SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – FELONY BRANCH

In the Matter of the Search of Information Associated with Facebook Accounts disruptj20, lacymacauley, and legba.carrefour That Is Stored at Premises Controlled by Facebook, Inc.	)))))	Special Proceeding Nos. 17 CSW 658, 17 CSW 659, and 17 CSW 660 Chief Judge Morin

SUPPLEMENTAL MEMORANDUM ON INTERVENTION

This brief is filed pursuant to the Court's request at the October 13, 2017 hearing, Transcript at 62-63, for further briefing on the propriety of a motion for limited intervention to address the manner in which the Government's search warrants should be enforced. The brief also addresses the distinction raised by the Government, about which the Court also inquired, between friends and "likers" whose status as such is open to the public, and those whose status is not public. *Id.* at 52-53, 66.

I. The Court Should Grant the Motion for Leave to Intervene.

The principal authority on which the Government relies as a basis for opposing the motion of the Facebook account-holders for leave to intervene to ask the Court to quash or limit the enforcement of the search warrant in this matter—and presumably the ground on which it would oppose the motion of the Doe proposed intervenors—is the following Supreme Court dictum:

> The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the "deliberate, impartial judgment of a judicial officer . . . between the citizen and the police," *Wong Sun v. United States*, 371 U.S. 471, 481–482 . . . (1963), and by providing, *ex post*, a right to suppress evidence improperly obtained and a cause of action for damages.
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> *United States v. Grubbs*, 547 U.S. 90, 99 (2006).

The Supreme Court made this observation in rejecting the contention that seized evidence should

be suppressed because the anticipatory search warrant at issue in that case did not itself identify the triggering condition so that the property owner could, if desired, explain to the searching officers why the triggering condition had not been met. The reply brief filed by the Facebook account holders explains why that dictum does not aid the Government here, but the Doe intervenors say more—we believe that this language **supports** the motion for leave to intervene in this case.

After all, the Does have sought leave to intervene precisely in order to seek the protection that the Supreme Court said the Constitution gives them: the Doe intervenors ask this Court, a judicial officer, to interpose its "deliberate, impartial judgment . . . between the citizen[s] and the police." *Id.* Nothing in *Grubbs* or any other controlling authority holds that judicial consideration of the propriety and scope of search warrants and the minimization procedures to be employed in their enforcement is limited to ex parte proceedings when a proposed search warrant is brought to a magistrate or judge for signature.

Furthermore, in the pre-Internet era when searches were necessarily conducted in physical premises, there was good reason not to allow parties to bar entry of law enforcement authorities, both because of the potential for confrontation and because the mere presence of the police could prevent possible removal or destruction of evidence. In the Internet era, however, because the data to be searched is stored in the cloud by corporate entities that have every incentive to follow through on their commitments to preserve evidence pending adjudication of outstanding issues about a search, the reasons for requiring unquestioned compliance with search warrants has been reduced. Moreover, the increasing scope of sensitive data that is subject to digital storage by third parties and thus to possible search has led to judicial concern about the need to adjust Fourth Amendment law and procedure. *United States v. Jones*, 565 U.S. 400, 416-418, 430 (2012) (Alito and Sotomayor,

JJ., concurring). The result has been precedents such as *In re Search of Elec. Commun. in the Account of chakafattah gmail.com at Internet Serv. Provider Google, Inc.*, 802 F.3d 516, 529 (3d Cir. 2015), and, indeed, this Court's rulings over the past several weeks in the *DreamHost* case, *In re DreamHost*, 2017 WL 4169713 (D.C. Super. Sept, 15, 2017); *In re disruptJ20.org*, 2017 WL 2017 WL 4569548 (D.C. Super. Oct. 10, 2017), in which either the party whose records were sought, or the company holding those records, have been allowed to present post-service but pre-execution challenges to the terms of a search warrant and have them considered by a judicial officer before execution of the warrant.

