

Nos. 17-SS-388, 17-SS-389, 17-SS-390

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**IN THE DISTRICT OF COLUMBIA  
COURT OF APPEALS**

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**IN RE: FACEBOOK, INC.,**

*Appellant,*

**v.**

**UNITED STATES OF AMERICA,**

*Appellee.*

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**BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES  
UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE  
DISTRICT OF COLUMBIA, AND PUBLIC CITIZEN, INC.  
IN SUPPORT OF APPELLANT AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to D.C. Court of Appeals Rule 29(c) the undersigned counsel certifies that amici curiae The American Civil Liberties Union, The American Civil Liberties Union of the District of Columbia, and Public Citizen, Inc. are nonprofit, non-stock corporations. They have no parent corporation, and no publicly traded corporation has an ownership interest in them.



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Arthur B. Spitzer

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	ii
TABLE OF AUTHORITIES .....	iv
INTERESTS OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	5
TO ALLOW THE TARGETED USERS THE OPPORTUNITY TO PROTECT THEIR CONSTITUTIONAL RIGHTS, THE COURT SHOULD LIFT THE NON-DISCLOSURE ORDER. ....	5
CONCLUSION.....	14
CERTIFICATE OF SERVICE .....	16

## TABLE OF AUTHORITIES

### Cases

<i>Alexander v. United States</i> , 509 U.S. 544 (1993) .....	5
<i>Burse v. United States</i> , 466 F.2d 1059 (9th Cir. 1972) .....	11
<i>Ealy v. Littlejohn</i> , 569 F.2d 219 (5th Cir. 1978) .....	11
<i>Fed. Election Comm’n v. Machinists Non-Partisan Political League</i> , 655 F.2d 380 (D.C. Cir. 1981) .....	8
<i>Gibson v. Florida Legislative Investigation Comm.</i> , 372 U.S. 539 (1963) .....	11
<i>In Matter of Search of Info. Associated with Facebook Account Identified by Username Aaron.Alexis that is Stored at Premises Controlled by Facebook, Inc.</i> , 21 F. Supp. 3d 1 (D.D.C. 2013) .....	11
<i>In re Application of the United States of Am. for Nondisclosure Order Pursuant to 18 U.S.C. § 2705(b) for Grand Jury Subpoena #GJ2014032122836</i> , 2014 WL 1775601 (D.D.C. Mar. 31, 2014) .....	5
<i>In re Grand Jury Subpoena: Subpoena Duces Tecum</i> , 829 F.2d 1291 (4th Cir. 1987)....	11
<i>In re Sealing &amp; Non-Disclosure of Pen/Trap/2703(d) Orders</i> , 562 F. Supp. 2d 876 (S.D. Tex. 2008) .....	5
<i>Local 1814, Int’l Longshoremen’s Ass’n v. Waterfront Comm’n</i> , 667 F.2d 267 (2d Cir. 1981) .....	11
<i>Marcus v. Search Warrants</i> , 367 U.S. 717 (1961) .....	8
<i>Maryland v. Macon</i> , 472 U.S. 463 (1985) .....	8
<i>Matter of Grand Jury Subpoena for: [Redacted]@yahoo.com</i> , 79 F. Supp. 3d 1091 (N.D. Cal. 2015) .....	5
<i>Matter of Search Warrant for [redacted].com</i> , No. 16-2316M, 2017 WL 1450314 (C.D. Cal. Mar. 31, 2017) .....	5
<i>McIntyre v. Ohio Elections Comm’n</i> , 514 U.S. 334 (1995) .....	13
<i>Microsoft Corp. v. DOJ</i> , 2017 WL 530353 (W.D. Wash., 2017) .....	5
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997) .....	9
<i>Riley v. California</i> , 134 S. Ct. 2473 (2014) .....	12
<i>Solers, Inc. v. Doe</i> , 977 A. 2d 941 (2009) .....	9, 13
<i>Southeastern Promotions Ltd. v. Conrad</i> , 420 U.S. 546 (1975) .....	5
<i>United States v. Galpin</i> , 720 F. 3d 436 (2d Cir. 2013) .....	11
<i>United States v. Jones</i> , 565 U.S. 400 (2012) .....	12
<i>United States v. Riccardi</i> , 405 F.3d 852 (10th Cir. 2005) .....	12

