NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

IN RE SEARCH WARRANTS DIRECTED TO FACEBOOK INC. AND DATED JULY 23, 2013	NOTICE OF MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT'S OPPOSITION TO APPELLEE'S MOTION TO DISMISS Sup. Court, New York County Index No. 30207-13

PLEASE TAKE NOTICE, that upon the affirmation of Mariko Hirose sworn to on August 7, 2014, a copy of the proposed brief of *amici curiae*, and all the papers and proceedings in the above-styled case, the undersigned will move this Court at 27 Madison Avenue, New York, New York, on Monday, August 18, 2014 at 10:00 A.M., or as soon thereafter as is practicable, for an order granting leave to the New York Civil Liberties Union and the American Civil Liberties Union to file with this Court a brief of *amici curiae* in support of Appellant Facebook's opposition to the New York County District Attorney's Office's motion to dismiss the appeal in the above-styled action.

Respectfully submitted,

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Dated: August 7, 2014
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

IN RE	:	
	:	Sup. Court, New York County
SEARCH WARRANTS	:	Index No. 30207-13
DIRECTED TO FACEBOOK INC.	:	
AND DATED JULY 23, 2013	:	

AFFIRMATION OF MARIKO HIROSE IN SUPPORT OF MOTION BY THE NEW YORK CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Mariko Hirose, an attorney admitted to practice before the courts of New York, affirms the following to be true under penalty of perjury:

1. I am an attorney at the New York Civil Liberties Union (NYCLU) and I submit this affirmation in support of the motion by the NYCLU and the American Civil Liberties Union (ACLU) for leave to file the attached brief as *amici curiae* in support of Appellant Facebook and in opposition to the motion of the District Attorney of New York County to dismiss the appeal in the above-styled matter.

2. The matter involves an appeal from the denial of a motion to quash warrants directing Facebook, Inc. to search, retrieve, and produce virtually all of the communicative material on the Facebook website with respect to 381 Facebook accounts. The court issuing the warrants also imposed an order directing that Facebook not disclose the fact that the materials were the subject of seizure pursuant to the warrants. Facebook has appealed from the issuance of the gag order as well as from the denial of the motion to quash.

3. The NYCLU is the New York State affiliate of the 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. Those rights are very much implicated by the above-styled appeal. Accordingly, the NCYLU and ACLU respectfully request the opportunity to address these matters in an *amici* brief in support of Facebook's opposition to the motion to dismiss this appeal.

4. The NYCLU and the ACLU are involved in efforts to ensure that the Internet remains a free and open forum for the exchange of information and ideas and 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 N.Y.3d 433, 445 (2009) (holding that prolonged use of GPS to monitor person's movement violated State constitutional right to privacy). Accordingly, the NYCLU and the ACLU respectfully request to submit the attached *amici* brief in an effort to provide assistance to the Court as it addresses the motion to dismiss this meritorious appeal.

5. The proposed *amici* brief argues, first, that the warrants issued in this case failed to satisfy the Fourth Amendment's particularity requirement, which must be applied with "scrupulous exactitude" where a warrant authorizes the seizure of expressive and communicative materials. *Stanford v. Texas*, 379 U.S. 476, 485 (1965). The unanimous Supreme Court opinion in *Riley v. California*, decided after Appellant filed its opening brief, strengthens the growing consensus that the particularity requirement is heightened in searches of electronic devices and

accounts, since these searches can reveal highly private information—including medical information, political affiliations, hobbies, pastimes, and romantic life. The warrants issued in this case failed to satisfy federal constitutional standards.

6. Second, *amici* argue that the warrants failed to meet the heightened particularity standard required under the New York State Constitution. The New York Court of Appeals has held that where a warrant authorizes the seizure of expressive materials, the State Constitution imposes a more exacting standard than its federal counterpart. It is clear that much of the private and personal information sought by the government here—including private conversations, political and religious associations, and photographs—directly implicate the users' First Amendment protected speech interests. As such, the court below was required to apply the State Constitution's rigorous standard, which it failed to do.

7. Third, *amici* argue that the gag order's wholesale prior restraint of speech was unconstitutional because it failed strict scrutiny. Given the strong presumption against the validity of prior restraints, gag orders can only be justified if they advance a compelling government need in a narrowly tailored fashion. If the government demonstrated a compelling need to ensure against the destruction of evidence, a preservation order would have provided a more narrowly tailored approach to address that concern. Furthermore, even if the government's legitimate concerns would not have been adequately addressed with a preservation order, any gag order issued should have been presumptively limited in duration.

8. All of the preceding matters demonstrate the meritorious nature of Facebook's appeal.

9. In addition, *amici* argue that Facebook has standing to move to quash the warrants and appeal the denial of that motion. The bulk warrants served on Facebook were to be executed like a subpoena, and before facilitating what it believed would be unlawful searches and seizures of

its users' information, Facebook had the right to challenge the scope and breadth of the warrants. So understood, the lower court's order denying Facebook's challenge is properly the subject of an appeal. Moreover, given Facebook's substantial relationship with its users and their relative inability to assert their constitutional rights, Facebook satisfies all the factors for third-party standing to raise the constitutional rights of its users.

