’ investigative powers are not abused, and are exercised wisely and in  
7 compliance with the Constitution as well as other limits). Indeed, courts should exercise their  
8 considerable discretion in this area with care and an eye to preventing prosecutorial abuse, in  
9 light of the fact that grand jury subpoenas “are issued pro forma with no prior court approval”  
10 and thus “are instrumentalities of the United States Attorney’s office although issued under the  
11 district court’s name and for the grand jury.” *In re Grand Jury Subpoena*, 829 F.2d 1291, 1296-  
12 97 (4th Cir. 1987).

15 Further, a prosecutor should exercise care to divide conflicting and competing roles, such  
16 as his role in the trial versus his role in these subpoenas. *See, e.g., United States v. Raphael*, 786  
17 F. Supp. 355, 359 (S.D.N.Y. 1992) (ordering government to produce grand jury transcripts for  
18 inspection, and noting disapprovingly that “the same prosecutors . . . are responsible for the  
19 Grand Jury subpoenas at issue” as well as the related trials); *see also United States v. Kovaleski*,  
20 406 F. Supp. 267, 270 (E.D. Mich. 1976) (quashing grand jury subpoena for impermissible  
21 purpose, in part because “[t]he same Assistant United States Attorney was involved in the  
22 perjury investigation and the trial”); *United States v. Shaygan*, No. 08-20112-CR, 2009 WL  
23 980289, at \*12-14, 19, 23 (S.D. Fla. 2009) (sanctioning AUSAs for unethical conduct, including  
24 breaching “taint wall” between a prosecution and a collateral investigation into “witness  
25 tampering”). This Court should take appropriate steps to remedy potential prosecutorial abuse.  
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1                   **E. This Court Should Grant Relief That Fully Protects DOES’ First Amendment**  
2                   **Rights, Including a Protective Order.**

3                   DOES do not know whether the subpoena has been complied with. Nor do the other  
4 commenters. They do know, however, that the subpoena has been issued because the Review-  
5 Journal published an article about it. (See Ex. 1); (Doe 1 Decl. at ¶ 11; Doe 2 Decl. at ¶ 11; Doe  
6 3 Decl. at ¶ 11.) Thus, granting the motion to quash will make clear to the public that their free  
7 speech and privacy rights have been protected, and that the government does not have *carte*  
8 *blanche* to monitor its critics going forward. Even if information about commenters has already  
9 been delivered to the government – and even if the subpoena has been withdrawn – that would  
10 not moot this motion because a court can still grant the DOES appropriate relief. Rule 57 of the  
11 Federal Rules of Criminal Procedure give district court judges and magistrates wide latitude to  
12 fashion appropriate relief. Fed. R. Crim. P. 57(b) (“Procedure When There Is No Controlling  
13 Law”) (“A judge may regulate practice in any manner consistent with federal law, these rules,  
14 and the local rules of the district....”).<sup>19</sup> See also *Church of Scientology of California v. United*  
15 *States*, 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (appeal of summons issued by IRS  
16 not moot even though tapes sought by summons had been produced because court could render  
17 partial relief by ordering the return or destruction of the tapes); *In re Grand Jury Subpoenas*  
18 *Duces Tecum*, 78 F.3d 1307, 1310-11 (8th Cir.1996); *In re Grand Jury Subpoenas Dated*  
19 *December 7 and 8*, 40 F.3d 1096, 1100 (10th Cir.1994).

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25                   <sup>19</sup> Under the provisions regarding protective orders in the discovery context, the rules provide  
26 that “[a]ny time the court may, for good cause, deny, restrict, or defer discovery or inspection, or  
27 grant other appropriate relief. The Court may permit a party to show good cause by a written  
28 statement that the court will inspect ex parte.” Fed. R. Crim. P. 16(d)(1). Here, there is good  
cause given the First Amendment concerns.

1 Here, granting the motion to quash will provide the public with assurances that their  
2 rights have been protected. Even if the subpoena is modified, for example, commenters have no  
3 way of knowing whether their information has been disclosed. Further, this Court should order  
4 any information already provided to the government should be ordered destroyed. Finally, the  
5 government should be barred from using any information obtained – directly or indirectly –  
6 through the subpoena. Thus, a protective order should prohibit the government from issuing  
7 subpoenas to any Internet Service Provider (ISP) to obtain information about anonymous  
8 commenters’ IP addresses.  
9

10  
11 **III. CONCLUSION**

12 For all the foregoing reasons and in the interests of justice, the subpoena should be  
13 quashed. Further, all appropriate steps should be taken to protect the rights of people to  
14 comment anonymously.  
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17 Respectfully submitted, this 16th day of June, 2009,  
18

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