New York County Clerk's Index Nos. 30207/13, 30178/14

Court of Appeals of the State of New York

IN RE: 381 SEARCH WARRANTS DIRECTED TO FACEBOOK INC. AND DATED JULY 23, 2013

IN THE MATTER OF THE MOTION TO COMPEL DISCLOSURE OF THE SUPPORTING AFFIDAVIT RELATING TO CERTAIN SEARCH WARRANTS DIRECTED TO FACEBOOK, INC., DATED JULY 23, 2013

FACEBOOK, INC.,

Appellant,

-against-

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE,

Respondent,

BRIEF OF *AMICI CURIAE* THE NEW YORK CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE CENTER FOR DEMOCRACY & TECHNOLOGY

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PRELIMINARY STATEMENT

This case raises a series of questions at the intersection of privacy, transparency, and technology that fall squarely within *amici curiae*'s mission to protect civil rights and civil liberties in the digital age. At the heart of the case is a sweeping set of bulk warrants issued under the federal Stored Communications Act ("SCA") that compelled Facebook, Inc. to turn over to the Manhattan District Attorney, in secret, the contents of 381 user accounts—including any private messages, chat histories, photographs, comments posted on pages of friends and family, and membership lists of religious, political, and other social groups to which the users belong (*see* sample redacted search warrant at A.41-44). Of the 381 Facebook users whose private electronic communications were targeted by these bulk warrants over three years ago, 319 were never charged with any crime (Appellate Division opinion at A.30).

As the court below appreciated (Appellate Division opinion at A.30), the scope of the bulk warrants issued here and the District Attorney's professed right to indefinitely retain what it has seized raise significant concerns for the right to privacy under the United States and New York Constitutions. After all, as the Appellate Division recognized: "Facebook users share more intimate personal information through their Facebook accounts than may be revealed through rummaging about one's home" (*id.*).

Despite recognizing the privacy interests at stake, the Appellate Division erred when it, like the trial court, failed to review the constitutionality of the bulk warrants, reasoning that Facebook had no right to challenge the warrants on behalf of its users (A.11). At the same time, the Appellate Division failed to review, without explanation, the trial court decision that approved the indefinite gag order that prevented Facebook from notifying its users of the warrants (A.36-37) and the decision that permitted the District Attorney to continue to withhold from public access the affidavit submitted in support of the warrants (A.38-40).

Amici curiae focus their brief on the right of service providers to challenge the warrants on behalf of their users, the right of service providers to notify users of the warrants, and the public's right to access the warrant application materials. Specifically, *amici curiae* support and supplement Facebook's discussion of these issues with five specific points that may otherwise escape the Court's attention.

First, the SCA must be interpreted as a constitutional matter to grant service providers like Facebook the right to challenge the scope of the warrants. Warrants issued under the SCA compel service providers to engage in the act of searching for and turning over electronic data. It has long been the case that when the government seeks to conscript third-parties into performing some function for the State, it must at minimum give those parties the Due Process opportunity to challenge the reasonableness of the compulsion. The interpretation of the SCA

that gives companies like Facebook the right to challenge the scope of SCA warrants is the only one that complies with Due Process.

Second, the need to protect the constitutional rights of individuals weighs strongly in favor of recognizing Facebook's third-party standing to defend the privacy rights of its users against SCA warrants. In this digital age, a vast swath of deeply private information is in the hands of companies—emails, calendars, photographs, reading records, and more. These companies must be permitted to stand up for their users and to defend against unconstitutional government overreach into that information, particularly where, as here, the users themselves are kept in the dark about the government's actions.

Third, unjustified, indefinite gag orders on service providers like Facebook violate their First Amendment right to notify their users that their private information is being sought by the government. Gag orders are prior restraints on speech that come with a heavy presumption of unconstitutionality; they are justified only if they are narrowly tailored to advance a compelling government need and there are no less restrictive alternatives that would advance that need. They should not be imposed routinely, and in any event they should presumptively be of specified, limited duration.