**Other Authorities**

Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*,  
75 S. Cal. L. Rev. 1083 (2002) ..... 11

**Constitutional Provisions**

U.S. Const. amend IV ..... 6

## INTERESTS OF AMICI CURIAE<sup>1</sup>

The American Civil Liberties Union (“ACLU”) is a nationwide nonpartisan organization of more than 1.6 million members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by state and federal constitutions. Founded in 1920, the ACLU has vigorously defended the freedoms enshrined in the First and Fourth Amendments for nearly a century in state and federal courts across the country. As part of this work, the ACLU has been at the forefront of efforts to ensure that anonymous, political speech remains protected online, and that the right to privacy remains robust in the face of new technologies.

The American Civil Liberties Union of the District of Columbia, an affiliate of the national ACLU, is devoted to advocacy on behalf of more than 20,000 District members and supporters.

Public Citizen, Inc., is a non-profit consumer advocacy organization with more than 400,000 members and supporters nationwide. Since its founding in 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs and public

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<sup>1</sup> Pursuant to D.C. Court of Appeals Rule 29(a), this brief is being filed with the consent of all parties.

debates. Over the past eighteen years, Public Citizen has often appeared amicus curiae in cases in which subpoenas have sought to identify authors of anonymous Internet messages, and its attorneys have represented Doe defendants and hosts of Internet fora. In these cases, the courts have adopted standards to assure protection of Doe defendants' First Amendment rights, one consistent aspect of which is notice to the Does. *See, e.g., Dendrite Int'l v. Doe No. 3*, 342 N.J. Super. 134 (N.J. Super. Ct. App. Div. 2001). Public Citizen is also one of the founding members of the Cyberslapp Coalition, which proposed a model policy that many Internet Service Providers now follow in responding to subpoenas to identify anonymous speakers.

## SUMMARY OF ARGUMENT

Absent an overriding interest in secrecy, which appears to be absent here, the government should not be permitted to impose a non-disclosure order on an Internet Service Provider (“ISP”) that would effectively prevent the ISP’s users from asserting their constitutional rights. In many cases, service providers will lack either the will, the means, or the knowledge necessary to challenge overbroad warrants, and users will often prove the best advocates for their own constitutional interests. Enabling the targeted users to participate in the Court’s evaluation of the warrants will ensure, through a proper adversary process, that both individual constitutional rights and the government’s investigatory interests receive fair consideration.

At issue is the non-disclosure order that accompanied three warrants issued to Facebook, seeking “all contents of communications, identifying information, and other records related to three Facebook accounts for a specified three-month period of time.” Save for a brief Notice to Potential *Amici Curiae* (“Notice”), which offers an “abbreviated statement of facts,” the case is sealed.

Given proper notice, Facebook’s users are likely to succeed in quashing or narrowing the warrants at issue. The government’s extraordinarily broad demand for “all contents of communications” is hard

to square with the particularity requirement of the Fourth Amendment, especially as applied in cases involving speech protected by the First Amendment. The warrants' broad sweep would enable the government to review the targets' communications with third-parties, their political and social affiliations, their reading habits, and their views on a plethora of political, social, religious, and personal issues. And the warrants' demand for "identifying information," which may well be intended to unmask individuals engaged in anonymous political speech and association, implicates important First Amendment rights and interests. But the Constitution can offer adequate protection only if the targets of seemingly overbroad warrants, such as those at issue here, know their rights are under threat.

By contrast, the government's countervailing interest in secrecy appears to be at a low ebb. According to the Notice, "the events underlying the government's investigation are generally known to the public," and "neither the government's investigation nor its interest in Facebook user information [is] secret." Moreover, Facebook has already "preserved all records responsive to the Warrants." Without more, the government should not be allowed to prevent Facebook from notifying its users that their First and Fourth Amendment rights are in jeopardy.

This Court should therefore reverse the court below and direct it to vacate the non-disclosure order.

