SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – SPECIAL PROCEEDINGS

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 Proceedings Nos. 17-CSW-658, 17-CSW-659 & 17-CSW-660 Chief Judge Morin

REPLY IN SUPPORT OF MOTION TO INTERVENE FOR PURPOSE OF SEEKING TO QUASH OR NARROW SEARCH WARRANTS

The government's principal argument in opposition to intervention is that a search warrant can never be challenged prior to its being carried out. That position is demonstrably incorrect, as the Supreme Court has not only allowed but required pre-enforcement challenges to be available in certain circumstances.

Although the government is correct that in many circumstances search warrants cannot be challenged ex ante, the practical difficulties precluding such a challenge in the context of a physical search do not apply here. There is no legal or logical reason why an ex ante challenge is impermissible where the warrant seeks electronically stored information that will be preserved during the pendency of a challenge. Moreover, the government's own representation to the U.S. Supreme Court that a Stored Communications Act warrant for electronic information is in the nature of a subpoena — a form of process that may be challenged and quashed or modified prior to enforcement — undercuts its insistence that ex ante challenges are unworkable.

In fact, if the three Facebook account owners here are unable to obtain an ex ante determination on the constitutionality of the government's bid to rummage through their political, associational, and private information, their Fourth Amendment rights — and the rights of the thousands of individuals who have communicated with their accounts — in this information will be irrevocably lost, with future remedies almost certainly unavailable.

The remainder of the government's opposition to intervention concerns the merits of the motion to quash, rather than the analytically distinct and logically antecedent question whether intervention is appropriate. In any case, the government's merits arguments are thin and conclusory. The government declares that the "disclosure" stage of a two-stage disclose-then-seize warrant is not a "seizure" and that account holders' privacy is not at risk, but the government does not justify either proposition with any arguments or authority and does not grapple with the account holders' substantial authorities, facts, and arguments demonstrating the contrary.

ARGUMENT

The D.C. Rules of Criminal Procedure do not answer the question whether a search warrant may in some circumstances be challenged pre-enforcement. However, 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." Here, the result most consistent with applicable law and the Court's rules is to permit such a challenge.

I. An Ex Ante Challenge To A Search For Electronic Information Should Be Permitted If The Information Has Been Preserved.

The government is mistaken that ex ante challenges to warrants are never permitted. On the contrary, in *A Quantity of Books v. Kansas*, 378 U.S. 205, 210 (1964) (plurality opinion), and *Marcus v. Search Warrant*, 367 U.S. 717, 734-38 (1961), the Supreme Court *required* pre-seizure procedural protections, over and above the ordinary warrant process, where a warrant authorized the seizure of books that might be subject to First Amendment protection. Although these cases do not address electronic material, the character of the material sought here — including expressive material that bears on both political demonstrations and associations — enjoys First Amendment protection and therefore triggers a comparable interest in procedural safeguards. At the very least, *A Quantity of Books* and *Marcus* demonstrate that ex ante challenges to search warrants are

workable and sometimes necessary, and they disprove the government's suggestion that ex ante challenges are categorically barred.

Outside of the First Amendment context, the government is correct that the targets of physical search warrants may not ordinarily seek judicial review prior to their enforcement. The practical reason is obvious: if a suspect could forestall a search by interrupting execution to seek judicial review, he might be able to frustrate the search entirely by disposing of or relocating the objects of the search while review is pending. Where destruction of evidence is a danger, that circumstance also provides an exception to the requirement of pre-enforcement review set forth in *A Quantity of Books* and *Marcus*. *See Heller v. New York*, 413 U.S. 483, 492-93 (1973).

But there is no possibility that evidence will be destroyed here, because Facebook has preserved the electronic information that the warrant seeks, and there is no question that the government will be able to obtain the information should the account holders' challenge fail. Therefore, the practical justification for the usual practice of deferring judicial review until after the warrant is carried out occurs is entirely inapplicable.

