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

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
	)	Hearing: 10 AM August 24, 2017

MEMORANDUM OF DOE 1, DOE 2, DOE 3, DOE 4, and DOE 5 IN OPPOSITION TO THE ENFORCEMENT OF THE SEARCH WARRANT TO THE EXTENT THAT IT SEEKS IDENTIFYING INFORMATION ABOUT VISITORS TO www.disruptj20.org

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATEMENT OF THE CASE

The United States Government has indicted some 200 individuals for their alleged roles in acts of assault and property damage that occurred in the District of Columbia on January 20, 2017, the day of President Donald Trump's inauguration. In furtherance of those prosecutions, the Government secured a search warrant directed to DreamHost, a California company whose servers host a website called DisruptJ20, located at http://www.disruptj20.org. That web site expressed opposition to Trump and to the government policies that the site's authors anticipated he would likely implement, and urged readers to participate in inauguration protests. The site included detailed information about a range of protests planned for the week leading up to Inauguration Day, and the Women's March planned for the following day, January 21, both in Washington, D.C. and in many other cities around the country. After the events of weekend were over, the site provided descriptions and photographs of the protest events, along with information about the arrests of some demonstrators as well as the legal rights of those who had been arrested.

Scrutiny of the current contents of the web site, as well as of past versions of the web site still available on the Internet Archive, https://web.archive.org/web/*/www.disruptj20.org, does not reveal calls for violence; indeed, some of the material urged participants not to resort to violence. However, according to representations in the Motion to Show Cause that initiated this proceeding, it appears that the warrant may have been secured based on claims of probable cause to believe that the authors and/or operators of the site were somehow implicated in the assaults and property damages that occurred on Inauguration Day. ("That website was used in the development, planning, advertisement and organization of a violent riot that occurred in Washington, D.C. on January 20, 2017." Motion to Show Cause, at 1.) Based on whatever showing may have been made in support of that contention, the United States demands sweeping access to all files in DreamHost's possession

pertaining to the web site, including server log files that would contain information showing the Internet Protocol addresses ("IP addresses") from which members of the public were using Internet access to view the contents of the web site.

After ignoring DreamHost's efforts to discuss its concerns about the apparent breadth of the warrant, the Government initiated this proceeding, asking the Court to compel DreamHost to comply with the subpoena in its entirety. DreamHost opposed the motion to compel on both constitutional and non-constitutional grounds. On August 14, 2017, DreamHost published an article on its blog announcing both the Government's motion, its own efforts to narrow the demand, and the brief it had filed in opposition to the Motion to Compel. It was the broad coverage of this post that alerted the Doe intervenors, each of whom exercised his or her First Amendment rights by viewing the web site for the purpose of pursuing other activity protected by the First Amendment, to the fact that the anonymous basis on which they had gained access to the web site was in jeopardy. After their counsel unsuccessfully tried to engage the Government in a discussion of the First Amendment ramifications of the warrant, the Does have moved for leave to intervene for the purpose of filing this brief in opposition to the issuance of any Court order compelling DreamHost to provide their identifying information to the Government.

ARGUMENT

A. First Amendment Scrutiny Limits Court Orders and Government Investigations That Trench on First Amendment Interests.

Court orders directed at private parties are actions by the Government that are subject to scrutiny under the First Amendment. *NAACP v Alabama,* 357 U.S. 449, 462 (1958). Such scrutiny applies even when the orders are issued at the behest of private parties, whether the orders are awards

of damages, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), or injunctive orders that compel private parties to take specific actions on pain of contempt. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). First Amendment scrutiny is all the more important where the order is sought from a court at the behest of government officials whose actions are themselves subject to the First Amendment's strictures. *NAACP*, 357 U.S. at 460-463; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