## ARGUMENT

### **TO ALLOW THE TARGETED USERS THE OPPORTUNITY TO PROTECT THEIR CONSTITUTIONAL RIGHTS, THE COURT SHOULD LIFT THE NON-DISCLOSURE ORDER.**

“[C]ourt orders that actually forbid speech activities,” such as the gag orders at issue here, “are classic examples of prior restraints.” *Alexander v. United States*, 509 U.S. 544, 550 (1993). As such, they “come[] to this Court bearing a heavy presumption against [their] constitutional validity.” *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).<sup>2</sup>

*Amici* assume that Facebook will explain why that heavy presumption cannot be overcome here, and *amici* agree. Issuing court orders, at a prosecutor’s request, that forbid citizens from speaking on pain of contempt

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<sup>2</sup> As a district court in California recently explained, “[c]ourts considering the issue have almost uniformly found that Section 2705(b) NPOs [(“notice preclusion orders”)], or NPOs issued under analogous statutes, are prior restraints and/or content-based restrictions.” *Matter of Search Warrant for [redacted].com*, No. 16-2316M, 2017 WL 1450314, at \*7 (C.D. Cal. Mar. 31, 2017); *see also, e.g., In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 881-83 (S.D. Tex. 2008); *Matter of Grand Jury Subpoena for: [Redacted]@yahoo.com*, 79 F. Supp. 3d 1091, 1093 (N.D. Cal. 2015); *Microsoft Corp. v. United States Dep’t of Justice*, No. C16-0538JLR, 2017 WL 530353, at \*11–12 (W.D. Wash. Feb. 8, 2017); *In re Application of the United States of Am. for Nondisclosure Order Pursuant to 18 U.S.C. § 2705(b) for Grand Jury Subpoena #GJ2014032122836*, No. 14-480 (JMF), 2014 WL 1775601, at \*2 (D.D.C. Mar. 31, 2014).

should never become routine, and no statute can diminish the applicable constitutional standards. But even putting prior restraint doctrine aside, the government's interests in secrecy here do not appear sufficient to justify a non-disclosure order that would effectively preclude Facebook's users from asserting their own constitutional rights.

As *amici* understand it, Facebook has not challenged the constitutionality of the warrants themselves; rather, it seeks only to vacate the non-disclosure order "so that it [can] provide its users with notice of the Warrants and an opportunity to object to them before Facebook produce[s] responsive records to the government." Notice at 2. As in many cases, the users are the people best positioned to show why execution of the warrants would infringe their constitutional rights before the fact of production has effectuated the very harms the First and Fourth Amendments are meant to prevent. But they can do so only if Facebook is not prohibited from notifying them about the warrants.<sup>3</sup>

It seems quite likely that the users would succeed in a motion to quash or narrow these warrants for failure to satisfy the Fourth Amendment's requirement that search warrants must "particularly describ[e] the . . . things

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<sup>3</sup> It would be unreasonable to expect Facebook, with more than 150 million users in the United States, and other companies, most of which have far fewer resources, to challenge every overbroad warrant served for user information.

to be seized.” U.S. Const. amend IV. *Stanford v. Texas*, 379 U.S. 476 (1965), shows why. In that case, a Texas court issued a warrant authorizing the search of a home for “books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas.” *Id.* at 478–79. Police officers spent more than four hours in the house, and a large amount of written material was “hailed off to an investigator’s office.” *Id.* at 479–80.

Although the search warrant in *Stanford* may have been particular enough in its description “to pass constitutional muster[] had the things been weapons, narcotics or cases of whiskey,” *id.* at 486 (quotation marks omitted), the Supreme Court condemned it as an unconstitutional general warrant because “it was not any contraband of that kind which was ordered to be seized, but literary material.” *Id.* Reviewing the history of abuses that led to the adoption of the Fourth Amendment, the Court held that “[t]he indiscriminate sweep of that language [in the warrant] is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history.” *Id.*

Recognizing that “[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure

could also be an instrument for stifling liberty of expression,” *Marcus v. Search Warrants*, 367 U.S. 717, 729 (1961), the Court insisted that when issuing search warrants involving First Amendment materials, “the constitutional requirement that warrants must particularly describe the ‘things to be seized’ is to be accorded the most scrupulous exactitude.” *Stanford*, 379 U.S. at 485. As later cases have therefore recognized, “[t]he First Amendment imposes special constraints on searches for and seizures of presumptively protected material.” *Maryland v. Macon*, 472 U.S. 463, 468 (1985). As the D.C. Circuit has explained, releasing political associational information to the government has the potential “for chilling the free exercise of political speech and association guarded by the [F]irst [A]mendment.” *Fed. Election Comm’n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981).