The government's authorities for its categorical view about the unavailability of ex ante challenges are far afield or unpersuasive. From *United States v. Grubbs*, 547 U.S. 90 (2006), and *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the government pulls isolated dicta in which the Supreme Court states, in the most general of terms, that a neutral judicial officer's issuance a warrant and availability to adjudicate a motion to suppress after the fact provide constitutional protection (or "sufficient protection" in *Zurcher*) for Fourth Amendment rights. Because these decisions both involved challenges to searches that had already been conducted, the Court had no occasion to, and in fact did not, opine on the question of ex ante challenges to warrants. Moreover, the Court was responding to arguments far different than those raised here. The government's

proffered passage from *Zurcher* addressed the argument that a different substantive standard should apply to certain types of searches. 436 U.S. at 565. The government's quote from *Grubbs* appeared as part of the Court's rejection of the argument that "anticipatory" search warrants, which are based on the expectation of certain future events, are valid only where the warrant itself (as opposed to the warrant affidavit) spells out the triggering condition. 547 U.S. at 99. The issues and holdings of these cases show how far removed their dicta are from this case.

The government's other two authorities are equally unhelpful. The Eastern District of Wisconsin decision in *In re: Information Associated with E-Mail Account [redacted]@gmail.com That Is Stored at Premises Controlled by Google, Inc.* (Gov't Exhibit A), relies on the same out-of-context dicta that the government has cited from *Grubbs* and on an analogy to a physical home search, which (as noted above) presents evidence-destruction issues not implicated here. And the Superior Court's decision in *United States v. Jaffe* (Gov't Exhibit B) is entirely conclusory.

Moreover, at least two district courts and one state supreme court have permitted intervention to challenge a search warrant prior to enforcement or even required that such a challenge be available. *See In re Search of Elec. Commc'ns in the Account of chakafattah gmail.com at Internet Serv. Provider Google, Inc.*, 802 F.3d 516, 522 (3d Cir. 2015) (summarizing holding of sealed decision below: "The District Court granted Fattah's motion to intervene but denied his motion to quash the search warrant."); *United States v. Williams*, 2004 WL 1469491, *1 (S.D.N.Y. June 29, 2004) (entertaining pre-enforcement challenge, without discussing the issue); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1061 (Colo. 2002) ("[W]e hold that an innocent, third-party bookstore must be afforded an opportunity for a hearing prior to the execution of any search warrant that seeks to obtain its customers' book-purchasing records."). The government's authorities do not reflect a consensus view, much less a carefully reasoned one.

Instead of grasping at precedential straws, viewing the question in terms of the interests at stake makes clear that pre-enforcement challenges to preserved electronic information are entirely appropriate. As noted, the government has no reason to fear here that the evidence will become unavailable while the account holders' challenge is resolved. And permitting an ex ante challenge serves substantial individual interests, including (as in *A Quantity of Books* and *Marcus*) First Amendment interests. *See* Mot. to Quash at 9 (discussion *NAACP v. Alabama*, 357 U.S. 449 (1958). As the government itself has recognized in briefing before the U.S. Supreme Court, "[t]he First Amendment regulates *acquisition* or use of information to suppress free speech or association[.]" Br. for the U.S. at 39, *United States v. Carpenter*, No. 16-402 (U.S., filed Sept. 25, 2017) ("U.S. *Carpenter* Br.") (emphasis added). The political and associational material implicated here — what political events the account holders organized and attended, who else was there, what they hoped to accomplish, and their political beliefs and associational affiliations — would make government agents privy to posts discussing and debating political opinions, proposing organizing strategies, or identifying individuals associated with certain groups and causes, including groups and causes antithetical to the current Administration on whose behalf the investigating agents are acting. *See* Decl. of Emmelia Talarico (attached to Motion to Quash as Exhibit B), at 1-2; Decl. of Lacy MacAuley (attached to Motion to Quash as Exhibit C), at 1-2; Decl. of Legba Carrefour (attached to Motion to Quash as Exhibit D), at 1-2. Significant privacy interests, too, are implicated by the government's broad demand for information, which here would result in disclosure of individuals' medical and psychiatric information, credit card and password information, personal photographs of family members including children, intimate messages to a romantic partner, and discussions of domestic violence that an account holder or third parties have suffered — all deeply personal information that has no connection to any criminal activity that