A fair number of courts, some of whose opinions are cited in the briefs filed by account-holder intervenors, have weighed such concerns and developed search protocols in sua sponte rulings, but such limitations have been omitted in other cases, perhaps because the prosecutors did not present the issue. Indeed, one of the dangers in granting orders that affect First Amendment rights based on an ex parte proceeding is that the party seeking the order has no incentive to point out the need for safeguards; in the circumstances, it is all too easy for the First Amendment considerations to be overlooked. That is why the Supreme Court has held, albeit in a different context, that the First Amendment requires notice and an opportunity to respond before injunctions affecting speech may be granted, unless the party seeking the order makes a compelling showing that giving notice was impossible. *Carroll v. Pres. and Com'rs of Princess Anne*, 393 U.S. 175, 184 (1968). Even the availability of a subsequent hearing does not save the order "in the absence of a showing of justification for the ex parte nature of the proceedings." *Id.* at 184. Why, then, would a court want to adopt a rule barring intervention and barring pre-execution review of the propriety of a given warrant and the manner of implementation, when the adversary process is available to

refine the warrant and the means of execution—in the words of the Supreme Court, in "the fashioning of the order." *Id.* at 183. "[T[he failure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure." *Id.* at 184.

Moreover, the search warrant in the *Grubbs* case was served on the target of a criminal investigation (into child pornography, like most of the other cases cited by the Government here and in *DreamHost*), who therefore **had** access to the suppression remedy. The Doe intervenors in this case, by contrast, are not accused of anything, and they are asserting a constitutional interest—the right to speak and associate anonymously—that will be irreparably breached if the warrant is executed without limitation, and that would find no remedy in a later suppression hearing. Once the Does are identified as friends and likers of the Facebook accounts in questions, their right to speak anonymously will be gone forever. Thus, the time to vindicate their First Amendment rights is **now**, through the mechanism of a motion for leave to intervene.

In *DreamHost*, this Court entertained challenges brought by the custodian of the records; it considered what the intervening Doe defendants had to say but avoided addressing the motion for leave to intervene, suggesting that the issue might arise at a later stage of the case if, after using the minimization procedures adopted in that case, the Government sought the right to obtain identifying information redacted from the data supplied by DreamHost. Unlike *DreamHost*, where the Court could address the issues without **first** addressing the question of intervention because the document owner raised the First Amendment issues directly, here Facebook has refrained from presenting substantive objections to the search warrants, preferring to preserve for its users the opportunity to present those questions for judicial consideration.

In litigation over the merits of discovery seeking to identify their users, some online companies will, as DreamHost did, present the merits of the First Amendment analysis; the employer-rating site Glassdoor, the lawyer-rating site Avvo, and the business-rating site Yelp have all litigated a number of such cases.[1] Many other companies, especially the larger ones such as Google, Twitter, and Facebook, more commonly insist only on being allowed to notify their customers, and on withholding compliance for a reasonable period that is long enough for the customers themselves to retain counsel and seek judicial relief against the discovery by preserving their right to remain anonymous. Such companies leave it to the customers themselves to seek judicial relief from compelled disclosure that violates the First Amendment. Most of those cases arise in the civil context; the law and procedure governing challenges to search warrants should be structured similarly to enable such customers to protect their own rights, so long as the Government's interest in ensuring that the data is preserved for possible search is also protected.

The D.C. Court of Appeals has yet to pass on the issue of intervention, but it is apparent that the Court of Appeals considers the viability of challenges to search warrants based on the First and Fourth Amendment rights of the affected parties an open question. After all, the D.C. Court of Appeals entertained Facebook's appeal from the non-disclosure order in these very cases. The Court of Appeals understood that the reason why Facebook was appealing the non-disclosure order was so that its users could present judicial challenges to the search warrant, and the stay of enforcement of the search warrant enabled those issues to be considered. Moreover, understanding the purpose of the appeal, the Court of Appeals lifted the Superior Court's seal on the proceedings sufficiently

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[1] *E.g.*, *ZL Techs. v. Does 1-7*, 220 Cal. Rptr. 3d 569 (Cal. App. 1st Dist. 2017) (litigated by Glassdoor); *Thomson v. Doe*, 356 P.3d 727 (Wash. App. Div. 1 2015) (litigated by Avvo); *Yelp, Inc. v. Hadeed Carpet Cleaning*, 770 S.E.2d 440 (Va. 2015).

to allow the formulation of a "statement of the issues" that was clear enough to allow amici to urge the Court to reverse the non-disclosure order. Although the Government mooted the appeal on the eve of oral argument, thus depriving the Court of Appeals of jurisdiction to consider the appeal on the merits, the procedural rulings along the way surely constitute a recognition that the ability of the individuals whose information stands to be exposed by an overly expansive search warrant to bring a pre-enforcement challenge to the warrant is at least an open question at the appellate level under District law and procedure. This Court's rulings in *DreamHost* make clear that such challenges are permissible.