10. Finally, *amici* argue that this appeal is not moot. As to Facebook's compliance with the warrants, the privacy interests of Facebook's users in the seized information nonetheless endure. As to the recent lifting of the gag order following the filing of Facebook's opening brief in this appeal, the government's actions do not moot this appeal and in fact situate it squarely within two exceptions to the mootness doctrine. First, a defendant's voluntary cessation of allegedly illegal conduct generally does not deprive a court of power to hear and determine the case. The government carries the heavy burden of showing that there is no reasonable expectation that the wrong will be repeated in the future and that intervening events have irrevocably eradicated all the effects of the alleged violation. The government cannot meet that burden here, given that it continues to possess the Facebook users' information and aggressively maintains its claimed authority to seek such gag orders in future cases. Second, to the extent that the government will continue to seek indefinite gag orders and only lift them when facing an appeal, the issues presented by this case fall within the exception to mootness of conduct capable of repetition yet evading review.

11. Each of the arguments identified above is amplified in the attached brief. Accordingly, *amici* request that the Court grant leave to file the attached brief in support of Facebook's opposition to the motion to dismiss the above-styled appeal.

12. Facebook has consented to *amici*'s motion for leave to file the attached brief. The New York County District Attorney's Office takes no position on the motion.

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Dated: August 7, 2014
New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 23

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

Index No.: Undocketed

NOTICE OF APPEAL

Hon. Melissa C. Jackson

FILED UNDER SEAL

SCID 30207-13

PLEASE TAKE NOTICE that Facebook, Inc. hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from a decision and order of the Supreme Court, County of New York entered on September 20, 2013 denying Facebook Inc.'s Motion to Quash Bulk Search Warrants and Strike Nondisclosure Provisions, and from each and every part thereof.

Dated: New York, New York,
September 20, 2013

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 23

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

DECISION
Undocketed

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Melissa C. Jackson, J.:

On July 23, 2013, this court ordered the execution of three-hundred eighty-one search warrants directed at subscribers of Facebook, Inc., ('Facebook') authorizing the District Attorney and its investigators to search and seize digital information, uploaded by hundreds of individual account users, stored within Facebook's servers. The search warrants, identical in scope, were supported by a ninety-three page affidavit filed by the New York County District Attorney's Office detailing the evidence culled during a long-term investigation into a massive scheme to defraud and other related crimes.

On August 20, 2013, Facebook moved to quash the search warrants on the grounds that the warrants constituted a violation of its users' Fourth Amendment rights. In the alternative, Facebook moved to vacate the nondisclosure portion of the warrants, asserting that the warrants were defective because they did not cite the correct provision of the Federal Stored Communications Act. Should the court deny disclosure, Facebook, requested that the court create an independent monitor and minimization protocol to safeguard its subscribers' alleged privacy interests.

For the foregoing reasons Facebook's motion is denied in its entirety.

Factual Findings and Background

Facebook is a social online media website which enables computer users to set up personal accounts and profiles.[1] These individual accounts are managed by the end user (or customer) and are subject to an end user agreement between Facebook and the account user outlining the terms of use for the website. The individual account user is able to control their privacy settings on their accounts which allows (or disallows) certain users from viewing their profiles and postings.

Facebook could best be described as a digital landlord, a virtual custodian or storage facility for millions of tenant users and their information. The digital information (i.e., a photograph or video), once 'uploaded' to Facebook, is stored in Facebook's digital repository. A

[1] Each Facebook account user is given a "wall" (which functions as a digital corkboard) which permits the account user or another user (i.e. friend, family or someone from the general public) to post pictures, links, stories, videos and other items for others to see. The wall is broken down by a "timeline" feature which permits the posting user to post such items by the relevant month and year in which they may apply.

user can then access the photograph anywhere in the world and from any device that connects to Facebook because the picture is now stored on Facebook's servers. The mechanism of 'global' or 'open' access is distinguishable from users that 'download' digital information to their personal computers from the Internet. Downloaded digital information transfers from cyberspace to the individual user's computer. Hypothetically, were a court to authorize the search of the latter downloaded information, the warrant would permit the seizure of the individual user's physical computer (also known as the hard drive) to enable a forensic analyst to search the digital information to seek evidence of a crime. In the matter at bar, Facebook is a digital storage facility of its subscriber's digital information; the information is not kept on the user's computer. Hence, the search warrants authorize the search and seizure of digital information contained within the Facebook server.

Due to the unique nature of Facebook as an online repository of digital information, the search warrants at issue require Facebook to permit the District Attorney access to individual user accounts as well as archived or stored information maintained by Facebook. Due to the fungible nature of digital information, the ability of a user to delete information instantly and other possible consequences of disclosure, the court ordered the search warrants sealed and Facebook not to disclose the search and seizure to its users.