Like the warrant in *Stanford*, the warrants here are akin to general warrants. The contents of a Facebook account may easily contain more personal and political information than was seized in that case, and the warrants here, seeking “all contents of communications, identifying information, and other records related to three Facebook accounts,” Notice at 1, contains an order of far less particularity than the warrant in *Stanford*. Rather than spending four hours in the users’ homes deciding what to seize,

government agents here propose to seize what amounts to *all* the papers in the users' homes, and then spend four, or forty, or four hundred hours sifting through them looking for evidence. As in *Stanford*, “[t]he indiscriminate sweep of [the] language [in the warrant] is constitutionally intolerable.” 379 U.S. at 486.<sup>4</sup>

That the words and pictures sought here are in electronic form and have been transmitted on the internet is of no help to the government because First Amendment protections are no less robust on the internet. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997). “While in the past there may have been difficulty in identifying the most important places. . . for the exchange of views, today the answer is clear. It is cyberspace—the vast democratic forums of the Internet in general, and social media in particular.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quotation marks and citation omitted). As this Court has made clear, “speech over the internet is entitled to First Amendment protection [and] . . . this protection extends to anonymous internet speech.” *Solers, Inc. v. Doe*, 977 A. 2d 941, 950 (D.C. 2009) (quotation marks and citation omitted).

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<sup>4</sup> Even if the targets of the warrant at issue here were not engaged in political and anonymous speech, the warrants would still likely fail to meet even the most elemental Fourth Amendment particularity requirements, as they do not adequately limit the scope of the privacy intrusion that they authorize.

Nor does the fact that the words and pictures sought here are in electronic form make it impossible for the government to satisfy the particularity requirement of the Fourth Amendment in the manner required in cases involving First Amendment material. For example, the warrant could have authorized a search limited by certain keywords, or for communications on certain topics, or with particular individuals. As issued, however—at least as *amici* understand the facts from the Notice—the warrants will allow government investigators to examine the speech of an unknown number of Facebook users in the course of sweeping up all communications by other individuals with the targets over a three-month period, very possibly including communications with spouses and other family members, with romantic partners (or would-be romantic partners), and with political allies. By disclosing what organizations’ Facebook pages a target has “liked,” the target’s protected political and social affiliations will be revealed. By disclosing what third-party material a target has posted on his or her Facebook page, the government will be informed of the target’s newspaper- or magazine- or blog-reading habits, and even worse, the items from those sources that the target found worthwhile. By disclosing the targets’ own posts and their comments on items posted by others, the targets’ views on a plethora of political, economic, religious, and social issues will

be revealed, not to mention their opinions of movies, books, television shows, and even comments sent privately to one person about another.<sup>5</sup>

In today's world, a Facebook account is at once a message board, an email service, a diary, a calendar, a photo book, a video archive, and much more. It encompasses everything from an individual's public posts and private messages to her "check ins" at locations and records of what she has "liked," become a "fan" of, or searched for. *See Matter of Search of Info. Associated with Facebook Account Identified by Username Aaron.Alexis that is Stored at Premises Controlled by Facebook, Inc.*, 21 F. Supp. 3d 1, 3–4 (D.D.C. 2013).

As a repository of private information, a Facebook account is akin to a private home for Fourth Amendment purposes. *See, e.g., United States v. Galpin*, 720 F.3d 436, 446–47 (2d Cir. 2013) (holding that a hard drive is like a residence for Fourth Amendment purposes); *see also United States v.*

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<sup>5</sup> The First Amendment, too, imposes a constitutional limit on a government's ability to search and seize non-public information about protected speech and communications: it must show both an "overriding and compelling" interest in the requested information and a substantial nexus between the requested information and that interest. *See Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *see also In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1302 (4th Cir. 1987); *accord Local 1814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n*, 667 F.2d 267, 273 (2d Cir. 1981); *Ealy v. Littlejohn*, 569 F.2d 219, 228 (5th Cir. 1978); *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972).

