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

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| In the Matter of the Search of www.disruptj20.org that Is Stored at Premises Owned, Maintained, Controlled, Operated by DreamHost | ) | Special Proceeding No. 17 CSW 3438 |
| | ) | Chief Judge Morin |

**MEMORANDUM OF PROPOSED INTERVENORS DOE 6, DOE 7, AND DOE 8 RESPONDING TO THE GOVERNMENT'S THIRD PROPOSED ORDER**

**Introduction and Summary of Argument**

At the hearing on September 20, 2017, the Court gave the Government very clear instructions about what minimal protections it considered essential for the protection of the First Amendment rights both of innocent visitors to the Trump inauguration protest site, DisruptJ20.org, and of the creators of that web site. In the course of a lengthy colloquy with the Court, Government counsel repeatedly assured the Court that he understood the Court's concerns and instructions and that the Government was prepared to submit an order consistent with those instructions. Accordingly, the Government was directed to submit another proposed order and both DreamHost and intervenors were allowed 24 hours to respond to that submission.

Regrettably, the new proposed order does not comport with the Government's assurances. The order—filed by the Government at 5:09 PM yesterday afternoon—falls woefully short of meeting the Court's concerns. Indeed, in a number of respects, the Government's proposed order defies the Court's expressed concerns and instructions. In some respects, this order is even more offensive to the First Amendment rights of innocent people who communicated with the operators of the web site than the proposed order filed by the Government on September 19, 2017.

Like previous briefs on behalf of intervenors, this brief addresses issues affecting the visitors to the web site, not issues only involving the site's creators . At the same time, intervenors note that they are in general agreement with at least some concerns that they understand DreamHost will be raising.

Intervenors are attaching a revised proposed order that addresses many of the substantive and textual problems in the Government's proposed order. This brief summarizes the reasons why intervenors have offered these changes. The changes are discussed in the order that they appear in

the document rather than in order of importance.[1]

**1. The Government's Proposed Order Makes It Too Easy to Get Access to Information Reflected in Communications to and from the DisruptJ20 Domain and to Listerv Membership Lists: Footnote 1 and paragraphs 1(h), 7(a)(iv), and 8(c).**

During the September 20 hearing, the Court repeatedly told Government counsel that the Court was unwilling to allow the Government to gain access either to identifying information pertaining to people not involved in the creation of the web site, or indeed to the contents of their communications, unless the Government could establish to the Court's satisfaction that those contents contained evidence of a crime within the Scope of the Seizure. Sept. 20 Hearing Tr. 12: 5-7, 13: 3-6. Absent such a prior determination, "the Court is not allowing the Government to . . . inspect either their identity or their communications. They're to remain not subject to the Government's review." *Id.* 13:3-4. Government counsel repeatedly assured the Court that he understood this direction and that the Government's next proposed order would find a way to address that objective. *Id.* 12:11-12, 13:7-8.

The order submitted yesterday afternoon does not meet that standard. It does nothing to protect the contents of communications from and to persons outside the web site from Government scrutiny pending a ruling by the Court (a matter addressed later in this memorandum). It appears that footnote 1 on page 1 and subpararaph (h) of paragraph 1 on page one are intended to address the issue of identifying information, but the language chosen by the Government would expose a great deal of identifying information to the Government without prior court review.

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[1]Immediately after the September 20 hearing, undersigned counsel approached John Borchert, counsel for the Government, to suggest that he share a draft proposed order before filing it in the hope that counsel could, in a spirit of cooperation, iron out as many of their differences as possible. Mr. Borchert indicated that the Government did not have the time for such a process.

The Government's language would allow DreamHost to redact only "the user name(s) and email address(es) of . . . persons . . . who communicated with the website." Proposed Order page 1 fn. 1, ¶ 1(h). However, as our opening brief on behalf of Does 6, 7 and 8 made clear, and further as reflected in the Does' affidavits, this language is completely inadequate to the task. Identifying information is not only disclosed by usernames and email addresses — it often appears in the text of emails, whether in signature blocks or elsewhere. For example, the email from the Doe intervenor who wrote to offer legal support provided her name and other identifying information in the signature block, and also identified another individual who had told this Doe how to offer support. Moreover, the language "who communicated with the website" does not provide sufficient protection because, as the affidavits of the Does reflect, individuals whose name appeared on listservs did not necessarily get there by communicating "with the web site." They might well have signed up at a meeting and been added to the listserv thereafter. Intervenors' proposed edits to the draft of footnote 1 and subparagraph (h) address this problem by referring more broadly to redaction of "identifying information." A suggested edit to paragraph 8(c) on page 5 of the redlined order offered by intervenors provides a corresponding increase in the scope of identifying information that the Government might ask to have unredacted.