AUTHORITY

First and foremost, the court is authorized to issue search warrants pursuant to New York State law which codifies the State and Federal Constitutional requirements. See CPL §690.05. Secondly, the court is empowered to order the search and seizure of the "type" of evidence sought by the New York County District Attorney's Office. See CPL §690.10(4).

Under Federal law, the court is authorized to issue search warrants targeting digital information pursuant to 18 USC § 2703. The Federal statutory language clearly and unequivocally grants a governmental entity the authority to seek a court order to compel an electronic service provider, such as Facebook, to disclose electronic information which they maintain. The District Attorney has followed all of the requisite procedures outlined in 18 USC §2703(d) and CPL §690.35 with regard to obtaining a court order to search and seize digital information stored by Facebook.

STANDING

The Fourth Amendment to the United States Constitution provides "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See US Const, 4th Amend. See also NY Const, Art I, §12.

Under State and Federal law, a moving party must first establish standing to claim a violation of the Fourth Amendment. See *People v. Ramirez-Portoreal*, 88 NY2d 99 [1996].

People v. Ortiz, 83 NY2d 840 at 842 [1994]. The movant must have an objective or subjective expectation of privacy in the area or item to be searched and seized. *Ramirez-Portoreal* at 108. In the case at bar, it is the Facebook subscribers who could assert an expectation of privacy in their postings, not the digital storage facility, or Facebook. In fact, Facebook delegates the issue of privacy to the individual user, subject to Facebook's "Terms of Use Agreement', which enables the user to choose the degree of privacy for their postings and account. Clearly Facebook has failed to establish the crucial procedural hurdle of standing to challenge the search warrant. On this basis alone, the court denies Facebook's Motion to Quash. However, despite the failure to establish standing, the court will address Facebook's secondary challenges and remedial requests.

SCOPE

Facebook argues that many personal items not particularly of import to a criminal investigation, but certainly sensitive, private and important to their customers, will be disclosed if they are forced to comply with the court's order and this potential privacy violation requires the court to quash the search warrants. Facebook's argument is without merit.

Under New York State law, the government must follow the court's order to search and seize only that which is particularly described within the search warrant. Any violation of the court's order may result in pre-trial suppression of evidence seized beyond the scope of the warrant. However, a search warrant is not invalidated or deemed constitutionally infirm nor is seized evidence inadmissible simply because, at first glance, it is not evidence of criminality.

In the course of a long-term criminal investigation, the relevance or irrelevance of items seized within the scope of a search warrant may be unclear and require further investigatory steps. Frequently ambiguous items may yield further investigation and evidence of new crimes. Conversely, items seized within the scope of a search warrant are subsequently determined to be tangential or irrelevant to the underlying investigation. For example, the seizure of a computer's hard drive in a cyber child pornography investigation requires a forensic investigator search through hundreds of computer files to find evidence relating to the investigation. The authorized seizure of a company's files relating to a larceny and tax fraud investigation requires a government investigator to comb through thousands of documents seized within the scope of the warrant to find evidence of criminality. The authority to search and seize a massive amount of material to seek evidence of criminality is clear. See e.g., *People v. Dominique*, 229 AD2d 719 [1997], aff'd 90 NY2d 880 [1997];

There are various procedural safeguards to ensure that evidence is constitutionally seized. The court, in the form of an independent magistrate, conducts the initial constitutional scrutiny of the government application to determine whether there is probable cause that evidence of a crime may be found in an individual's zone of privacy, whether that zone be digital or physical. If the search warrant is approved, the government seizes and searches the material to uncover evidence of a criminal activity. The court reviews the inventory of items seized by the government and ensures that the evidence is safeguarded to protect its integrity for future court proceedings. Finally, in pre-trial proceedings, the court determines the admissibility of evidence seized pursuant to the search warrant. It is the court's scrutiny of the search warrant application and the

fruits of the execution of the search warrant that protect the individual citizen from an unreasonable search and seizure.

In the matter at bar, the court reviewed the government application and found probable cause that evidence of criminality would be found within the subject Facebook accounts. Implicitly the court found the necessary nexus between evidence of criminality and the particular accounts and items to be seized and determined that the scope of the warrant was not overbroad nor constitutionally vague. Facebook's challenge to the search warrant on this particular ground is unpersuasive and without merit.

NONDISCLOSURE

Facebook asserts that the Nondisclosure Order rendered by the court is defective as a matter of law. This argument has no merit. State and Federal law authorize the court to order nondisclosure as a necessary exercise of its discretion. Under New York law, the court possesses the inherent authority to seal documents or records of proceedings pertaining to sensitive matters and pending investigations. In particular, the State legislature amended the old Code of Criminal Procedure to create the current Criminal Procedure Law wherein motions to controvert search warrants were limited solely to "defendants" as a means to protect Grand Jury investigations against disruptive collateral challenges. See *In Re Search Warrant L-18/81*, 108 Misc2d 440 [1981] *citing* Judiciary Law §2-b(3). "A court of record has power to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." This court possesses specific authority to seal or order the nondisclosure of the search warrants (and their applications) to the subjects of the warrants in order to protect the existence of evidence subject to an ongoing Grand Jury investigation.