Moreover, it is well-established that government investigations that impinge on First Amendment interests are subject to scrutiny under the First Amendment. *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963); *NAACP*, 357 U.S. at 460-462. The cases call for such scrutiny either because demands for information impinge directly on First Amendment rights, or because of the chilling effect that the investigation may have. For example, in *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the D.C. Circuit reversed the dismissal of a claim by an employee of the Library of Congress objecting to the fact that the Library had instigated an FBI full field investigation after it learned that he had attended meetings of the Young Socialists Alliance. Similarly, in *White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000), the Ninth Circuit allowed local critics of a proposed housing project to pursue First Amendment claims against federal housing officials for violating the critics' free speech rights by conducting a lengthy and intrusive investigation into their opposition. *See also ILA Local 1814 v. Waterfront Commn. of New York Harbor*, 667 F.2d 267, 272 (2d Cir. 1981) (limiting state commission's demand for list of contributors to a political committee); *Donahoe v. Arpaio*, 986 F. Supp. 2d 1091, 1135 (D. Ariz. 2013) (denying summary judgment against civil rights claim alleging a retaliatory law enforcement investigation directed at dissenters); *Alliance to End Repression v. City of Chicago*, 627 F. Supp.

1044, 1050-52 (N.D. Ill. 1985) (allowing First Amendment claims to proceed where local law enforcement infiltrated certain groups and accumulated "an extensive dossier" about an individual); *Paton v. La Prade*, 469 F. Supp. 773 (D.N.J. 1978) (allowing First Amendment claim brought by student over a "mail cover" that led to Government recordation of his name and address as someone who had sent a letter to a socialist group so that he could write a school paper). Once the investigation was found to implicate First Amendment interests, these courts required the government to show that their investigations were justified under a standard of "exacting scrutiny."

Cases from both the D.C. Court of Appeals and federal courts in the District of Columbia apply First Amendment limits to discovery orders in civil proceedings that seek information privileged against production by the First Amendment. In *Zerilli v, Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981), *United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987), and *Wyoming v Department of Agriculture*, 208 F.R.D. 449, 454-455 (D.D.C. 2002), local federal courts invoked First Amendment principles to limit discovery into materials protected by the First Amendment, requiring the parties seeking that discovery to show that the discovery they sought was central to their litigation contentions and that they had exhausted alternate means of obtaining the information they needed to advance their cases.

Moreover, following the many Supreme Court cases in which the First Amendment has been held to protect the right of authors to publish anonymously, *e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995), in *Solers v. Doe*, 977 A.2d 941, 956 (D.C. 2009), the D.C. Court of Appeals held that discovery orders seeking to pierce the right of Internet users to speak anonymously must be justified by an evidentiary showing that establishes a prima facie case that the Internet users sought to be identified have engaged in actionable speech. In this regard, the Court

of Appeals embraced an approach now joined by appellate courts in a dozen states. *E.g.*, *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 712, 717 (Ariz. App. 2007); *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

Although it is civil discovery orders trenching on the First Amendment that have received the greatest judicial attention, discovery orders in federal criminal investigations have similarly been subjected to First Amendment scrutiny, requiring the government to show "a compelling state interest in the subject matter of the investigation and a sufficient nexus between the information sought and the subject matter of the investigation." *In re Faltico*, 561 F.2d 109, 111 (8th Cir. 1977). *See In re Grand Jury Subp. No. 11116275*, 846 F. Supp. 2d 1, 4 (D.D.C. 2012). A leading case in that line of authority is *Bursey v. United States*, 462 F.2d 1059, 1082 (9th Cir. 1972), where the Ninth Circuit limited a grand jury subpoena issued in the course of an investigation of the Black Panther Party, a political group whose policies included advocacy of violent self-defense of black communities against police intervention. Although the Court of Appeals found that the overall investigation was legitimate, it protected subpoenaed witnesses from having to answer certain questions that trenched too far on protected First Amendment interests and were insufficiently justified by the government's proffered explanation for its investigation. Similarly, when a grand jury investigating the murder of a local youth was used as an excuse to demand information about a local political group, the Fifth Circuit blocked the inquiry: "It would be a sorry day were we to allow a grand jury to delve into the membership, meetings, minutes, organizational structure, funding and political activities of unpopular organizations on the pretext that their members might have some information relevant to a crime." *Ealy v. Littlejohn*, 569 F.2d 219, 229 (5th Cir. 1978). *See also Rich v. City of Jacksonville*, 2010 WL 4403095, at *11 (M.D. Fla. Mar. 31, 2010) (local law