Fourth, the First Amendment also requires that the affidavit that was submitted in support of the bulk warrants be made available to the public. The

unsealing of warrant application materials would directly advance the First Amendment goal of allowing informed public debate on matters of great public significance—including the scope of executive authority to search and seize our digital information. There is no longer any plausible interest in keeping the affidavit sealed in this case, as over three years have passed since the warrants were issued, indictments have been filed, and a number of cases have concluded.

Finally, although the public's right to access warrant application materials attaches regardless of whether they are maintained by the trial court, the Court should use this opportunity to instruct lower criminal courts to keep copies of warrant application materials. The trial court here failed to keep a copy of those materials, and it appears that this is regular practice in the Manhattan Criminal Court. It is critical for the promotion of good government and a fair criminal justice system for all criminal courts in New York to keep a record of the search warrant applications as well as the warrants.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of **the American Civil Liberties Union ("ACLU")**. Both organizations are non-profit, non-partisan entities dedicated to the defense and protection of the civil rights and civil liberties embodied in the Bill of Rights. Among the most fundamental of rights are the rights of privacy and free expression secured by the

Fourth and First Amendments to the federal Constitution and by Article I, Sections 12 and 8 of the New York State Constitution. The NYCLU and the ACLU have been involved in efforts to ensure that the right to privacy remains robust in the face of new technologies (*see e.g. Riley v California*, 134 S Ct 2473 [2014] [holding that police may not search a cell phone under the search-incident-to-arrest exception to the warrant requirement]; *United States v Jones*, 132 S Ct 945 [2012] [holding that attachment of GPS device to automobile of criminal suspect in order to track suspect's movements constituted a search under the Fourth Amendment]; *People v Weaver*, 12 NY3d 433, 445 [2009] [holding that prolonged use of GPS to monitor person's movement without a warrant violated State constitutional right to privacy]).

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit corporation with a subscribed membership of more than 750 attorneys, including private practitioners, public defenders, and law professors, and is the largest private criminal bar in the State of New York. It is a recognized state affiliate of the National Association of Criminal Defense Lawyers ("NACDL") and, like that organization, works on behalf of the criminal defense bar to ensure justice and due process for those accused and convicted of crimes. The NACDL and NYSACDL regularly file amicus curiae briefs in this Court, seeking to provide assistance in cases that present issues of broad importance to

criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Center for Democracy & Technology ("CDT") is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. CDT represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

ARGUMENT

I. SERVICE PROVIDERS HAVE THE RIGHT TO CHALLENGE STORED COMMUNICATIONS ACT WARRANTS.

Facebook correctly argues that the plain-language interpretation of section 2703(d) of the Stored Communications Act gives service providers the right to challenge the SCA warrants issued under it (appellant's brief, Feb. 16, 2016, at 20-24). In fact, this is the necessary interpretation of the SCA to avoid significant constitutional problems that would arise otherwise.

As Facebook highlights in its brief, "SCA warrants are very different from traditional warrants" (appellant's brief at 20). Traditional warrants are, by rule and design, directed at law enforcement and empower law-enforcement officials to search for and seize the objects of the warrant (CPL 690.05 [2] [a] ["A search warrant is a court order and process directing a police officer to conduct . . . a search of designated premises . . . for the purpose of seizing designated property or

kinds of property, and to deliver any property so obtained to the court which issued the warrant . . . ."]; *Application of U.S. of Am. for Order Authorizing Installation of Pen Register or Touch-Tone Decoder & Terminating Trap*, 610 F2d 1148, 1154 [3d Cir 1979] [explaining that Federal Rules of Criminal Procedure "den[y] ordinary citizens and corporations the authority to execute search warrants" in order to "guard against excessive and abusive use of the extraordinary power to search private premises and seize private property"]). By contrast, SCA warrants, as even the Appellate Division recognized, are served on the third-party provider and compel the third party to take action (A.22-23).