may have occurred on Inauguration Day, and that the government has no business perusing. *See* Decl. of Emmelia Talarico at 1-2; Decl. of Lacy MacAuley at 1-2; Decl. of Legba Carrefour at 1-2.

The interests of Emmelia Talarico, Legba Carrefour, and Lacy MacAuley in their privacy and political associations, and of thousands of other people in their own private information shared with the account holders and their own political associations, will be irrevocably lost if this pre-enforcement challenge is disallowed. Governmental investigators would see whatever is contained within the target Facebook accounts for the ninety-plus-day period covered by the warrants. No subsequent judicial remedy could unring that bell. The same is true, admittedly, of a typical physical search in which an ex ante challenge is unavailable. However, the unavailability of pre-enforcement review in the ordinary physical search stems from the obvious and overriding danger that evidence will be spirited away during the delay, not from a determination that the loss of privacy or the chilling of political and associational activity is not worth judicial protection. *Cf. Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998) (noting that for the purpose of determining propriety of injunctive relief, "a prospective violation of a constitutional right constitutes irreparable injury").

The government suggests that the warrant application process is a sufficient safeguard to obviate the need for further pre-enforcement review. This claim is doubly flawed. First, it is a non sequitur. The government does not dispute (in fact, it touts) that the validity of a warrant is ultimately subject to review in most cases via a motion to suppress evidence. So the government is not claiming that a decision to issue a warrant is unreviewable, just that review should happen on the government's preferred timeline. The government does not explain why the mere fact that a warrant has been issued bears on the timing of judicial review that it acknowledges should

eventually be available. Second, the government overlooks the ex parte nature of the warrant process. Usually, when the courts defer further judicial review of a ruling, that ruling is the product of an adversary process. When adversary process is absent — for instance, in the case of a temporary restraining order — special rules demand expedited consideration as soon as both sides of the dispute are able to participate. *See* D.C. Super. Ct. R. 65(b)(4) (expedited procedure for motion to dissolve TRO issued without notice to adverse party). This proceeding is the first time that these account holders have had the chance to participate in proceedings regarding their Facebook accounts and to defend their own interests before the Court. Analogizing to the TRO process, the Court should find that the ex parte nature of the prior proceedings militates in favor of early review where feasible (distinguishing, once again, the run-of-the-mill physical search, where the possibility of destruction of evidence renders ex ante review infeasible).

If the warrants cannot be challenged in this proceeding, not only will the privacy rights of the account holders and of thousands of their friends, contacts, fellow demonstrators, and "likers" be invaded, but it is extraordinarily unlikely (for most if not all of them) that any later remedy will be available. The government holds out the possibility of a suppression hearing, but that is of no use unless the individuals whose privacy is invaded are charged with a crime. The three account holders are not currently charged with crimes in connection with the government's investigation of political protest activity on January 20, and there is no reason to believe that they will be. And it is virtually inconceivable that the government will criminally charge many of the 6,000 people whose private messages, photographs, and "likes" will be revealed by its overbroad warrants. *See* Decl. of Emmelia Talarico at 1-2; Decl. of Lacy MacAuley at 1-2; Decl. of Legba Carrefour at 1-2. Most likely, then, many if not most — and possibly even all — of the people whose privacy will be invaded by these warrants would lack a suppression remedy. Nor can these individuals seek