Federal law also grants specific authority to this Court and permits the court to mandate disclosure of electronic communication "without required notice to the subscriber or customer if the governmental entity obtains a warrant issued using ..[S]tate warrant procedures...by a court of competent jurisdiction." See 18 USC §2703(b)(1)(A). Furthermore, the court is permitted to mandate nondisclosure when the court finds that disclosure would have an "adverse result." The term "adverse result," includes "(c) destruction of or tampering of evidence" and "(e) otherwise seriously jeopardizing an investigation or unduly delaying a trial." See 18 USC §2705(a)(1)&(2).

It is obvious that any disclosure by Facebook of the underlying search warrants to the targeted account holders would potentially have dire direct and indirect consequences. Evidentiary leads resulting from the Facebook material could be destroyed, removed or deleted. Individuals of interest, suspects or witnesses could flee or be intimidated. The integrity of any long-term criminal investigation could be severely compromised.

In the alternative, Facebook requests that the court appoint a monitor or establish a protocol to ensure the privacy rights of its subscribers. The court denies this application as not only unnecessary but also as an unwieldy, time-consuming expense proffered by Facebook to satisfy its contractual obligations to its users. In light of the court's clear Federal and State authority to order nondisclosure of a pending investigation or existence of a court order,

Facebook's application to disclose any portion of the search warrants, the underlying investigation, or any details relating to the pending matter is hereby denied. The Nondisclosure Order remains in effect until the court orders otherwise.

CONCLUSION

IT IS HEREBY ORDERED that Facebook's Motion to Quash the search warrants in this matter is denied in its entirety;

IT IS FURTHER ORDERED that Facebook abide by the Nondisclosure Order previously issued by this court. Any violation of the court's Nondisclosure Order may subject Facebook to criminal contempt, civil penalties of State and Federal law and any relief the court deems just and proper;

IT IS FURTHER ORDERED that Facebook immediately comply with the Search Warrants authorized to be executed in July, 2013. Any further delay will impede the progress of the grand jury investigation and unnecessarily lead to the destruction of potential evidence.

SO ORDERED.

Dated: New York, New York
September 17, 2013

Melissa C. Jackson
Acting Justice Supreme Court

New York Supreme Court

Appellate Division – First Department

SUPREME COURT INDEX NO. 30207-13

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

BRIEF OF *AMICI CURIAE* NEW YORK CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANT'S OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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Dated: August 7, 2014

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INTRODUCTION

This case involves the seizure of electronic communications in a manner that deeply implicates both the Fourth and First Amendments to the federal Constitution as well as Article I, Sections 8 and 12 of the New York Constitution. In July 2013, the Manhattan District Attorney secured from the Supreme Court, New York County, a sweeping set of warrants regarding 381 Facebook accounts, as part of an investigation into allegations of social security fraud and false claims of medical disabilities. A4 (Decision and Order of the Hon. Melissa C. Jackson, dated Sept. 17, 2013, at 1).[1] The warrants directed Facebook to search for and retrieve a vast array of the users' information, including private messages, chat histories, photographs, comments posted on pages of friends and family and comments by friends and family, and membership lists of groups that they have joined. A9-10 (Search Warrant at 1-2). The Supreme Court further imposed a gag order, unlimited in duration, prohibiting Facebook from notifying the individuals that these profoundly invasive warrants had been issued. A11-12 (Search Warrant at 3-4). Facebook challenged the constitutionality of the warrants and the gag order in the Supreme Court, A44-51 (Mem. of Law in Support of Facebook, Inc.'s Motion to Quash Bulk Search Warrants and Strike Nondisclosure Provisions), and continues to pursue the challenge in this appeal.

[1] Facebook's Appendix, dated June 20, 2014, is cited as "A."

Amici the New York Civil Liberties Union and the American Civil Liberties Union submit this brief because this appeal raises important issues of first impression in the New York appellate courts relating to the protection of privacy in the digital age.[2] In the argument set forth below, *Amici* contend that the Fourth Amendment requires warrants to be particularized, that this particularity requirement applies with more force to electronic searches, and especially to electronic searches directed at expressive activity protected by the First Amendment. The warrants issued in this case lacked any meaningful limiting criteria and failed utterly to satisfy the particularity requirement under the federal Constitution as well as the analogous provision of the New York Constitution.

Amici also contend that the Supreme Court erred in issuing and affirming an indefinite gag order that prevented Facebook from notifying its users of the sweeping warrants. The First Amendment requires such gag orders to be narrowly tailored to serve a compelling government interest. Here, the District Attorney offered only generalized risks of disclosing the existence of the warrants, and in any event the gag order was not narrowly tailored because it was never limited in duration by its terms—when issued it imposed a gag in perpetuity—and because a

[2] *Amici* are entities committed to safeguarding fundamental constitutional rights in the digital age. A detailed statement of interest of *Amici Curiae* appears in counsel's affirmation submitted in connection with *Amici*'s motion for leave to file this brief.

preservation order would have functioned as a less restrictive alternative to a total prohibition against disclosure.