This is not to say that SCA warrants are not warrants in a certain sense (they are in that they require probable cause), or that law enforcement can never seek involvement of third parties in executing a warrant, but it does mean that these warrants implicate additional constitutional concerns. The case law around the All Writs Act, 28 USC § 1651, which law enforcement uses to require third parties to assist in the execution of warrants (*see e.g. United States v New York Tel. Co.*, 434 US 159, 172 [1977]), is instructive. First, the United States Supreme Court has dictated that law enforcement cannot impose unreasonable burdens on third parties in requiring their assistance (*see id.* at 172). Second, courts issuing All Writs Act orders have recognized that a third-party company served with the order, and therefore being forced to participate in the execution of a warrant, has a Due

Process right to notice and an opportunity to be heard on the reasonableness of the order prior to being compelled to assist (*see Application of U. S. of Am. for an Order Authorizing an In-Progress Trace of Wire Communications Over Tel. Facilities*, 616 F2d 1122, 1132-1133 [9th Cir 1980] [holding that a telephone company served with an All Writs Act order to aid in the execution of a warrant for tracing phone calls must be given an opportunity to challenge it]; *In re U.S.*, 610 F2d at 1156-1157 [same]; *In re XXX, Inc.*, 2014 WL 5510865, *2 [SD NY, Oct. 31, 2014, No. 14 MAG. 2258] [same for court order demanding a telephone manufacturer's assistance in unlocking a cell phone in aid of a search warrant]; *In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Ct.*, 2015 WL 5920207, *7 [ED NY, Oct. 9, 2015, 15 Misc. 1902 (JO)] [same]). "The procedural guarantees of due process attach when the state derives a person of an interest in 'liberty' or 'property,'" and an All Writs Act order requiring assistance undoubtedly deprives the company of its property interest in the control of its goods and services (*In re U.S.*, 610 F2d at 1156).

Service providers compelled to assist in the execution of SCA warrants have the same Due Process right to challenge those warrants as they have to challenge All Writs Act orders. Both court orders deprive recipients of the control of their property interest, and so both trigger the Due Process right to a meaningful opportunity to respond prior to compliance. In fact, this procedural right is so

established and commonsense that the Second Circuit recently reviewed Microsoft's effort to quash SCA warrants, which Microsoft argued were legally defective, without questioning Microsoft's right to do so (*see In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F3d 197, 222 [2d Cir 2016] [directing lower court to quash warrants that demand user content stored outside of the United States]; [1] *see also e.g. In re Search of Google Email Accounts*, 99 F Supp 3d 992, 995 [D Alaska 2015] [holding that 18 USC 2703 [d] permits service providers to move to modify a warrant that is unduly burdensome]). Facebook's interpretation of the SCA is the only interpretation that is consistent with the right to Due Process.

II. SERVICE PROVIDERS MAY RAISE THE CONSTITUTIONAL RIGHTS OF THEIR USERS IN CHALLENGING STORED COMMUNICATIONS ACT WARRANTS.

The District Attorney argues that even if Facebook has the statutory right to challenge the SCA warrants, the Court should affirm the appellate court's holding that Facebook cannot raise the constitutional rights of its users in this proceeding (respondent's brief, May 12, 2016, at 37-40; A.29-30). But this ignores the recognition that litigants are permitted to raise the rights of third parties as a

[1] The Microsoft case undermines the District Attorney's argument that even if the SCA gives Facebook the right to challenge the warrants, Facebook is not permitted to challenge the legality of the warrants and is limited to complaining about the "unusually voluminous nature" of the requests or the "undue burden" that they impose in a practical sense (respondent's brief at 41-42 [citing 18 USC 2703[d]]). As Facebook explains, being compelled to participate in a search that the company believes violates its users' privacy rights is an "undue burden" (appellant's reply brief, June 17, 2016, at 11-12).

prudential matter where there is, as here, "(1) the presence of some substantial relationship between the party asserting the claim and the rightholder, (2) the impossibility of the rightholder asserting his own rights, and (3) the need to avoid a dilution of the parties' constitutional rights" (*N.Y. County Lawyers' Assn v State of N.Y.*, 294 AD2d 69, 75 [1st Dept 2002]).