redress against Facebook, *see* 18 U.S.C. § 2703(e) (foreclosing cause of action against electronic communication service provider for disclosing information in response to a warrant), which in any case has admirably notified its users of the threat to their privacy and so is not the party that a judicial remedy needs to deter here. Facebook itself could challenge the warrants on the merits, but it has not done so here, nor would it be realistic to expect Facebook to expend significant resources to fight every search warrant it receives. And there is virtually no hope of seeking civil relief against the prosecutors who sent the search warrants to Facebook, as prosecutors are protected by absolute immunity when engaged in prosecutorial functions, *see Kalina v. Fletcher*, 522 U.S. 118, 127 (1997), and otherwise by qualified immunity, *see Messerschmidt v. Millender*, 565 U.S. 535, 556 (2012) (officers protected from liability for executing invalid warrants except in the "rare" case where "the magistrate so obviously erred that any reasonable officer would have recognized the error").

The question whether ex ante review of a warrant for preserved electronic information is appropriate is somewhat analogous to the question whether an individual with a legal interest in documents sought from a third-party can appeal a court order rejecting a challenge to legal process requiring production. Here as there, the question is whether courts should review a judicial order earlier than they would in an ordinary case (here, through a suppression motion; there, by denying review of an interlocutory order under the final judgment rule). For approximately a century, the *Perlman* rule has provided that such early review is proper: that is, an individual can appeal an interlocutory order requiring a third party to turn over the individual's property, because the individual cannot be required to place her interest in the hands of a third party who might not risk contempt to safeguard the individual's interest. *See Perlman v. United States*, 247 U.S. 7, 13 (1918) (rejecting proposition that the individual "was powerless to avert the mischief of the order but must

accept its incidence and seek a remedy at some other time and in some other way"); *accord Adams v. Franklin*, 924 A.2d 993, 995 n.2 (D.C. 2007) (applying the *Perlman* rule). Likewise, here, the account holders cannot be assured of — in fact, are quite unlikely to have available — a subsequent opportunity to protect their interests themselves or via a third party. Accordingly, just as *Perlman* recognized an exception to the usual practice of deferring appeal until final judgment, this Court should recognize an exception to the usual practice of deferring review of a warrant's validity until a subsequent suppression motion.

Finally, the government's own legal position in other proceedings regarding the status of process under the Stored Communications Act undercuts its argument here that a motion to quash is out of place. Where, as here, the government seeks contents of electronic communications from an electronic communications provider like Facebook, the Stored Communications Act (as well, of course, as the Fourth Amendment) applies. The SCA prohibits electronic communication providers from disclosing the contents of the electronic communications they store (with certain exceptions not relevant here) absent legal process; the form of legal process depends on the type of information sought. *See* 18 U.S.C. §§ 2702, 2703. Where the government seeks to require an electronic communication provider to disclosure the contents of communications that has been stored electronically for 180 days or less (as here, where the government sought on February 9, 2017, the disclosure of communications dating back to November 1, 2016), the government must obtain a warrant from a state or federal court using the court's ordinary procedures. 18 U.S.C. § 2703(a). The contents of electronic communications that have been stored longer may be obtained in certain circumstances by subpoena. 18 U.S.C. § 2703(b)(1)(B).

In cases concerning the government's ability to enforce demands for electronic information stored outside the United States, the government has repeatedly taken the position that an SCA

warrant for electronic records is not a typical search warrant but is rather in the nature of a subpoena, which may be enforced against the recipient regardless of where the information is stored. *See* Pet. for Writ of Certiorari at 23, *United States v. Microsoft*, No. 17-2 (U.S., filed June 23, 2017); *Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197, 214 (2d Cir. 2016) (discussing "the approach, urged by the government and endorsed by the District Court, that would treat the SCA warrant as equivalent to a subpoena"). Although the Second Circuit rejected the government's position, the federal district court here recently adopted it, explaining that an SCA warrant "is executed like a subpoena in that it is served on the ISP in possession of the information and does not involve government agents entering the premises of the ISP to search its servers and seize the e-mail account in question." *In re Search of Information Associated with [redacted]@gmail.com*, 2017 WL 3445634, at *19 (D.D.C. July 31, 2017) (citation and internal quotation marks omitted). Additionally, in a recent Supreme Court filing, the government explained that one of the characteristics of a traditional warrant that distinguishes it from other compulsory process is that the former is carried out by law enforcement whereas the latter requires production by the recipient. *See* U.S. *Carpenter* Br. at 45. The warrants here are distinguishable from a traditional warrant in precisely the same way.