But there is a larger problem. The Court recognized in its September 15 order that the warrant, as broadly drafted, sweeps well beyond the parts of DreamHost's files that rest comfortably within the probable cause showing set forth in Detective Pemberton's affidavit; it includes files that the Government has never shown probable cause to search. And yet paragraphs 5, 6 and 7 of the proposed order from the Government gives the Government the ability to conduct searches of those files (keyword searches, apparently) in the hope that this search will turn up probable cause to search

and seize those documents. Intervenors respectfully submit that, for the reasons argued in their September 7 brief, allowing a search for the purpose of finding probable cause for a search is contrary to the principles of "scrupulous exactitude" demanded by the Fourth Amendment permits. Moreover, as previously argued in the September 7 brief, in the context of a search of a political protest web site, an order allowing such a search violates the First Amendment as well.

The D.C. Court of Appeals should have the opportunity to address this important question of law before this narrow part of the search moves forward. It is for that reason that intervenors reiterate this point in writing even though they recognize, based on counsel's colloquy with the Court at oral argument, that the Court is reluctant to take this approach.

In that regard, however, to the extent that the Court's reluctance is based on the proposition that the warrant was issued by a different Superior Court judge, and that the Court is loath to revisit another judge's ruling, intervenors respectfully suggest that Judge Weisberg only decided that there was probable cause of a search of DreamHost's files generally. There is no indication that Judge Weisberg considered the specific issue of probable cause to search the contents of emails sent by outsiders to email addresses on the domain, or to search lists of members of listservs. Hence, the ruling that intervenors seek would in no way be in derogation of any of Judge Weisberg's determinations. Moreover, Judge Weisberg's broad probable cause finding was made in an ex parte proceeding, with no opportunity for adversary testing. That context makes it especially appropriate that the Court consider the extent of the factual predicate for the search.

Just as the First Amendment requires that appellate courts review factual determinations on which First Amendment decisions turn independently, based on the record as a whole, *see 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), the significant First Amendment concerns that were never called to Judge Weisberg's attention are an additional reason for independent review of those facts by the Superior Court judge to whom this issue is now assigned. In addition, as argued in some detail in intervenors' September 7 brief, at pages 4 to 11, the supporting affidavit was highly misleading in a number of respects and, indeed, contained some statements whose falsity can be established by comparing the affidavit to archived parts of the web pages being described in that affidavit.

Consequently, although intervenors have offered language that would faithfully implement the Court's decisions as expressed in the September 15 order and in the Court's statements in open court on September 20, intervenors ask, in the alternative, that (1) footnote 1 be stricken in its entirety (except with respect to the references to blog posts), (2) paragraph 1(h) of the order be replaced in its entirety by the first of two alternatives presented in intervenors' proposed order, and (3) subparagraph 7(a)(iv) be entirely stricken from the proposed order. If this alternative approach is taken, there will be no need to adopt the proposed changes in paragraph 8(c).

**2. The Individuals Who Will Conduct the Review Should Be Identified**: **Paragraph 4.**

The Government's proposed order provides that the names of individuals who will be given access to the files obtained from DreamHost should be provided only to the Court, ex parte and under seal. However, the ruling that only authorized people will get access to data, and that all others shall be forbidden, is an important part of the protections that the Court is providing for the innocent visitors to the web site. In the event someone learns that an individual had access to protected information, the only way to ascertain whether that access was in violation of the Court's order is if the list of persons with authorized access is public. Consequently, intervenors ask that the

words “ex parte and under seal” be stricken from paragraph 4.

### 3. The Adjudication of the Government’s Proposed Detailed Review Should Be Subject to the Adversary Process: Paragraph 5.

The Court’s September 15 opinion and order provided that when the Government was filing its proposed General Review and its proposed Detailed Review, the Government would be **allowed** to request filing certain information under seal, but only to the extent “the government has provided sufficient facts to justify the request.” Order at page 9. Clearly implicit in this part of the Order was the requirement that, other than as specifically justified, these matters were to be filed in open court. At the September 20 hearing, pages 30-31, the Court indicated that this was its intent and that any ex parte filings would have to be justified in the usual manner as required by the case law (presumably, by making a showing sufficient to overcome the First Amendment and common law right of access to court records). Undersigned counsel pointed out that the Proposed Order submitted on September 19 contained blanket language allowing ex parte filings under seal without imposing any precondition of justification. *Id.* 31:1-8. Although Government counsel sat through this colloquy and posed no objection, the proposed order filed yesterday repeats the unconstitutional language allowing carte blanche ex parte filings. Accordingly, intervenors’ proposed order would delete the phrase “ex parte and under seal” in the first sentence of paragraph 5, and would include additional language immediately following paragraph 5(f) (on page 5 of the redlined proposed order) that is intended to provide for the filing of partly redacted papers, as well as the litigation of any contentions that the Government may raise about the need for sealing of some part of the proposed Detailed Review as well as any parts of the arguments for the Detailed Review. The proposed language also specifies that DreamHost and proposed intervenors will have the opportunity to

explain any objections they may have to the Proposed Detailed Review.