Amici write specifically to emphasize that the third factor—the need to protect against the dilution of users' constitutional rights—counsels strongly in favor of permitting Facebook to assert the right of its users. In the digital age, much of our private information, from Facebook messages to emails to photographs to Internet search queries, is in the hands of third-party service providers (*Jones*, 132 S Ct at 957 [Sotomayor, J., concurring] [noting that in this digital age "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks"]). The service providers that hold this information are often the most effective line of defense against government attempts to access this information, especially because the SCA does not require the government to notify the users of their attempts and indeed allows the government to obtain gag orders on the companies to keep the users in the dark (18 USC § 2703 [a], § 2705 [b]).

Nonetheless, the appellate court found, and the District Attorney argues, that even plainly unconstitutional SCA warrants may be reviewed only in an ex post

motion to suppress rather than ex ante by service providers (A.18-19; respondent's brief at 37-39). But this argument ignores the fact that the prospect of suppression is meaningless to those never charged with a crime, or those whose cases were dismissed, or even to those who were charged but whose Facebook accounts contained no evidence relating to a crime. In other words, motions to suppress are an entirely inadequate remedy to constrain privacy violations in circumstances where the government's conduct is most likely to be unjustified and unconstitutional.

This case is illustrative of the inadequacy of relying on motions to suppress to protect privacy rights. Of the 381 targeted Facebook user accounts in the city's investigation of disability fraud, 319 users were not indicted (A.30). Some of those indicted had their charges dismissed after the District Attorney found evidence suggesting that they had indeed been disabled.[2] Over three years after the warrants were issued, *amici* are not aware of any case in which the constitutionality of the warrants at issue has been decided in a motion to suppress; at this point it seems likely that there will be no judicial review of the troubling scope of the bulk warrants served on Facebook if not by this Court in this appeal.[3]

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[2] *See* James C. McKinley Jr., *Judge Drops Charges for 8 in an Inquiry on Benefits*, NY Times, http://www.nytimes.com/2014/08/22/nyregion/judge-drops-charges-for-8-in-an-inquiry-on-benefits.html [Aug. 21, 2014].

[3] It is an illusion that every criminal case will reach a point where a motion to suppress is filed. It is likely that most of the prosecutions related to this case concluded with plea bargains without reaching motion practice. (*See Missouri v Frye*, 566 US –, –, 132 S Ct 1399, 1407

The existence of a potential remedy that is so illusory and ineffective should not preclude Facebook from raising the constitutional rights of its users (*see e.g. N.Y. County Lawyers' Assn.*, 294 AD2d at 76 [permitting criminal defense attorneys to raise the constitutional rights of their indigent clients because the clients are not in a position to litigate on their own behalf and other remedies that they have are not as effective in protecting their rights]; *Craig v Boren*, 429 US 190, 193-94 [1976] [permitting vendors of alcoholic beverages to raise the rights of their customers while recognizing the possibility of the customers bringing their own cases]; *Singleton v Wulff*, 428 US 106, 117 [1976] [permitting physicians to assert women's interest in securing an abortion despite availability of several means by which women could litigate their rights directly]).

III. SERVICE PROVIDERS SHOULD NOT BE SUBJECT TO UNJUSTIFIED, INDEFINITE GAG ORDERS.

An unjustified, indefinite gag order that prevents companies from providing notice of SCA warrants to users violates the First Amendment. A gag order accompanying an SCA warrant is a prior restraint on speech that comes with a heavy presumption of unconstitutionality because it imposes "the most serious and the least tolerable infringement on First Amendment rights" (*Neb. Press Assn v Stuart,* 427 US 539, 559 [1976]; *see also Fischetti v Scherer*, 44 AD3d 89, 92-93

[2012] ["[O]urs 'is for the most part a system of pleas, not a system of trials.'"]; *People v Baret*, 23 NY3d 777, 800 [2014] [recognizing "the sheer volume of prosecutions disposed of by guilty plea"].)

