

Nos. 17-SS-0388, 17-SS-0389, and 17-SS-0390 (consolidated)



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

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Clerk of the Court

IN RE: FACEBOOK, INC.,

APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

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On Appeal from the Superior Court for the District of Columbia

**BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION,  
ACCESS NOW, CENTER FOR DEMOCRACY & TECHNOLOGY, AND  
NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE IN SUPPORT OF  
APPELLANT'S APPEAL OF THE SUPERIOR COURT'S ORDER TO  
PRODUCE INFORMATION RESPONSIVE TO THE WARRANTS AND  
URGING REVERSAL**

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All parties have consented to the filing  
of this brief.

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## DISCLOSURE STATEMENT

*Amici Curiae* Electronic Frontier Foundation (“EFF”), Access Now, Center For Democracy & Technology (“CDT”), and New America’s Open Technology Institute (“OTI”) state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

*Amici Curiae* certify that no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

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## STATEMENTS OF INTEREST<sup>1</sup>

*Amici Curiae* are non-profit public interest organizations protecting and promoting speech and innovation on the Internet.

EFF is a non-profit, member-supported civil liberties organization that works to protect free speech, innovation, and privacy in the online world. With more than 35,000 dues-paying members, EFF represents the interests of technology users in both court cases and broader policy debates regarding the application of law in the digital age. EFF actively encourages and challenges industry and government to support free expression, innovation, privacy, and openness in the information society. EFF frequently participates, either as counsel of record or *amicus*, in cases involving the First Amendment and new technologies. EFF has a special interest in combatting prior restraints on Internet speech, having served as counsel in challenges to the gag order provisions of the National Security Letter statutes, among other efforts, and in protecting user privacy and anonymity. Both issues are implicated by the underlying request in this matter.

Access Now is a non-profit organization that defends and extends the digital

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<sup>1</sup> *Amici* certify that no person or entity, other than *Amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. Pursuant to D.C. App. R. 29(a), this brief is filed with the consent of all parties. *Amici* do not and have not represented any of the January 20, 2017 Inauguration protest defendants.

rights of users at risk around the world. Combining innovative policy, global advocacy, and direct technical support, Access Now fights for open and secure communications for all. Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and universality, and wields an action-focused global community of users from more than 185 countries. Access Now advocates for reform of government surveillance authorities in order to bring their activities in line with global human rights standards, and contributes tech-driven arguments and evidence promoting privacy and anonymity online to diverse judicial, legislative, and policy fora.

CDT is a non-profit public interest organization that advocates for individual rights in Internet law and policy. CDT represents the public's interest in an open, innovative, and decentralized Internet that promotes constitutional and democratic values of free expression, access to information, privacy, and individual liberty. CDT has participated in a number of cases addressing the scope of individuals' First Amendment rights, including the right to anonymous speech, in online communication.

OTI is New America's program dedicated to ensuring that all communities have equitable access to digital technology and its benefits, promoting universal access to communications technologies that are both open and secure. New

America is a Washington, DC-based think tank and civic enterprise committed to renewing American politics, prosperity, and purpose in the Digital Age through big ideas, bridging the gap between technology and policy, and curating broad public conversation. New America's OTI has a particular interest in preserving both the privacy and freedom of speech of all people who use modern technology, as demonstrated by work as *amicus* on prior cases involving cell-site location data as well as primary complainant to the Federal Communications Commission regarding the use of "Stingray" surveillance devices. These issues are directly implicated by the demands at issue in this matter.

## SUMMARY OF THE ARGUMENT

While little has been revealed about the investigation underlying this case, it is clear from the limited information available to *amici* that the investigation “intrudes into the area of constitutionally protected rights of speech, press, association and petition” and is thus subject to heightened First Amendment scrutiny. *Gibson v. Fla. Legislative Invest. Comm.*, 372 U.S. 539, 546 (1963).

The order gagging Facebook from notifying its users that their account information is being sought implicates the First Amendment in two distinct ways:

First, the non-disclosure order is both a prior restraint *and* a content-based restriction on speech and is therefore subject to the most demanding First Amendment scrutiny.