**4. The Description of the Innocent Users Who Are Entitled to the Protection of the Minimization Process Is Unduly Narrow: Paragraph 5(f).**

At the September 20 hearing, counsel for intervenors argued that, because the Government's consistent argument in this proceeding has been that its only purpose in pursuing the enforcement of the search warrant in this case was to enable the prosecution of individuals who engaged in or planned a riot, the language of subparagraph 5(f), stating that the Government's minimization procedures were to be aimed at limiting "review of any information associated with individuals who did not have a criminal purpose in visiting or communicating with the website" was too narrow – or, conversely, that extending the search to anyone who had "a criminal purpose" in visiting or communicating with the site was too broad. Counsel proposed to substitute the word "riotous" for the word criminal. The Court indicated that "riotous" was too narrow because the crimes charged in the indictment included malicious destruction of property and assault on police officers. Intervenors' counsel undertook to formulate language that would be sufficiently expansive to meet the Court's concerns but not so broad as to include anything allegedly criminal.

Although "riotous" squares best with the probable cause showing on which the search warrant is based, as well as on the Government's arguments in this case, as promised at the hearing, intervenors have proposed this alternative language: persons "whose purpose ~~did not have a criminal purpose~~ in visiting or communicating with the website was not to engage in the crimes set forth in the Scope of Seizure as described below in paragraph 6 of this order."

**5. The Order Should Protect Against Review of Communications from Outsiders Whose Content the Court Has Not Yet Had the Chance to Assess: Paragraph 5**.

As discussed above at page 2, during colloquy with counsel at the September 20 hearing, the Court indicated that it was not just identifying information of outside visitors to the web site that was to be protected from discovery by the Court's multi-step review process. Even the contents of communications from outsiders were to be protected from government inspection until the Court has had a chance to pass on whether there was good reason to believe that the communications were within the Scope of Seizure. The Government's proposed order does nothing to address that concern. Accordingly, language to provide a procedure for such review is offered for inclusion at the very end of paragraph 5 of intervenors' proposed order, following the last sentence of the Government's proposed paragraph 5, and appearing on page 6 of intervenors' redlined version.

**6. Innocent People Who Communicated With the Web Site Should Be Protected from Government Prying: Paragraph 6(e).**

The Government's proposed order submitted on September 19 provided a Scope of Seizure which, with one exception, was confined to evidence of the crime of rioting. That one exception appearing in subparagraph (d), pertaining to evidence of the state of mind or persons charged with rioting, would have allowed seizure of documents showing that individuals "knowing about planned violence, refused to participate." Intervenors objected that this language would address not evidence of crime but evidence of innocence; and people who chose not to participate in planned violence despite their hostility to Donald Trump are exactly the ones who deserve the greatest protection against snooping by the Trump Administration. The Court appeared to indicate its agreement with this objection. Transcript at pages 23-25.

In place of that objectionable language, the Government has added subparagraph (e), which

gives it access to any information in the DisruptJ20 files that might be "potentially exculpatory information for any individual." This is the loophole through which the Government could seek access to any information about the site. On the Government's theory, if it is evidence of a crime, it is seizable. And if it is not evidence of a crime, it might be exculpatory for somebody and hence is seizable. Indeed, there are thousands if not millions of web sites, Facebook pages and email accounts belonging to people who detest Donald Trump that could show that their owners did not engage in a riot on January 20. The Trump Administration cannot get search warrants to obtain all that politically useful data on the flimsy excuse that it could be exculpatory of criminal activity.

The Government did not obtain this search warrant for the purpose of getting political protestors acquitted. It did not make a probable cause showing that it needed to get access to the DreamHost files to obtain exculpatory information. And the Government's professed desire to obtain exculpatory information, even if put forth in good faith, does not afford a compelling government interest sufficient to overcome the First Amendment rights of political protestors to be free of Government snooping into their political communications.

The Government's professed desire to protect itself against a charge of withholding exculpatory information is meritless. If a court order has forbidden it to obtain access to documents that do not contain evidence of a crime, then it did not have the information and cannot be charged with having failed to produce the information. Subparagraph (e) should be stricken.

**7. The Order Requires Tightening to Ensure That the Government Cannot Use Documents Unless and Until the Court Has Approved Its Stated Reasons for the Seizure: Paragraphs 7, 10 and 12.**

The Court has instructed the Government that its provision of detailed reasons why particular documents are subject to seizure is not alone a basis for obtaining that seizure; rather, the Court's

explanation of its ruling at the August 24 hearing specified that seizure was to be allowed only if the Court approves the Government's proffered explanations. But the Government's proposed order never expressly says that. Accordingly, intervenors' proposed order includes a new paragraph 10 to that effect, and adds a references in paragraphs 7 and renumbered paragraph 12 to the review process in that added paragraph, creating an additional restriction on the Government's seizure of documents pursuant to its Detailed Review process.

## CONCLUSION

The Court's order should include the revisions suggested above and in the attached proposed order. To the extent that the revisions protecting against Government inspection of the substance of protected political speech, and the identities of those outside the web site who are communicating, without a showing of sufficient cause to overcome the First Amendment rights of the web site visitors, are not adopted, the Court should grant a limited stay pending appeal of any part of the order that provides access to emails sent to or from addresses on the DisrupotJ20.org domain and to lists of email addresses of people belonging to DisruptJ20 listservs.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of September, 2017, I will serve copies this memorandum both by first-class mail and by email on counsel for the Government and counsel for DreamHost, as follows:

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