[1st Dept 2007] ["[P]rior restraints of speech are unquestionably viewed with a strong presumption against their validity."]). Such a prior restraint is justified only if it is narrowly tailored to advance a compelling government need and there are no "less restrictive alternatives" that would advance that need (*see Natl. Broadcasting Co. Inc. v Cooperman*, 116 AD2d 287, 293 [2d Dept 1986] [citing *Neb. Press Assn,* 427 US at 562]).

There are some reasons to suspect that the gag order here was issued as a routine matter, without the justification necessary to comply with the First Amendment. Nothing in the record suggests that there was any particular need for a gag order in this case beyond the generalized concern that "disclosure could cause individuals to flee, destroy evidence, or otherwise interfere with an ongoing criminal investigation" (sample search warrant at A.43-44). These general concerns arise in the execution of every warrant, but property owners have historically received notice of warrants in ordinary circumstances, as well as notice that property has been taken (*see* CPL 690.50 [1] [requiring police officers to make reasonable effort to give "notice of his authority and purpose" and to show "the warrant or a copy thereof upon request" when searching a premise or a vehicle, except in certain circumstances]; CPL 690.50 [4] [requiring "a receipt itemizing the property taken" when seizing property pursuant to a search warrant]).

Moreover, even assuming that the District Attorney had specific and compelling concerns justifying this gag order, nothing in the record justifies an *indefinite* gag. Gag orders must be narrowly tailored in duration to the compelling need (*see e.g. Butterworth v Smith*, 494 US 624, 632-33 [1990][holding that a permanent ban on the disclosure by a grand jury witness of his own testimony cannot be justified once the grand jury has been discharged]; *Kamasinski v Judicial Review Council*, 44 F3d 106, 112 [2d Cir 1994][upholding a limited ban on disclosure of judicial investigations, but "only so long as the [government] acts in its investigatory capacity"]; *N.Y. Times Co. v Starkey*, 51 AD2d 60, 64 [2d Dept 1976] ["[T]he right to a fair trial may require the issuance of an order, *temporary in duration*, forbidding the publication by the press of information prejudicial to a defendant on trial."] [emphasis added]). Even in the context of international terrorism investigations, courts have rejected indefinite gags (*In re Natl. Sec. Letter*, 930 F Supp 2d 1064, 1075-77 [ND Cal 2013]; *Doe v Gonzales*, 500 F Supp 2d 379, 421 [SDNY 2007] ["Once disclosure no longer poses a threat to national security, there is no basis for further restricting [National Security Letter] recipients from communicating their knowledge of the government's activities. International terrorism investigations might generally last longer than run-of-the-mill domestic criminal investigations, but they do not last forever."], *aff'd in part and rev'd in part by Doe, Inc. v Mukasey*, 549 F3d 861 [2d Cir 2008] *as mod*

(Marc. 26, 2009)). As one judge of the Second Circuit has remarked in such a context:

> "[A] ban on speech and a shroud of secrecy in perpetuity are antithetical to democratic concepts and do not fit comfortably with the fundamental rights guaranteed American citizens. Unending secrecy of actions taken by government officials may also serve as cover for possible official misconduct and/or incompetence."
>
> (*Doe v Gonzales*, 449 F3d 415, 422 [2d Cir 2006] [Cardamone, J, concurring].)

Given the First Amendment interests at stake, a magistrate judge in Texas issued a protocol requiring that gag orders on electronic surveillance be limited in time as a presumptive matter and subject to extension only upon a renewed showing of a compelling need (*In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F Supp 2d 876, 880-87 [SD Tex 2008]). He found that such a protocol would help bring the "the indispensable role of daylight in our system of justice" (*id.* at 886). Like the court in Texas, this Court should adopt a clear set of rules that limits indefinite gag orders as required by the First Amendment.