The government's insistence that an SCA warrant is like a subpoena rather than a traditional warrant is relevant here because of a different, non-territorial characteristic of a subpoena: it *is* subject to a motion to quash prior to enforcement. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) (adjudicating such a case); *United States v. Hubbard*, 650 F.2d 293, 311 n. 67 (D.C. Cir. 1980) (collecting examples); *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1 (D.D.C. 2012) (adjudicating third-party motion to quash subpoena issued to Twitter for movant's account information). The government's Supreme Court briefing acknowledges that

compulsory process requiring production by the recipient is subject to pre-enforcement challenge. *See* U.S. *Carpenter* Br. at 45.

The government cannot have it both ways. Having benefited from treating a warrant for electronic information as a subpoena elsewhere, and having asserted the same position in two separate cases pending before the Supreme Court, the government's attempt here to disclaim those aspects of subpoena practice that it finds inconvenient should be viewed skeptically. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (explaining doctrine of judicial estoppel: "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.").

In sum, the fundamental constitutional interests at stake for the account holders and others, the absence of a realistic alternative to vindicate them, the common-sense distinction between this case and an average physical search warrant case, and the government's own stance that SCA warrants should be treated as subpoenas, all point toward the same conclusion: the account holders should be permitted to intervene to protect their interests at this stage, before their rights are irrevocably lost.

II. The Government's Remaining Arguments Are Neither Relevant To The Question Of Intervention Nor Persuasive In Opposing The Motion To Quash.

The rest of the government's opposition to intervention consists of a defense of the warrants issued here. These arguments are irrelevant to the independent and logically antecedent question whether the account holders should be permitted to challenge the warrants at all.

Moreover, the government's arguments defending the warrants are wholly conclusory. They reiterate the terms of the warrant itself in characterizing the first stage of the disclose-then-

seize warrant as not itself a seizure. But the government never answers the account holders' arguments and authorities explaining that, like the material the warrants authorize the government to "seize," the material ordered "disclosed" is also "seized" for Fourth Amendment purposes and searchable at will by the government. *See* Mot. to Quash at 15-17.

The government's ipse dixit that the account holders' privacy is not at risk likewise rings hollow. The account holders' observation that government investigators can rummage through the entire contents of their Facebook accounts, applying whatever degree of scrutiny they wish, stands unrefuted. The government's offer to seal material that it is not authorized to seize is a small step in the right direction, but it is far from sufficient. The government proposes to seal this material only "after its review of the data provided by Facebook." The account holders' point, of course, is that the government should not be permitted to review most of this data at all — only the material that it has probable cause to seize. It is true that in an ordinary physical search, police officers may have to look at papers they are not authorized to seize. But that observation is necessarily cursory; here, by contrast, the prosecutors will have the contents of the account holders' communications in their possession for as long as they desire and can examine it with a fine-tooth comb if they wish. The government provides no reason why further safeguards, in particular a special master, would be unworkable, or why it would be inappropriate under these circumstances.

The Court should therefore quash the warrants, or in the alternative, narrow them by requiring that a special master ensure that the government seizes only the material for which it has demonstrated probable cause.

CONCLUSION

The motions for leave to intervene and to quash or narrow the warrants should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of October 2017, I caused copies of the foregoing Motion to Intervene along with a proposed order to be served on counsel for the Government and counsel for Facebook by first-class mail, postage prepaid, as well as by email, as follows:

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