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VIA ELECTRONIC MAIL

Supervisor Dom Zanger (District 1)
Supervisor Kollin Kosmicki (District 2)
Supervisor Mindy Sotelo (District 3)
Supervisor Angela Curro (District 4)
Supervisor Ignacio Velazquez (District 5)
San Benito County
481 4th St., 1st floor
Hollister, CA 95023

Re: Administrative Subpoena to Meta Platforms, Inc.

Dear Supervisors:

I represent those who publish Benito Beet Beat, a satirical news outlet available on Facebook at <https://facebook.com/benitobeetbeat>. It is clearly identified as “Satire/Parody” and described as “[s]erving up a fresh, satirical slice of local politics and news—directly from the root of San Benito County. We peel back the layers of boardroom blunders and county capers, spicing it up with a dash of irony.”

I write to object to the administrative subpoena you have directed County Counsel to issue to Meta Platforms, Inc. for records identifying the publishers of Benito Beet Beat. The subpoena is a clear violation of the First Amendment and Stored Communications Act. Please withdraw the subpoena immediately or face the risk of imminent legal action.

I understand the alleged basis for the subpoena is the unfounded allegation that an editorial cartoon published by Benito Beet Beat constituted a true threat to members of the Board of Supervisors or their families. For the reasons explained below and in light of binding precedent, the cartoon is not a true threat as a matter of law and cannot justify the subpoena.

The cartoon was a satire on cuts to security staff in the County’s behavioral health services. It depicted an imaginary situation in which a staff member said “We’re in danger! Call security now!” because a person in mental distress seeking help said, “Voices are telling me I need to hurt a supervisor or his kids!” while another staff member thought, “We cut security because Velasquez told us to do it.”

The cartoon is self-evidently political satire fully protected by the First Amendment. It critiques the decision to reduce security by imagining a situation in which that reduction jeopardized staff who were attempting to help a person in distress. It is not remotely close to a true threat to cause harm and cannot form the basis for a subpoena to identify its authors or publishers.

As the Supreme Court has said, “an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment,” especially in light of the “respected

tradition of anonymity in the advocacy of political causes.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342–43 (1995). In particular, “the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without ‘fear of economic or official retaliation ... [or] concern about social ostracism.’” *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (quoting *McIntyre*, 514 U.S. at 341–42).

Political speech is at the heart of the First Amendment. *Morse v. Frederick*, 551 U.S. 393, 403 (2007); *San Leandro Teachers Ass’n. v. Governing Bd. of San Leandro Unified School Dist.*, 46 Cal. 4th 822, 845 (2009). Speech on matters of public concern “cannot be restricted simply because it is upsetting or arouses contempt,” and “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). The First Amendment protects “outrageous and outlandish statements” often contained in satire and parody. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1194 (9th Cir. 1989). Speech “is not actionable simply because it is base and malignant” in the eyes of some, and it “may not be suppressed simply because it is offensive” to one or many. *Id.* at 1199 (cleaned up).

Nothing about the cartoon plausibly justifies invading the First Amendment right to anonymous political speech. For centuries, “the political cartoon has occupied a central position in the presentation of critical comment on events and personages of the times,” and “the political cartoonist makes extensive use of symbolism, caricature, exaggeration, extravagance, fancy, and make-believe.” *Yorty v. Chandler*, 13 Cal. App. 3d 467, 471–72 (1970). “The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided.” *Hustler Magazine v. Falwell*, 485 U.S. 46, 54 (1988). Political cartoons may exceed “the bounds of good taste and conventional manners,” yet they “have played a prominent role in public and political debate” and remain protected by the First Amendment. *Id.*

The obviously satirical nature of the cartoon at issue, which depicts the impact of an imagined mental health crisis after cuts to security staff, demonstrates that it cannot be characterized as a true threat unprotected by the First Amendment. An unprotected threat must be one that “a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat, namely, a serious expression of an intent to commit an act of unlawful violence, rather than an expression of jest or frustration.” *People v. Lowery*, 52 Cal. 4th 419, 427 (2011) (cleaned up); see also, e.g., *People v. Smolkin*, 49 Cal. App. 5th 183, 188 (2020).

True threats cannot be found in “jests, hyperbole, or other statements that when taken in context do not convey a real possibility that violence will follow.” *Counterman v. Colorado*, 600 U.S. 66, 74 (2023) (cleaned up). A true threat exists only when “a reasonable person would consider the communication to be a serious expression of an intent to inflict bodily injury on an individual,” not “hyperbole, satire, or humor” that would not be “threatening to a reasonable person.” *United States v. Elonis*, 841 F.3d 589, 597 (3d Cir. 2016). An official’s mere assertion of a subjective fear for safety, untethered to any objectively reasonable basis, is not sufficient to make a statement a true threat. *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1019 (E.D. Cal. 2017).