IV. THE PUBLIC HAS A FIRST AMENDMENT RIGHT TO ACCESS THE WARRANT APPLICATION MATERIALS.

The First Amendment also requires the unsealing of the investigator's affidavit that was submitted in support of the bulk warrants. The First Amendment right of public access to criminal proceedings and documents exists to promote

informed discussions of governmental affairs, so that "the individual citizen can effectively participate in and contribute to [the] republican system of self-government" (*Globe Newspaper Co. v Superior Ct. for Norfolk County*, 457 US 596, 604-05 [1982] [finding First Amendment right of the public to access criminal trials]). To further this purpose, a number of courts that have held that the First Amendment qualified right of access attaches to warrant application materials after their execution and after the investigation is over (*see e.g., In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F2d 569, 573 [8th Cir 1988] [finding First Amendment right of access to warrant application materials]; *United States v Loughner*, 769 F Supp 2d 1188, 1195 [D Az 2011] [same after investigation has concluded]; *In re Application of the N.Y. Times Co. for Access to Certain Sealed Ct. Records*, 585 F Supp 2d 83, 87-90 [DDC 2008] [same].)[4] These courts correctly applied the two-factor test for determining whether the First Amendment right of access attaches, which examines whether society has "experience" with the tradition of access and whether "logic" dictates that public

[4] As indicated by the District Attorney (*see* brief of respondent at 58-59), some courts have held that the First Amendment right of access does not apply to warrant application materials. At least some of the courts cited by the District Attorney, however, namely the Ninth and the Fourth Circuits, only held that the right of access does not apply while an investigation is ongoing and did not consider the right to access in the post-investigation stage (*Times Mirror Co. v United States*, 873 F2d 1210, 1221 [9th Cir 1989] [reserving the question whether there is a First Amendment right of access to warrant materials after the investigation has concluded or indictments have been returned]); *Baltimore Sun Co. v Goetz*, 886 F2d 60, 62 [4th Cir 1989] [framing the question presented as whether the First Amendment convers a qualified right to access warrant materials prior to the indictment]).

access will have a positive effect on the criminal justice system (*Press–Enterprise Co. v Superior Ct. Of Cal. for Riverside County*, 478 US 1, 10-13 [1986] ["*Press–Enterprise II*"] [finding First Amendment right to access transcript of preliminary hearings under the two-factor test]),

First, "experience" favors public access to warrant application materials after the execution of warrants and after the investigation has concluded. The history of public access to criminal proceedings dates from before the founding of the country (*Richmond Newspapers v Virginia*, 448 US 555, 569-72 [1980]). While by necessity the warrant application proceeding itself has not been open to the public, "search warrant applications and receipts are routinely filed with the clerk of court without seal" after the warrants' execution[5] (*Gunn*, 855 F2d at 573; *see also In re Search Warrants Issued on Apr. 26, 2004*, 353 F Supp 2d 584, 589 [D Md 2004] [noting that sealing of search warrant materials was traditionally an extraordinarily action, becoming routine only since the 1990s]). Moreover, the existence of the common law tradition of access to these warrant application materials (brief of appellant at 50-51) weighs in favor of finding the "experience" of access supporting the First Amendment right (*see Hartford Courant Co v Pellegrino*, 380 F3d 83, 92 [2d Cir 2004] [noting that courts invoke the common

[5] That the District Attorney did not file the warrant applications with the court in this case makes little difference given that New York rules should be interpreted to require such filing. (*see supra* Part V).

law right in support of finding a history of openness under the First Amendment]; *In re New York Times*, 585 F Supp 2d at 89 ["The fact that there is a common law tradition of right of access is an appropriate consideration to take into account when examining the scope of the First Amendment"]).