Second, the underlying warrants are apparently calculated to invade the right of Facebook’s users to speak and associate anonymously on a matter of public interest, and the First Amendment requires that the users be accorded notice and the opportunity to contest the warrants. However, the non-disclosure order functions to prevent Facebook’s users from asserting these rights.

*Amici* write to urge the Court to give full weight to these First Amendment interests and to express their doubt that the non-disclosure order may be applied here consistent with the Constitution. The First Amendment simply does not permit the government to deprive individuals of their right to seek government

redress over invasions into their online anonymity, or to presumptively restrain online speech on a certain topic, without any binding standards, fixed deadlines, or judicial review.

## ARGUMENT

### **I. This Court Must Apply the Most Demanding Scrutiny to the Non-Disclosure Order Because It Is a Prior Restraint on Facebook’s Speech.**

#### A. The Non-Disclosure Order is a Prior Restraint on Speech.

It cannot be disputed that the non-disclosure order at issue here is a prior restraint. “The term prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.” *Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (quotations and citation omitted; emphasis original). The non-disclosure order to Facebook here does exactly that: it forbids Facebook—in advance—from notifying its users, or anyone else, that the government has sought information from the users’ accounts. The fact that the gag is temporary does not change the analysis. *See Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (finding a temporary gag order for purposes of empanelling a jury to be a prior restraint).

Courts considering the issue have “almost uniformly” found that non-disclosure orders issued under 18 U.S.C. § 2705(b) are prior restraints. *Matter of Search Warrant for [redacted].com*, No. 16-2316M (FFM), 2017 WL 1450314, at

\*7 (C.D. Cal. Mar. 31, 2017).<sup>2</sup> This is because Section 2705 non-disclosure orders “effectively preclude speech on an entire topic—the electronic surveillance order and its underlying criminal investigation.” *In re Sealing and Non-Disclosure of Pen/Trap/2703(D) Orders (“In re Sealing”)*, 562 F. Supp. 2d 876, 881–82 (S.D. Tex. 2008). These gags affect the First Amendment rights of both recipients like Facebook and the public. *See In re Matter of Search Warrant for [redacted]@hotmail.com*, 74 F. Supp. 3d 1184, 1186 (N.D. Cal. 2014).

B. This Court Must Apply Exacting Prior Restraint Scrutiny.

A prior restraint is “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press*, 427 U.S. at 559. Unlike a time-place-and-manner restriction that channels speech but does not prohibit it, or libel or true threat laws that punish speech only after it has occurred, a prior restraint forbids speech entirely. *Id.* at 556, 559.

As a result, prior restraints are justified only in unusual and extreme circumstances, when no other remedy will suffice. *Id.* at 559. “Any prior restraint on expression comes to [a court] with a heavy presumption against its

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<sup>2</sup> (citing *In re Sealing and Non-Disclosure of Pen/Trap/2703(D) Orders (“In re Sealing”)*, 562 F. Supp. 2d 876, 881-82 (S.D. Tex. 2008); *In re Grand Jury Subpoena for: Redacted@yahoo.com*, 79 F. Supp. 3d 1091, (N.D. Cal. 2015); *Microsoft Corp. v. DOJ*, No. C16-0538JLR, 2017 WL 530353, at \*11-\*12 (W.D. Wash. Feb. 8, 2017); *In re Application of the U.S. for Nondisclosure Order Pursuant to 18 U.S.C. § 2705(b) for Grand Jury Subpoena #GJ2014032122836*, No. MC 14-480 (JMF), 2014 WL 1775601, at \*2 (D.D.C. Mar. 31, 2014))

constitutional validity” and “carries a heavy burden of showing justification.” *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted).