Amici further contend that this Court should reject the District Attorney's effort to dismiss this meritorious appeal on the ground that the denial of a motion to quash the warrant is not an appealable order. The warrant issued below was an order directing Facebook to produce records, and as such was subject to a motion to quash. Facebook properly filed the motion to quash and raised the privacy rights of its users under the third-party standing doctrine, which has traditionally allowed businesses to raise the rights of their customers where their customers would be hindered from bringing their own legal challenge. The denial of the motion to quash involves an order which is properly the subject of an appeal.

Finally, *Amici* contend that this Court also should reject the District Attorney's argument that the controversy is now moot because Facebook has turned over the electronic records sought by the District Attorney and because the gag order was lifted three days after Facebook filed the opening brief in this appeal. Mem. of Law in Support of Mot. to Dismiss at 11-17. At bottom, the District Attorney continues to retain the electronic communications not only of the 62 individuals who have been indicted based on the records that Facebook turned over but also of the hundreds who have not been indicted. Affirmation of Bryan Serino in Support of Appellee's Mot. to Dismiss ("Serino Aff.") ¶ 13. Facebook's request

for expungement of these materials on behalf of its users presents a continuing justiciable controversy with regard to the scope of the warrant. Moreover, the challenge to the gag order also remains justiciable as the District Attorney has not disavowed its intent to seek similar gag orders in the future and the challenge to the gag order falls into the narrow category of cases involving exceptions to the strict application of the mootness doctrine.

For all of these reasons, this Court should deny the District Attorney's motion to dismiss the appeal and, upon reaching the merits of this appeal, should reverse the lower court decision regarding the motion to quash and the issuance of the gag order.

ARGUMENT

I. THE WARRANTS WERE UNCONSTITUTIONAL BECAUSE THEY PERMITTED A GENERALIZED SEARCH OF ELECTRONIC ACCOUNTS THAT CONTAIN INTIMATE DETAILS OF PEOPLE'S LIVES AND FIRST AMENDMENT PROTECTED EXPRESSION.

The Fourth Amendment requires that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This particularity requirement prohibits general warrants that would allow the government to "rummage" through someone's personal effects. *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971). The need for such particularity, and for stringent limitations on warrants, is "especially great" when the searches by their nature "involve[] an intrusion on privacy that is broad in scope." *Berger v. New*

York, 388 U.S. 41, 56 (1967) (imposing procedural limitations on wiretapping warrants).

At least two dimensions of the warrants issued against Facebook implicate an "intrusion on privacy that is broad in scope," thus triggering the need to impose careful limitations. First, the warrants are directed at electronic accounts that contain a large quantity of private and personal information. Courts around the country have recognized that "the particularity requirement assumes even greater importance" in electronic searches because otherwise there is "a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant." *United States v. Galpin,* 720 F.3d 436, 446-47 (2d Cir. 2013) (quoting *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1177 (9th Cir. 2010)); *see also United States v. Riccardi*, 405 F.3d 852, 862-63 (10th Cir. 2005) (holding that a warrant authorizing the seizure of all files on a computer failed to meet particularity standards). This is because "advances in technology and the centrality of [electronic devices] in the lives of average people have rendered [such devices] akin to . . . residence[s] in terms of the scope and quantity of private information [they] may contain." *Galpin,* 720 F.3d at 446. As the Supreme Court recognized in a recent unanimous decision, even an electronic device as small as a cell phone "typically expose[s] to the government far *more* than the most exhaustive search of a house….contain[ing] in

digital form many sensitive records previously found in the home [as well as] a broad array of private information never found in a home." *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) (emphasis in original).[3] The contents of such devices can reveal highly private information—including medical information, political affiliations, hobbies, pastimes, and romantic life. *See id*. at 2490. So too can the contents of electronic accounts like Facebook, which is at once a message board, an email service, a diary, a calendar, a photo book, a video archive, and much more.

Second, the warrants are directed at seizure of private expressive and communicative materials. Where a warrant authorizes the seizure of expressive and communicative materials, the particularity requirements of the Fourth Amendment must be applied with "scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (citing *Stanford v. Texas*). In *Stanford v. Texas*, the United States Supreme Court invalidated for lack of particularity a warrant ordering officers to search for books and other written instruments concerning the state Communist Party and its operations, explaining that the particularity requirement in this circumstance derives from the protection of the First Amendment and from the history of the Framers' abhorrence of general warrants which had been systematically used to

[3] *Riley* held that the police may not search a cell phone under the search-incident-to-arrest exception to the warrant requirement. 134 S. Ct. at 2485.

seize their personal papers and written materials. *See* 379 U.S. at 482-83. The Supreme Court held that to allow the "indiscriminate sweep" of the warrant seeking all written communications relating to the state Communist Party would be "false to the terms of the Fourth Amendment, false to its meaning, and false to its history." *Id.* at 486.