Second, public access to warrant application materials after the execution of the warrants and after the conclusion of the investigation contributes positively to the functioning of the criminal justice system. It is well established that "[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process," "fosters an appearance of fairness, thereby heightening public respect for the judicial process," and "permits the public to participate in and serve as a check upon the judicial process" (*Globe Newspaper,* 457 US at 606). This Court has already recognized that suppression hearings that challenge warrants should be open to the public because the secrecy of the initial warrant application proceeding gives "particular value and significance" to later public scrutiny of the ex parte actions of the prosecutor and the judge (*Matter of Associated Press v Bell*, 70 NY2d 32, 38 [1987] [applying First Amendment right of access to suppression hearings because they "frequently challenge acts of the police and prosecutor"]). Public scrutiny of warrant application materials has the same salutary effect as public access to suppression hearings (*see Gunn*, 855 F2d at 573 ["[P]ublic access to documents filed in support of search warrants is important to the public's

understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct"]; *In re John Doe Partnership,* 145 Misc 2d 783, 787 [Sup Ct, Westchester County 1989] [ordering the public filing of warrant application materials with only limited redactions in that case and noting that the order is justified because the "[t]he issuance of search warrants is a significant feature of the criminal justice system which is susceptible to misapplication"]).

This case illustrates the value of public scrutiny of warrant application materials. Because of the sweeping scope of the warrants at issue and because of the relative novelty of such a broad electronic search, Facebook's appeal has generated significant media interest and public concern.[6] The District Attorney's refusal to disclose the investigator's affidavit, which contains its justification for the search, has only sowed distrust—because while "[p]eople in an open society do not demand infallibility from their institutions, . . . it is difficult for them to accept what they are prohibited from observing" (*Richmond Newspapers*, 448 US at 572).

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[6] *See e.g.* James McKinley, "Facebook Lawsuit Over Search Warrants Can Proceed, a Court in Manhattan Rules," N.Y. Times, Sept. 25, 2014, http://www.nytimes.com/2014/09/26/nyregion/facebook-suit-over-warrants-can-proceed-court-rules.html; Kashmir Hill, "Facebook Calls Foul on New York D.A.'s Secret Seizure of 381 Disabled Retirees' Photos, Likes, Private Messages," Forbes, June 27, 2014, http://www.forbes.com/sites/kashmirhill/2014/06/27/facebook-fighting-secret-warrant/; Jon Campbell, "NYCLU Weighs In On Facebook Search Warrants in New York Court," Village Voice, Aug. 11, 2014, http://blogs.villagevoice.com/runninscared/2014/08/nyclu_is_weighing_in_on_facebook_privacy_in_new_york_court.php.

Disclosure of the affidavit would allow the public to have a fully informed discussion of the prosecutorial and judicial conduct at issue in this case.

Here, because the First Amendment right of access attaches to the investigator's affidavit, denial of access must be narrowly tailored to serve compelling objectives (*see Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1, 6 [1st Dept 2001]). The District Attorney cannot meet this standard given that the warrants were executed over two-and-a-half years ago, indictments were filed, and many of the cases have now concluded (petitioner's addendum at 3). The investigator's affidavit should be unsealed, with redactions if necessary.[7]

V. TRIAL COURTS SHOULD MAINTAIN COPIES OF WARRANT APPLICATION MATERIALS.

Finally, although the warrant application materials are judicial documents whether they are filed with the court or not, the Court should take this opportunity to instruct lower courts that they must retain copies of warrant application materials. From what *amici* understand, unlike federal courts (Fed. R. Crim. Pro. 41(g)), New York courts do not have a uniform practice of maintaining warrant application materials. In fact, it appears that it is the general practice of the

[7] To the extent that there are legitimate privacy interests at stake, redaction is an alternative to complete sealing (*see Matter of John Doe Partnership*, 145 Misc 2d at 789-90 [ordering the warrant application to be publicly filed with limited redactions for the names of individuals]).

Manhattan Criminal Court *not* to retain a copy of these materials and instead entrust law enforcement to hold on to such materials.[8]