A prior restraint is invalid unless it survives the most exacting scrutiny, even more demanding than the strict scrutiny applied generally to content-based restrictions on speech. To pass constitutional muster, prior restraints must be *necessary* to further a governmental interest of the highest magnitude. *See Nebraska Press*, 427 U.S. at 562–63 (finding that a criminal defendant’s right to a fair trial was a sufficiently important governmental interest). The prior restraint will be *necessary* only if:

- (1) The harm to the governmental interest is highly likely to occur;<sup>3</sup>
- (2) The harm will be irreparable;<sup>4</sup>
- (3) No less-restrictive alternative exists for preventing the harm;<sup>5</sup> *and*
- (4) The prior restraint will actually prevent the harm.<sup>6</sup>

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<sup>3</sup> *See Nebraska Press*, 427 U.S. at 563, 565, 567 (approving of the trial court’s finding of a clear and present danger of impairment of the defendant’s fair trial rights, but cautioning against uncertainty); *see also New York Times v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J. concurring) (requiring absence of prior restraint to “surely result” in feared harm); *Levine v. U.S. Dist. Ct.*, 764 F.2d 590, 595 (9th Cir. 1985) (activity restrained must pose “either a clear and present danger or a serious and imminent threat to a protected competing interest”).

<sup>4</sup> *New York Times*, 403 U.S. at 730.

<sup>5</sup> *See Nebraska Press*, 427 U.S. at 563–65; *Levine*, 764 F.2d at 595.

The Court must apply this test to the non-disclosure order issued against Facebook here.

Based on the information provided about the underlying investigation, the fourth factor appears especially salient in this case. Facebook has represented that “neither the government’s investigation nor its interest in Facebook user information [i]s secret” and “the events underlying the government’s investigation are generally known to the public.”<sup>7</sup> Notice to Potential *Amici*, at 2.

To the extent that the underlying investigation and the government’s interest in the Facebook users’ data is generally known to the public, this alone requires voiding the prior restraint order. Indeed, in *Nebraska Press*, the Supreme Court reversed even a temporary gag order against the publication of a criminal defendant’s confession because the fact of the confession was already well known in the town where the crime occurred. 427 U.S. at 574. Similarly, in *Oklahoma Publishing Company v. District Court*, 430 U.S. 308, 310 (1977), the Supreme

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<sup>6</sup> See *Nebraska Press* 427 U.S. at 565–66 (“We must also assess the probable efficacy of prior restraint on publication[.]”); *Levine*, 764 F3d at 598.

<sup>7</sup> The timing of the government’s investigation and the underlying motions of this case in the Superior Court of the District of Columbia coincide with the proceedings in the cases involving the January 20, 2017 Presidential Inauguration protestors, who are currently facing prosecution in the same jurisdiction. These cases and the events surrounding them have been highly publicized. See, e.g., Jonah Engel Bromwich, *Felony Charges for Journalists Arrested at Inauguration Protests Raise Fears for Press Freedom*, N.Y. Times, Jan. 26, 2017 at A12, available at: <https://www.nytimes.com/2017/01/25/business/media/journalists-arrested-trump-inauguration.html>.

Court voided a gag order issued, pursuant to a state law, against the disclosure of a juvenile defendant's identity after the juvenile appeared in open court.

## **II. The Non-Disclosure Order Is Also Independently a Content-Based Restriction on Speech Subject to Strict Scrutiny.**

Independent of its operation as a prior restraint, the non-disclosure order here is also a content-based restriction on Facebook's speech: it forbids Facebook from communicating specific information. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (restrictions "based on the message a speaker conveys . . . are subject to strict scrutiny"); *Matter of Search Warrant for [redacted].com*, 2017 WL 1450314, at \*8 (gag orders issued pursuant to Section 2705 are necessarily content-based). The order "effectively preclude[s] speech on an entire topic—the electronic surveillance order and its underlying criminal investigation." *In re Sealing*, 562 F. Supp. 2d at 881–82.

Such gags also affect the First Amendment rights of the public. *In re Matter of Search Warrant for [redacted]@hotmail.com*, 74 F. Supp. 3d 1184, 1186 (N.D. Cal. 2014). "By constricting the flow of information at its source, the government dries up the marketplace of ideas" and "stifle[s] public debate about" about a matter of public concern—specifically, the proper scope and extent of this important law enforcement tool[s]." *In re Sealing*, 562 F. Supp. 2d at 882. "Given the public's intense interest in this area of law, such content-based restrictions are subject to rigorous scrutiny." *Id.*

Strict scrutiny requires that content-based restrictions on speech be narrowly tailored to further a compelling governmental interest. “Narrow tailoring” under strict scrutiny requires that the restriction on speech directly advance the governmental interest, that it be neither overinclusive nor underinclusive, and that there be no less speech-restrictive alternatives to advancing the governmental interest. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000); *see also Reno v. ACLU*, 521 U.S. 844, 874 (1997).