The warrants directed in this case to Facebook failed significantly to limit the scope of the privacy intrusion that they authorized and created, in effect, general warrants prohibited by the Fourth Amendment. The warrants allowed the government, without any meaningful limitations, to indiscriminately search through hundreds of people's personal papers, including "all undeleted or saved photos," "[a]ll videos," "[a]ny public or private messages," "[a]ny and all associated Groups information, including a list of all other users currently registered in any such groups," "[a]ll notes written and published to the account," "[a]ll chat history, including…the content of all chats and date and time information for all chats," "[a]ll "likes on Other's Posts, Likes on Your Posts from others, and Likes on Other Sites," "[a]ll Searches data" and "[a]ll Shares data." A9-10 (Search Warrant at 1-2) (internal quotation marks omitted). Moreover, the warrants authorized the government to rummage through the personal papers of those who are not under any investigation but had simply communicated with one of those 381 Facebook accounts or had belonged to the same "Group" as one of the

accounts. And they did so without any limitation on what the government may do with the very private information that it gathered. A9-12 (Search Warrant). Courts around the country routinely reject warrant applications for electronic searches of online communication accounts that—like the warrants issued here—fail to propose reasonable limitations on the searches sought, by, for example, specifying the types of material sought, imposing date restrictions, and articulating clear procedures governing materials that are irrelevant to the investigation.[4] Likewise, the lower court should have rejected the District Attorney's application.

Given that the warrants failed to satisfy Fourth Amendment particularity standards, they also failed to satisfy the heightened particularity standards under the New York State Constitution. The New York State Court of Appeals has held that the state Constitution "imposes a more exacting standard for the issuance of . . . warrants . . . than does the Federal Constitution," where, as here, the warrant

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[4] *See, e.g.*, *In the Matter of the Search of Information Associated with [redacted]@mac.com that is Stored at Premises Controlled by Apple, Inc.*, No. 14-228, 2014 WL 1377793, at *2 (D.D.C. Apr. 7, 2014) (rejecting application for account's emails "that constitute evidence and instrumentalities of violations of 41 U.S.C. § 8702," where it did not specify what would occur with non-relevant information); *In the Matter of Applications for Search Warrants for Info. Associated with Target Email Accounts/Skype Accounts*, No. 13–MJ–8163, et al., 2013 WL 4647554, at *8 (D. Kan. Aug. 27, 2013) (rejecting application for all electronic communications associated with target accounts because it "fail[ed] to set any limits" and lacked "filtering procedures" to ensure limited capture of non-relevant and privileged information); *In re [REDACTED] @gmail.com*, No. 14-70655, slip op. at 6 (N.D. Cal. May 9, 2014) (rejecting application for account's emails where government failed to provide "date restriction of any kind" or make "any kind of commitment to return or destroy evidence that is not relevant to its investigation"), *available at* https://www.techdirt.com/articles/20140512/09130627206/ government-goes-judge-shopping-email-warrant-rubber-stamp-gets-request-shot-down-second-judge-row.shtml.

involves the seizure of expressive materials. *People v. P.J. Video, Inc.,* 68 N.Y.2d 296, 299 (1986) (interpreting N.Y. State Const., Art. 1, § 12). In addition, the State Court of Appeals has more recently expressed its willingness to adopt "a separate standard" from the Fourth Amendment as necessary to safeguard the privacy of New Yorkers from new technological surveillance and the "enormous unsupervised intrusion by the police agencies of government upon personal privacy . . . in this modern age." *People v. Weaver*, 12 N.Y.3d 433, 445 (2009) (holding that prolonged use of GPS to monitor a person's movement violated the State constitutional right to privacy). Failing the Fourth Amendment particularity standard, the warrants also fail to satisfy the more exacting standard imposed by the New York Constitution for the seizure of expressive materials, especially seizures implicating digital privacy.

II. THE GAG ORDER WAS UNCONSTITUTIONAL.

In addition to issuing the sweeping unconstitutional warrants targeting the communications of 381 Facebook accounts, the court below approved the District Attorney's application for an indefinite gag order prohibiting Facebook from notifying those users that the government is seeking their private information. A5 (Decision and Order of the Hon. Melissa C. Jackson, dated Sept. 17, 2013, at 1). Nor was the gag order lifted once the District Attorney obtained the information; it

was only lifted after Facebook filed the opening brief on this appeal. Serino Aff. ¶¶ 9-10.

The gag order issued to Facebook was a prior restraint on speech which comes with a heavy presumption of unconstitutionality because it imposes "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976); *see also Fischetti v. Scherer*, 44 A.D. 3d 89, 92-93 (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 Nat'l. Broad. Co. v. Cooperman*, 116 A.D. 2d 287, 293 (2d Dept. 1986) (citing *Neb. Press Ass'n,* 427 U.S. at 562). Gag orders issued under the Stored Communications Act ("SCA") must meet not only statutory standards but also First Amendment requirements. *See In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 880-87 (S.D. Tex. 2008) (applying strict scrutiny to assess the constitutionality of gag order attached to order issued under SCA).