Moreover, the law should not make it easier for prosecutors to evade First Amendment protection for the right to remain anonymous, nor to evade protections for privacy given the pervasive nature of the storage of private information in the cloud, by making it significantly harder for political activists to secure judicial protection against the misuse of search warrants than it is to fend off grand jury subpoenas. Caselaw addressing First Amendment concerns implicated by criminal discovery into political associations developed in the 1970's and beyond, during a time when federal law enforcement officials were deploying COINTELPRO, federal grand juries and other investigations to attack perceived enemies of the Administrations in power at that time; under the ensuing decisions, political dissenters could contest those investigations by raising First Amendment objections. *E.g.*, *Bursey v. United States*, 466 F.2d 1059, 1066 (9th Cir. 1972). Considering the fixation of the current Administration on oppressing its political opponents, courts need to develop similar techniques for opposing abusive uses of search warrants to evade First Amendment protections; such techniques would stand as a bulwark against the misuse of such investigative techniques. And courts grappling with these concerns, and deciding how to address

them, need not do so exclusively in ex parte proceedings.

In *DreamHost*, the court allowed custodians of the information to challenge the enforcement of the warrant; other controlling authority strongly supports extension of that entitlement to the parties whose information is at stake. What remains in the present motion (and the similar motion by the Facebook account-owners to intervene) is to decide whether the parties whose First Amendment rights are at stake also have a proper role in such proceedings. In *Doe No. 1 v Burke*, 91 A.3d 1031 (D.C. 2014), the Court of Appeals addressed the issue of its jurisdiction to consider the appeal of an anonymous Internet user from the denial of its motion to quash a subpoena to Wikipedia seeking the Doe's identifying information. Although it was the issue of appellate jurisdiction that was most immediately before the Court, in the course of accepting appellate jurisdiction the Court assumed that the D.C. courts had subject matter jurisdiction to consider a Doe's challenge to government process seeking to strip the Doe of her First Amendment right to speak anonymously. Similarly, here, the Doe intervenors have standing to object to the search warrant insofar as the government seeks to employ it to divest them of their First Amendment right to "like" on an anonymous basis particular posts on one of the Facebook accounts here at issue. Moreover, the fact that the D.C. Council created a special procedure for anonymous Internet users seeking to protect against the enforcement of court discovery orders seeking to compel the disclosure of identifying information—the special motion to quash, D.C. Code Ann. § 16-5503— provides additional reason for the Court to allow the Doe intervenors to appear here for the purpose of limiting the enforcement of the search warrant. [2]

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[2] At last Friday's hearing, undersigned counsel suggested that the difference between intervening for all purposes and intervening for limited purposes was reflected by the distinction between intervening as of right pursuant to Rule 24(a) of the Superior Court Rules of Civil

Indeed, the Court's experience in the *DreamHost* litigation shows the value that Doe intervenors can contribute to the process of adjudicating a warrant challenge. In *DreamHost*, the presentation of argument by one set of Does led the Government to cut back on the scope of the search warrant that it had originally sought, and the argument of another set of Does put forward specific language problems in the Government's succession of proposed orders that the Court eventually considered and hence led to the formulation of the final order defining the minimization procedure. In **this** case, the Government has responded to the Does' arguments about the several thousand Facebook users who "liked" the overall disruptJ20 Facebook page and the several thousand users who are "friends" of either MacAuley or Carrrefour by renouncing the search warrants' demands for the entire lists. Hearing Transcript at 47:1-8. Intervenors still hope to play a useful role, however, in finalizing the procedures to be used in searching the individual communications transmitted by the "friends" and specifying the friends whose "likes" of comments or posts might form the basis for the demand for identification. Intervenors have also argued that **notice** to all of the Does is appropriate under D.C. Court of Appeals precedent.

Finally, proposed intervenors urge the Court **not** to employ the approach adopted in footnote

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Procedure and permissive intervention under Rule 24(b). Hearing Transcript at 63. However, review of the relevant authorities shows that even a motion for leave to intervene as of right may be limited to specific purposes. For example, unlike the precedents in some federal circuits, the D.C. Court of Appeals has treated intervention for the limited purpose of securing access to court records as being made pursuant to Rule 24(a)(2). *Mokhiber v. Davis*, 537 A.2d 1100, 1114 (D.C. App. 1988) (intervention in civil case to assert common law rights or access). And under Rule 24 of the Federal Rules of Civil Procedure, on which Superior Court Rule 24 is modeled, limited-purpose intervention may be "as of right." *Trbovich v. Mine Workers*, 404 U.S. 528, 538 (1972). Similarly, in this case, where the Does are asserting a First Amendment right not to have their right to speak anonymously taken away without the compelling justification required by Supreme Court and Court of Appeals precedent, their motion for leave to intervene is appropriately considered as being analogous to a motion under Rule 24(a), even though for a limited purpose.