*Riccardi*, 405 F.3d 852, 861–63 (10th Cir. 2005) (same). A demand for “all contents of communications” related to a Facebook account is therefore a classically overbroad fishing expedition, rather than a particularized search. *See, e.g.*, Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. Cal. L. Rev. 1083, 1107, 1125 n.238 (2002).

Four hours in the target’s home was too much for the Constitution to tolerate in *Stanford*, but the warrants at issue here would put government agents metaphorically, but realistically, hovering behind the shoulders of these targets in their homes, their offices, and even their bathrooms as they use their computers or smart phones for 90 days. *See* Notice at 1 (warrants seek information from a “three-month period of time”).<sup>6</sup>

In addition, to the extent that anonymous speech is at issue here, unmasking the identity of the speaker can be an independent violation of

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<sup>6</sup> The government no doubt appreciates the ease and speed with which enormous amounts of private information can be vacuumed into its offices electronically. But that very ease and speed are a warning flag that Fourth Amendment values—and here, First Amendment values as well—require careful protection in contexts like this one. *See, e.g., United States v. Jones*, 565 U.S. 400 (2012) (recognizing that the government’s convenient use of a GPS tracking device for 30 days demands Fourth Amendment scrutiny despite the fact that the target was traveling on public streets where he could lawfully have been observed by officers for 30 days if the government had been willing to invest the enormous resources required to do so); *see also Riley v. California*, 134 S. Ct. 2473, 2490 (2014) (“Allowing the police to scrutinize [cell phone] records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.”).

First Amendment rights. Anonymous speech is part of “an honorable tradition of advocacy and of dissent,” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995), and “an author’s decision to remain anonymous . . . is an aspect of the freedom of speech.” *Id.* at 342.

Recognizing the harm inherent in unmasking, this Court has required a heightened standard for civil defamation cases that risks unmasking anonymous speakers. *See Solers*, 977 A.2d at 954. A central component of that heightened standard is notice to the relevant user: “A court should not consider impacting a speaker’s First Amendment rights without affording the speaker an opportunity to respond to the discovery request.” *Id.* at 955 (quotation marks omitted). Instead, “the court should . . . require reasonable efforts to notify the anonymous defendant” and “delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash.” *Id.* at 954. Compared to the civil defamation context, the First Amendment concerns are heightened here because the government is directly imposing the burden on anonymous speech, and because the warrants seek not only identifying information, but also all “contents of communications.” In *Solers*, only the defendant’s identity could be disclosed; here, the users’ private searches, communications, affinities, and associations could be exposed and linked with his or her true identity.

Moreover, the government's countervailing interests here appear to be quite limited. According to the Notice, Facebook believes that "the events underlying the government's investigation are generally known to the public," "neither the government's investigation nor its interest in Facebook user information [i]s secret," and the requested data has already been preserved. Notice at 2.

The best people to address these issues are the users whose communications are targeted, but the gag order prohibits Facebook from notifying these individuals about the warrants for their communications. As discussed above, the current record, as summarized in the Notice, does not support the government's imposition of a non-disclosure requirement. The Court should therefore lift the requirement so that the affected individuals can be notified, and the relevant constitutional issues fully aired.

### CONCLUSION

For the foregoing reasons, this Court should vacate the non-disclosure order.

Respectfully Submitted,

Dated: June 30, 2017

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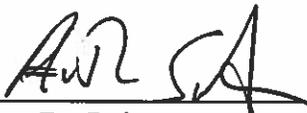
## CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, copies of the foregoing Brief of Amici Curiae The American Civil Liberties Union, The American Civil Liberties Union of the District of Columbia, and Public Citizen, Inc. were served upon

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by first-class mail. Courtesy copies were also sent via email to counsel for both parties.

  
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