enforcement official who used subpoena power to identify anonymous blogger without having evidence of a crime denied qualified immunity in action for violation of blogger's First Amendment rights). Cases decided in federal courts in the District of Columbia, described in the next section of this brief, have similarly limited grand jury investigations into protected First Amendment activity. *See In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F. Supp. 2d 11, 20 (D.D.C. 2009), and *In re Grand Jury Subpoena to Kramerbooks & Afterwords*, Inc., Nos. 98–MC–135–NHJ, 26 Med. L. Rptr. 1599, 1600 (D.D.C. Apr. 6, 1998).

B. The First Amendment Limits Court Orders That Trench on the Right to Read Anonymously.

It is "well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This right "follows ineluctably from the **sender's** First Amendment right," and "[m]ore importantly, . . . is a necessary predicate to the **recipient's** meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (emphases in original). As Justice Brennan stated in his concurrence in *Lamont v. Postmaster General*, "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *see also Reno v. ACLU*, 521 U.S. 844, 874 (1997) (invalidating provisions of law that "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another").

Moreover, just as the First Amendment right to speak includes the right to speak

anonymously, as discussed above, state and federal courts have recognized the right to read anonymously and have, accordingly, refused to enforce discovery demands for the identification of readers when not supported by a compelling government interest that was linked with sufficient precision to the demanded identification. Thus, *Lubin v. Agora*, 389 Md. 1, 882 A.2d 833 (2005), rejected a demand by the Maryland Securities Commissioner for the production of the list of subscribers to a financial newsletter; and *Tattered Cover v. City of Thornton*, 44 P.3d 1044 (Colo. 2002), restrained execution of a search warrant demanding that a bookstore produce customer records showing purchase of a "how to" book about producing drugs.

Two federal court decisions in the District of Columbia have held applied the same principle. When Special Prosecutor Kenneth Starr served a grand jury subpoena on Kramerbooks demanding a list of Monica Lewinsky's purchases, the United States District Court for the District of Columbia recognized the First Amendment implications and demanded an in camera showing of the government's claim of a compelling justification. *In re Grand Jury Subpoena to Kramerbooks & Afterwords*, Inc., Nos. 98–MC–135–NHJ, 26 Med. L. Rptr. 1599, 1600 (D.D.C. Apr. 6, 1998). In another case, that court limited grand jury subpoenas served in support of an investigation that was purportedly directed at obscene materials to seeking the identities of buyers of materials shown to be unprotected by the First Amendment. *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, 706 F. Supp. 2d 11, 18 (D.D.C. 2009). The lists of purchasers of expressive works of a sexual nature that were not shown to be outside First Amendment protection were protected against compelled disclosure. *Id.* at 20-21. And a different federal court, *In re Grand Jury Subpoena to Amazon.com Dated Aug. 7, 2006*, 246 F.R.D. 570, 572 (W.D. Wis. 2007), addressed a grand jury subpoena for a list of book buyers, issued in support of an otherwise

legitimate investigation into whether a particular seller was engaged in mail or wire fraud. The court quashed the subpoena because of the chilling effect of identifying book buyers who were themselves accused of no wrongdoing to the government without their consent. Instead of ordering production of the list of buyers, Amazon, which had received the subpoena, was allowed to inform a subset of the customers in question of the investigation and ask them whether they would be willing to communicate with the prosecutors. Only those users who were willing to speak to the government were to have their names provided.