No reasonable person would understand the cartoon at issue to express a true threat to any member of the Board of Supervisors or anyone else. As has been true of political cartoons for centuries, it expresses a pointed political message through perhaps hyperbolic imagery, but the context and circumstances of the cartoon make it self-evident that it is satire, not a threat.

The Supreme Court has confirmed that "political hyperbole" is not a true threat. *Watts v. United States*, 394 U.S. 705, 708 (1969). In *Watts*, a speaker at an antiwar rally said, "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706.

The Court held the statement could not be considered a true threat. The Court noted our "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," and political disputes are "often vituperative, abusive, and inexact." *Id.* at 708. Taken in context, the statement was not a true threat but rather "a kind of very crude offensive method of stating a political opposition to the President." *Id.*

If the statement in *Watts* was not a true threat despite the speaker's personal, verbal attack on the president, then the cartoon here certainly is not a true threat, given that it merely depicts an imaginary situation in which cuts to security impair the ability of staff to respond to a mental health crisis. At most, the cartoon imagines a hypothetical scenario in which an imaginary third party in mental distress—not the author of the cartoon—says that voices in his head are telling him to hurt a supervisor. On the face of the cartoon, the third party is seeking medical help from the County to prevent him from hurting anyone. The cartoon satirizes the County's inability to protect its behavioral health staff because of cuts to security. By doing so, it advocates for increased security to *prevent* harm. The cartoon's message confirms that no reasonable person could read it as a true threat.

As a result, it cannot be said that the author or publisher of the cartoon "consciously disregarded a substantial risk that [their] communications would be viewed as threatening violence," *Counterman*, 600 U.S. at 69, nor does it reflect specific intent to convey a threat. Accordingly, the cartoon cannot be considered a threat subject to prosecution under Penal Code sections 76 or 422 or a credible threat of violence authorizing a restraining order under Code of Civil Procedure section 527.6. Since there is no valid basis to seek criminal prosecution or a civil restraining order based on the cartoon, the subpoena is unlawful because it does not "inquire into matters the agency is authorized to investigate." *State Water Resources Control Bd. v. Baldwin & Sons, Inc.*, 45 Cal. App. 5th 40, 55 (2020).

In addition, the subpoena is not authorized by Government Code section 25170, which allows the Board of Supervisors to issue an administrative subpoena only "upon any subject or matter within the jurisdiction" of the Board, and under which any documents or records sought by the subpoena must be "relating to the affairs or interests of the county." Any alleged threat to an individual is not a matter within the jurisdiction of the Board or relating to the affairs or interests of San Benito County, as opposed to the personal interests of that individual.

The prosecution of alleged crimes is exclusively the province of the District Attorney or Attorney General, not the business of the Board of Supervisors. Cal. Const., Art. V, § 13; Gov. Code § 26500; *Dix v. Superior Court*, 53 Cal. 3d 442, 451 (1991); *People v. Shults*, 87 Cal. App. 3d 101, 106 (1978). If an individual wishes to seek a civil anti-harassment restraining order, they must do so in their own name, because only the allegedly threatened individual is the real party in interest authorized to bring such a claim. Code Civ. Proc. §§ 367, 527.6; *Personnel Comm'n v. Barstow Unified School Dist.*, 43 Cal. App. 4th 871, 877 (1996) (noting "real party in interest" is "the person possessing the right sued upon by reason of the substantive law").

The County cannot seek an anti-harassment restraining order on behalf of an individual. Therefore, the Board does not have jurisdiction over civil anti-harassment claims or power to issue an administrative subpoena for purposes of bringing such a claim. The administrative subpoena violates the Stored Communications Act because it is not "authorized by a Federal or State statute." 18 U.S.C. § 2703(c)(2)(F); *see also City and County of San Francisco v. HomeAway.com, Inc.*, 21 Cal. App. 5th 1116, 1131 (2018) (under Stored Communications Act, an "administrative subpoena must be 'authorized' by a state or federal statute").

For the foregoing reasons, please direct County Counsel to withdraw the subpoena immediately. Failure to do so would expose the County to imminent legal action and the risk of substantial payment of attorney fees.

Sincerely,

FIRST AMENDMENT COALITION



David Loy
Legal Director

cc: County Counsel
Meta Platforms, Inc.