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 Hearing: 2:15 PM October 13, 2017

(CORRECTED) MOTION OF DOE 1, DOE 2, AND DOE 3 FOR LEAVE TO INTERVENE TO OPPOSE ENTRY OF AN ORDER GIVING THE GOVERNMENT ACCESS TO IDENTIFYING INFORMATION ABOUT INDIVIDUALS WHO ASSOCIATED OR COMMUNICATED WITH LEGBA CARREFOUR OR LACY MACAULEY ON FACEBOOK OR "LIKED" THE DISRUPTj20 FACEBOOK PAGE

Doe 1, Doe 2, and Doe 3 seek leave of Court to intervene in this proceeding to oppose the order requested by the Government seeking to require Facebook to disclose electronic documents that contain identifying information about individuals who were Facebook friends with either Lacy MacAuley or Legba Carrefour, who "liked" the DisruptJ20 Facebook page or any of the posts or comments on that page or on the Facebook timelines of MacAuley or Carrefour, whom posted comments on those pages, or who sent Facebook messages to any of those accounts, for the following reasons:

1. As shown by the attached affidavits (from which the names and signatures have been redacted), each of the Does either was a Facebook friend of Lacy MacAuley or Legba Carrefour, or "liked" the DisruptJ20 pages. These connections and communications were made in connection with the Does' political activism. Each of the Does had expected that the communications that they sent (and the addresses at which they received communications) were private and anonymous. The execution of the warrant would lead to the loss of the anonymity that they enjoyed in sending and

receiving those communications.

2. None of the Does were engaged in any criminal activity during the January 2017 inauguration weekend. However, the Does object to disclosures that would lead to identifying them to a federal government that is increasingly hostile to dissent. Accordingly, the Does wish to ask the Court to protect their First Amendment right to speak and read anonymously

3. Neither Facebook nor the account holders have given any notice to MacAuley's or Carrefour's Facebook friends, or to the lists of persons who have "liked" the DisurptJ20 page, that enforcement of a search warrant stripping them of their right to speak anonymously is pending. The Does first learned of the search warrant seeking their identifying information after MacAuley, Carrefour, and Emmelia Talarico, the moderator of the DisruptJ20 Facebook account, moved for leave to intervene seeking to quash the search warrant, and the press carried word of that motion. Does 1, 2, and 3 are submitting this motion for leave to intervene less than two weeks after learning that their anonymity was at risk.

4. MacAuley, Carrefour, and Talarico have opposed execution of the warrant, but the Does believe that they are best able to articulate to the Court the reason why their identities should be protected against compelled disclosure. The Does unquestionably have standing to raise their First Amendment rights in opposition to discovery that would take away their First Amendment right to send and receive communications anonymously, and the Facebook account holders are not adequate representatives in presenting that question. *See In re Grand Jury Subp. No. 11116275*, 846 F. Supp. 2d 1, 4 (D.D.C. 2012) (Doe Twitter user allowed to intervene anonymously to oppose grand jury subpoena seeking identity of Twitter account owner); *see also Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1166 (W.D. Wash. 2010) (allowing Internet users whose information was sought by state

agency to intervene to protect First Amendment right to read anonymously even though company that held the information was also opposing the discovery). Indeed, D.C. law entitles them to move to quash any "discovery order" seeking personally identifying information "in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code Ann. § 16-5503. The statute is not limited to discovery orders in civil cases, and protesting the inauguration of the president of the United States is certainly "advocacy on issues of public interest."

5. The Doe intervenors seek leave to intervene at this time not only to present objections to a proposed order which is likely to be prejudicial to the Does' rights, but also to enable them to pursue an appeal of the proposed order if entered. The D.C. Court of Appeals has held that it has appellate jurisdiction to consider an appeal by a Doe internet user objecting to an order enforcing a subpoena to a third-party host, in that case Wikipedia. *Doe No. 1 v Burke*, 91 A.3d 1031 (D.C. 2014). The Doe intervenors will also ask this Court to direct Facebook and the account holders to provide notice to other Doe Internet users, as required by the D.C. Court of Appeals in *Solers v. Doe*, 977 A.2d 941, 956 (D.C. 2009). Facebook has given notice only to the holders of the three accounts named in the search warrant, but not to the thousands of account holders whose anonymity is at risk; nor have the account holders who have moved to protect their own accounts against the search warrant given such notice to others who would be affected.

6. The D.C. Rules of Criminal Procedure have no express provision for intervention, but Rule 57(b) provides that, "when there is no controlling law[, t]he court may regulate practice in any manner consistent with applicable law and these rules." Moreover, the D.C. Court of Appeals has authorized intervention in criminal proceedings by non-parties seeking to assert their First

Amendment rights. *See In re Jury Questionnaires*, 37 A.3d 879 (D.C. 2012).

8. Although the Court has already rejected, implicitly if not explicitly, many of the First Amendment arguments that intervenors expect to present, intervenors plan to argue on appeal, and in support of a stay pending appeal, that the Government's argument for use of the two-step process rests on distinguishable case law. In addition, intervenors anticipate the possibility of making an argument that the Court has not, to our knowledge, yet addressed — that the Government has never established probable cause to believe that the specific documents on which intervenors are focused contain evidence of crimes (that is, the lists of friends of the two individual account holders, and the list of those who have "liked" the disruptj20 Facebook page). It appears that the judge who signed the search warrant ruled that there is probable cause to search documents pertaining to the web site in general, but it has not addressed the question whether access to lists of friends and likers in particular meets the test of "scrupulous exactitude." *See Zurcher v Stanford Daily*, 436 U.S. 547, 564 (1978).

9. Undersigned counsel Paul Alan Levy certifies that he has conferred with counsel for Facebook, for the United States and for the account-holder intervenors about this motion for leave to intervene. The United States objects to the proposed motion for leave to intervene. Both Facebook and the account-holder intervenors consent to this motion.

CONCLUSION

The motion for leave to intervene should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of October, 2017, I am both mailing and emailing copies of this motion o counsel for the Government, for the account-holder intervenors, and for Facebook.

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