The court explained:

> The subpoena is troubling because it permits the government to peek into the reading habits of specific individuals without their prior knowledge or permission. . . . [I]t is an unsettling and un-American scenario to envision federal agents nosing through the reading lists of law-abiding citizens while hunting for evidence against somebody else. [In an era of pervasive surveillance and politicized Justice Department applying litmus tests,] rational book buyers would have a non-speculative basis to fear that federal prosecutors and law enforcement agents have a secondary political agenda that could come into play when an opportunity presented itself. Undoubtedly a measurable percentage of people who draw such conclusions would abandon online book purchases in order to avoid the possibility of ending up on some sort of perceived "enemies list."

Id. at 572-573.

C. The Government Has Not Made a Showing of Compelling Need to Identify the 1,300,000 Internet Protocol Addresses from Which Users Viewed the DisruptJ20 Web Site.

The implications of the Court allowing federal prosecutors to compel the identification of the more than a million IP addresses from which users viewed a web site devoted to protesting the President's inauguration are chilling indeed. Although a warrant this broad would be disturbing in any administration, the Doe intervenors have particular reason to be concerned in an administration led by a President who has shown intense intolerance for disagreement and a tendency to lash out

with raw language and threats directed at political adversaries. Intrusion into the privacy of so many individuals who viewed the anti-Trump protest site anonymously should not be enforced without a highly exacting showing of the government's need for that information.

The affidavits of the Doe intervenors explain the innocent, constitutionally protected reasons for looking at the DisruptJ20 web site. They wanted to protest, and to find protest activities in which they would be comfortable participating, and to which it would be appropriate to expose their children. They were planning their own protest activities, and they wanted both to draw on the ideas of others and to avoid getting in the way of others. They engage in online activism and online communications of their own, and wanted to study the methods used by others to communicate their activities. And one of the Does was a journalist living in Maine who visited the web site for the additional purpose of reporting on anti-Trump activities in the nation's capital. The Government has no legitimate basis snooping into their identities.

In that regard, even assuming that the United States has made a sufficient showing of probable cause to support some aspects of its search warrant — a matter that the Doe intervenors do not address with respect to parts of the subpoena not related to the disclosure of their IP addresses — intervenors have no reason to believe that the Government has shown any basis for demanding production of the log files showing the IP addresses of the anonymous Internet users who viewed the DisruptJ20 web site. A review of the web site reveals that it was largely devoted to expressing constitutionally protected opinions about Donald Trump and advocating a variety of peaceful protest activities directed at expressing such opinions on Inauguration Day and immediately before and after that date. Like the Doe intervenors, who explain in their affidavits the reasons why they viewed the web site, there is every reason to expect that the overwhelming majority of Internet users viewed the

web site for entirely protected reasons.

Moreover, enforcing the subpoena to identify anonymous users who viewed that site would have an enormous chilling effect on the public's right to surf the Internet and view political expression that they find of interest. The affidavits show that the Does are very concerned about being identified to federal prosecutors. They oppose Trump, but they do not want to be on his Enemies List. They fear a visit from the FBI or a call from federal prosecutors as a result of being identified as among the anonymous readers of the web site. It is likely that their reactions are typical.

What's more, even assuming for the sake of argument a legitimate basis for some parts of the warrant, the lesson of the many cases cited in the previous two parts of this memorandum is that the Government bears the burden of establishing the basis for each part of the challenged warrant. Thus, the United States must provide a compelling explanation for its demand for production of information leading to the identification of the more than one million addresses used by people who viewed this web site. And the Government cannot justify its sweeping demand for identifying information on the hope that a handful of the users thus identified will prove to have been guilty of some crime.

So far as intervenors are aware, the Government made no effort to justify this aspect of its subpoena. Unless it provides a justification that rises to the level of compelling need, the enforcement of the warrant should be denied on First Amendment grounds. Indeed, unless the government can show probable cause to believe that merely viewing this web site is evidence of criminal activity, enforcement of the warrant can be denied without reaching the First Amendment arguments, but simply for the failure to show probable cause supporting the search.

CONCLUSION

The Court should deny enforcement of the warrant insofar as it demands production of the server log files for the DisruptJ20 web site.

Respectfully submitted,

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