This absence of record-keeping is unacceptable to judicial integrity and fairness of the criminal justice system, as the highest courts of two states have found in invalidating such routine failure to maintain copies of warrant application materials (*see People v Galland*, 45 Cal 4th 354, 368, 197 P3d 736, 745 [2008] [holding that "a sealed search warrant affidavit, like search warrant affidavits generally, should ordinarily be part of the court records that is maintained at the court"]; *Anderson v Taylor*, 149 P3d 352, 358 [Utah 2006] [requiring all magistrates issuing search warrants to retain in their custody copies of search warrants and supporting material]). Maintaining warrant application materials as part of court files preserves the integrity of the court record (*see Anderson*, 149 P3d at 358). It "eliminates the need for time-consuming and cumbersome record-authentication procedures" (*Galland*, 45 Cal 4th at 368, 197 P3d at 745). And it reduces the possibility that affidavits and other court records are mishandled or even altered without detection, thus threatening the criminal defendants' right to a fair trial and fair appellate review (*see Anderson*, 149 P3d at 358; *Galland*, 45 Cal 4th at 359, 197 P3d at 739 [noting that search warrant affidavit portion in custody

[8] Based on information from court staff conveyed to NYCLU staff in 2014, it appears that the Criminal Courts of the City of New York in Queens County, Richmond County, and Kings County number and inventory warrant application materials when they are submitted and the clerk's office retains such materials after the warrant is returned. The public may access those materials with an unsealing order.

of the police department was destroyed prior to completion of appellate review]). As the Supreme Court of Utah pronounced:

> "The policy [of turning over custody of warrant application materials to law enforcement without securing copies] is sound only if we may confidently assume that law enforcement always acts with complete honesty, integrity, and competence. Unfortunately, it is much more likely that even the most honest and well-intentioned officer will occasionally make mistakes in handling, preserving, and filing the warrant documents. Were it not so, there would be no need for a warrant requirement at all."
>
> *Anderson*, 149 P3d at 358.

Indeed, the New York State Criminal Procedure Law reflects the principle that judicial record-keeping is essential for oversight of the search warrant process. Under CPL 690.36, oral applications for warrants must be recorded and filed with the court within twenty-four hours of the issuance of the warrant. (CPL 690.36 [3].) And under CPL 690.40, when an oral examination is offered in support of a search warrant application, such examination "must be either recorded or summarized on the record by the court." (CPL 690.40 [1].) As this Court has recognized, the legislative purpose of this recordkeeping requirement is the "assurance of the regularity of the application process" and "preservation for appellate review of the grounds upon which a search warrant is issued" (*People v Taylor*, 73 NY2d 683, 688-89 [1989]).

Although the CPL provision relating to the return of the warrant does not explicitly require the filing of written application materials (CPL 690.50 [5]), the

CPL evinces the assumption that warrant application materials be filed with the court (*see In re Sealed Documents*, 172 Vt 152, 158-59, 772 A2d 518, 524-25 [2001] [construing its own criminal procedure law that, like New York's, does not explicitly require the filing of written warrant affidavits, and holding that warrant application materials are nonetheless court records]). It would make no sense for New York State to require recordkeeping of oral applications for "assurance of the regularity of the application process" and "preservation for appellate review" (*Taylor*, 73 NY2d at 689), but not to do the same for written applications for warrants (*id.* [holding that neither goal was met where warrant application was "not kept as an official court record, with the safeguard attendant upon preserving such records for purposes of legitimate challenge to the warrant or appellate review"]).

The importance of record-keeping is heightened in the age of electronic surveillance where law enforcement may claim novel and unprecedented authority to conduct surveillance or experimenting with new technologies. Maintaining the warrant application files in court files ensures that the original records are kept not only for the benefit of criminal defendants but for those members of the public who seek to understand what judges and District Attorneys are doing in the ex parte warrant process. The Court should order lower courts to maintain copies of warrant applications in their files.

CONCLUSION

For the reasons above, the Court should reverse the Appellate Division's decision holding that Facebook cannot move to quash the warrants based on the constitutional rights of its users, and decide in Facebook's favor in each of the issues raised on this appeal.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH 22 NYCRR §500.1 and 500.13 (c)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of 500.13(c)(1) because the total word count for all printed text in the body of the brief, exclusive of the corporate disclosure statement, the table of contents, and the table of cases and authorities required by subsection (a) of this section is 5,882 words.

2. This brief complies with the typeface requirements of and the type style requirements of 500.1(j)(1) because the body of this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman and the footnotes are printed in 12-point Times New Roman.

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