Thus, even if the Court were for some reason to decline to treat the non-disclosure order as a prior restraint, it must nevertheless ensure that the order is narrowly tailored in this way. And as in the prior restraint analysis, the non-disclosure order is unlikely to be narrowly tailored: it does not advance a government interest in secrecy since “neither the government’s investigation nor its interest in Facebook user information was secret[.]” Notice to Potential *Amici Curiae* at 2. As such, the non-disclosure order is unconstitutional as applied here.

### **III. The Non-Disclosure Order Must Also Be Subject to Heightened Scrutiny Because It Infringes on the Facebook Users’ First Amendment Rights to Anonymous Speech and Association.**

The non-disclosure order must be subjected to heightened scrutiny for yet another independent reason: it denies Facebook’s users the opportunity to defend their own First Amendment rights to anonymous speech and association.

Courts have long recognized that the First Amendment protects the right to

engage in anonymous communication—to speak, read, listen, and/or associate anonymously, across any medium—and these activities are fundamental to a free society. As the Supreme Court has held, “[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment]: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (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.”). Similarly, anonymity has been recognized in international law and norms “for the important role it plays in safeguarding and advancing privacy, free expression, political accountability, public participation and debate.”<sup>8</sup>

The First Amendment protects not only the right to speak anonymously, but also the right to associate anonymously. For example, compelled disclosure of membership lists and other associational information constitutes an impermissible restraint on freedom of association. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (compelled identification of NAACP members violated members’ right to remain anonymous). As the Supreme Court has noted, “inviolability of privacy in

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<sup>8</sup> A/HRC/29/32 at 47, David Kaye, Report of the Special Rapporteur to the Human Rights Council on the use of encryption and anonymity to exercise the rights to freedom of opinion and expression in the digital age.  
[http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/29/32](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/32)

group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” *Id.*; see also *Brown v. Socialist Workers’ 74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91–92 (1982) (“The right to privacy in one’s political associations and beliefs will yield only to a ‘subordinating interest of the State [that is] compelling,’ and then only if there is a ‘substantial relation between the information sought and [an] overriding and compelling state interest.’”) (citations omitted)).

As a result, efforts to pierce anonymity are subject to heightened scrutiny, requiring the government to demonstrate a compelling need and show that the demand is narrowly tailored. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Am. Fed’n of Labor & Cong. of Indus. Orgs. v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003); *Dole v. Serv. Employees Union AFL-CIO, Local 280*, 950 F.2d 1456, 1462 (9th Cir. 1991).

The Court must require the government to make this showing here.

The Court should be mindful that Facebook users cannot seek to protect their First Amendment rights when they are not aware that those rights are being adjudicated. Rather, they must rely on social media service providers to assert their rights in their stead.

This is constitutionally problematic for at least two reasons. First, although Facebook has standing here to bring First Amendment claims on behalf of its

users, that third-party standing does not vitiate the requirement that the individuals have access to the court as well. *See, e.g., McKinney v. Alabama*, 424 U.S. 669, 675–76 (1976). Second, a social media service provider served with a non-disclosure order ordinarily has no duty to—and likely lacks the motivation and capacity to—vigorously assert the First Amendment rights of its subscribers. *Id.* And even if they were so motivated, social media service providers likely lack sufficient information about the context and circumstances surrounding the request—such as whether it is likely based on speech or associations—to raise First Amendment concerns.

## CONCLUSION

For the foregoing reasons, *amici* urge the Court to reconsider the non-disclosure order in light of the substantial First Amendment interests implicated and subject it to appropriately exacting constitutional scrutiny.

June 30, 2017

Respectfully submitted,

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