10 of *In re disruptJ20.org*, 2017 WL 2017 WL 4569548 (D.C. Super. Oct. 10, 2017) – postponing a decision about whether to allow the Does' motion for leave to intervene until the Government decides whether to seek any identifying information about a specific communication. To the contrary, the Court is urged to recognize that the value provided by the Doe intervenors to this proceeding stems from their capacity as intervenors. Additionally, one of the reasons why the Does seek leave to intervene is to provide them with the ability to pursue an appeal to the Court of Appeals in the event they object to aspects of the Court's final search order. Their motion for leave to intervene is ripe now, and the Does ask the Court to address it.[3]

II. The Connections Between the Does Seeking Leave to Intervene and the Three Facebook Accounts at Issue Are Not Publicly Available.

Undersigned counsel conducted an investigation to determine whether Facebook users who are neither friends of Lacy MacAuley and Legba Carrefour nor of the three Does could identify the Does as being friends of MacAuley or Carrefour or as having "liked" the DisruptJ20 Facebook page. As shown by the attached affidavit, the three Does' friend and like statuses are not publicly available.

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[3] For similar reasons, the Doe intervenors urge the Court not to limit the scope of the intervention to forbid intervenors from challenging the existence of probable cause for the search of identifying information. Hearing Transcript 62:11-19. Intervenors fully appreciate that the Court has decided, as a matter of comity, not to reconsider a probable cause finding made by a different judge of the Superior Court, Hearing Transcript at 6:1-6, 37:23, 6:12-19, taking the same approach that the Court took in *DreamHost*. Given the Court's ruling, proposed intervenors will not further address it in this Court. The Court of Appeals, however, is not constrained by considerations of comity, and to the extent that appellate review affects the determination of First Amendment issues, such review is to be made independently on the record as a whole, and not constrained by the deference usually accorded to factual or discretionary rulings. *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984); *Guilford Transp. Industries v. Wilner*, 760 A.2d 580, 592 (D.C. 2000). Intervention is an appropriate method to present that issue on appeal, if appropriate.

CONCLUSION

The motion for leave to intervene should be granted.[4]

Respectfully submitted,

/s/ Paul Alan Levy

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October 19, 2017

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[4] As in *DreamHost*, the Government has refused to serve copies of its papers on counsel for the Does on the ground that the Does are not party to the case. The Court is requested to direct the Government to include counsel for all proposed intervenors in its service of papers pending a ruling on the motions for leave to intervene.

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of October, 2017, I am both mailing and emailing copies of this motion to counsel for the Government, for the account-holder intervenors, and for Facebook.

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AFFIDAVIT OF PAUL ALAN LEVY

1. My name is Paul Alan Levy. I am lead counsel for the Doe intervenors.

2. In light of questions raised by the Court at the October 13 hearing, I conducted an investigation to determine whether Facebook users who are neither friends of Lacy MacAuley, nor of Legba Carrefour, nor of the three Does could identify the Does as being friends of MacAuley or Carrefour or as having "liked" the DisruptJ20 Facebook page.

3. On October 17, 2017, I logged onto Facebook using an account that had no "friend" connection either with Lacy MacAuley or with Legba Carrefour, or with any of the three Doe intervenors. When I navigated to Lacy Macauley's and Legba Carrefour's Facebook pages, I could not find any indication that any of the Doe intervenors was a friend of either one. (I could not see any of Carrefour's friends; I could see the names of some of MacAuley's friends, but based on what she told me about the total number of her Facebook friends, it was roughly 10% of the total number).

4. I navigated to the "Resist This" Facebook page, which I understand to be the successor of the DisruptJ20 page that is at issue on the subpoena. I was able to see the total number of "likes" but I could not see the identities of any of the Facebook users who had "liked" the page. When I log in using my own account, I can see only mutual friends who "like" that page.

I hereby certify under penalty of perjury that the foregoing is true and correct. Executed on October 19, 2017.

Paul Alan Levy