The indefinite gag imposed below failed to meet the First Amendment requirements. As an initial matter, the generalized risk that the District Attorney feared of destruction of evidence, fleeing, or some other unspecified "interfere[nce]

with an ongoing criminal investigation" cannot justify an indefinite gag. A12 (Search Warrant at 4). These are concerns that arise in an application for *every* warrant; yet, the default rule is that owners of property receive notice prior to the execution of search warrants. *See United States v. Acosta*, 502 F.3d 54, 58 (2d Cir. 2007) ("Law enforcement officers who execute a search warrant at a residence generally must give notice of their authority and provide the occupant a reasonable opportunity to respond before entering." (citing *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995))).

Even if there were a specific risk here that the Facebook users would destroy evidence upon finding out about the warrants, the gag order was not narrowly tailored to address that risk. That risk is more narrowly addressed by a preservation order. Such an order is specifically contemplated by the SCA. *See* 18 U.S.C. § 2703(f) (providing government with statutory authority to seek preservation order "pending the issuance of a court order or other process"). Furthermore, the issuance of a preservation order was well within the power of the court below. *See Schwartz v. Lubin,* 6 A.D.2d 108, 109-11 (1st Dept. 1958) (holding that New York Supreme Courts have "inherent equitable power" to order preservation of records). For its part, Facebook makes clear that the company "may access, preserve and share [users'] information" in response to a "search warrant, court order or subpoena." Facebook, *Data Use Policy*, available at

https://www.facebook.com/about/privacy/other. There thus was no obstacle to this less restrictive alternative, and the court erred in failing to consider it.

Moreover, even assuming that the government had specific and compelling concerns over flight or other interference with a criminal investigation in this case, any gag order issued should have been limited in duration, subject to extension only upon a renewed showing of a compelling need. *See, e.g.*, *New York Times Co. v. Starkey*, 51 A.D.2d 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) (citations omitted). Even the delayed notice provisions of the SCA recognize the necessity and the feasibility of limiting the duration of prior restraints. *See* 18 U.S.C. § 2705(a)(1) (authorizing delayed notification "for a period not to exceed ninety days"). Certainly, the gag order should not have lasted until the opening brief was filed on this appeal.

For these reasons, the indefinite gag order in this case was unconstitutional and served no purpose other than to "stifle public debate" about the validity of the government's sweeping warrants directed at Facebook and its users. *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d at 880-87 (explaining that non-disclosure orders interfere with "the indispensable role of daylight in our system of justice"). This Court should issue an opinion making

clear that the District Attorney may not seek, and lower courts may not issue, indefinite gag orders that are incompatible with the First Amendment commitment to robust discussion of public issues and the conduct of government officials.

III. AN APPEAL MAY BE TAKEN FROM THE DENIAL OF THE MOTION TO QUASH IN THIS CASE.

Facebook, served with a warrant that it believed to be unlawful and that required it to take action, properly filed a motion to quash the warrant on behalf of itself and its users. A44-51 (Mem. of Law in Support of Facebook, Inc.'s Mot. to Quash Bulk Search Warrants and Strike Nondisclosure Provisions, dated Aug. 20, 2013). The warrants issued against Facebook were "executed like a subpoena in that [they were] served on the [electronic communications service provider] in possession of the information and [did] not involve government agents entering the premises of the [service provider] to search its servers and seize the . . . account in question." *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, No. 13 Mag. 2814, 2014 WL 1661004, at * 3 (S.D.N.Y Apr. 25, 2014) ("*In re Microsoft Warrant*"), *aff'd* (S.D.N.Y. July 31, 2014). For this reason, Facebook had the opportunity and the right to challenge the legality of the warrants served on it before complying with them. *See generally In re Microsoft Warrant*, *supra*; *see also See* v. *City of Seattle,* 387 U.S. 541, 544-45 (1967) ("[T]he subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply."). And so

understood, the lower court order denying the motion to quash was properly the subject of an appeal, even when linked to a criminal prosecution. *See People v. Johnson*, 103 A.D.2d 754, 755 (2d Dept. 1984); *Inter-City Associates v. Doe*, 308 N.Y. 1044 (1955) (appealing the denial of an application to quash a subpoena because it was overly broad and "constituted an unreasonable search and seizure"); Mem. of Law in Support of Mot. to Dismiss at 5 ("[T]he denial of a motion to quash a subpoena [is] an appealable order.").[5]

Facebook also had and has the right, in the course of its challenge, to raise the constitutional rights of its users. Injured parties have the right to assert the constitutional rights of others under the third-party standing doctrine. *See, e.g.*, *N.Y. Cnty Lawyers' Ass'n. v. State*, 294 A.D.2d 69, 74-75 (1st Dept. 2002) ("*NYCLA*") (granting lawyers the right to raise Sixth Amendment rights of their clients); *People v. Kern*, 149 A.D.2d 187, 233-34 (2d Dept. 1989) (granting the State the right to raise rights of excluded jurors), *aff'd*, 75 N.Y.2d 638 (1990). This is particularly so where First Amendment rights are implicated. *See*

[5] Although the warrants issued here are subject to pre-enforcement review, *Amici* are not suggesting that they should be treated as subpoenas. The District Attorney correctly applied for a warrant, rather than issuing a subpoena, in order to obtain this sensitive and constitutionally protected information. *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 699 (1996) ("The Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant.'" (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983))); *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) ("The government may not compel a commercial [Internet service provider] to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause.") (holding that account holders enjoy a "reasonable expectation of privacy in the contents of emails that are stored with, or sent or received through, a commercial ISP" (internal quotation omitted)).

Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (holding that courts have "altered [the] traditional rules of standing . . . in the First Amendment area"); *People v. Foley*, 94 N.Y. 2d 668, 677 (2000) (noting that "[a]n exception has been carved out [in standing doctrine] in the area of the First Amendment"). Factors that courts consider in granting third-party standing are "(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." *NYCLA*, 294 A.D. at 75 (internal quotation marks omitted) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *NAACP v. State of Ala. Ex. Rel. Patterson*, 357 U.S. 449 (1958); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

All three factors for recognizing third-party standing are satisfied here. First, Facebook and its users have a "substantial relationship" based on their business-client relationship. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 195-97 (1976) (allowing beer vendor to assert equal protection claims of its customers); *In re Verizon Internet Servs, Inc*., 257 F. Supp. 2d 244, 258 (D.D.C. 2003) (holding that an internet service provider can assert the rights of its clients), *rev'd on other grounds*, *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Serv., Inc.*, 351 F. 3d 1229 (D.C. Cir. 2003). Facebook has promised its users that it will safeguard their most personal details, and therefore has a commercial interest in protecting

their rights.[6] Facebook thus satisfies the "substantial relationship" factor. *See NYCLA*, 294 A.D.2d at 75-76 (holding that attorneys' interest in effective representation for their clients satisfied substantial relationship factor).

Second, at the time that Facebook filed this challenge in the lower courts it would have been impossible for its users to raise their own rights because the gag order barred Facebook from notifying its users of the searches and seizures; as a result, the users were completely unaware of these intrusions into their privacy and could not assert their rights. Moreover, it is no answer to say that the gag has been lifted, as there are any number of reasons that the Facebook users who had their rights violated may not be able to challenge the warrant in court—because they take a plea before the issue is litigated; or because the government decides unilaterally to expunge the records in its possession thus mooting any claims for return of property; or because they will simply remain unaware that their Facebook records have been given over to the government.[7] Third-party doctrine has been applied in those circumstances where rightsholders face obstacles to their ability to effectively protect their own rights. *See NYCLA*, 294 A.D.2d at 76 (acknowledging that indigent clients have their own remedies, but that they are not

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[6] *See* Facebook, *Data Use Policy*, available at www.facebook.com/about/privacy/your-info ("[Y]ou [the user] always own all of your information. Your trust is important to us, which is why we don't share information we receive about you with others unless we have: received your permission; given you notice . . . ; or removed your name and any other personally identifying information.").

[7] While the gag order has been lifted, the record does not reflect that the government has notified Facebook's users that their records have been seized. *See* Serino Aff. ¶ 10.

in a position to litigate on their own behalf and other remedies are not as effective in protecting their rights); *see also, e.g.*, *Craig*, 429 U.S. at 193-94 (finding third-party standing for vendors of alcoholic beverages while recognizing the possibility of injured third parties bringing their own cases); *Singleton v. Wulff*, 428 U.S. 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).[8]

Finally, given the large number of individuals affected by the 381 warrants, which are identical in scope, AOB at 7,[9] granting third-party standing to Facebook here helps prevent the dilution of fundamental rights. *See NYCLA*, 294 A.D.2d at 75 (holding that a systemic challenge by the lawyers' organization prevented the dilution of fundamental rights where there was an allegation of systemic problems resulting in widespread violations of the right to counsel); *Kern,* 149 A.D.2d at 233-34 (2d Dept. 1989) ("[Because of the] unlikelihood of anyone other than the State asserting the rights of the excluded jurors and those of the community, these rights would likely be severely diluted or adversely affected unless the State were permitted to seek vindication thereof in the context of a particular case"), *aff'd*, 75

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[8] Moreover, as discussed in Part IV, *infra*, the government's application to lift the gag three days after Facebook filed its opening brief in this appeal does not deprive Facebook of the standing it has possessed from the outset. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case.").

[9] "AOB" refers to Opening Br. of Appellant Facebook, Inc., dated June 20, 2014.

N.Y.2d 638 (1990). It is Facebook that was and in the future will be served with these types of warrants, and it is Facebook that is the first line of defense against government intrusion into its users' privacy. If Facebook is not granted third-party standing, Facebook users are at risk of dilution of their constitutional rights.

In the end, third-party doctrine is a prudential doctrine that allows injured parties to raise the rights of third parties so long as courts can be assured that the parties in court will vigorously represent their rights. *See Craig*, 429 U.S. at 193-94; *Singleton*, 428 U.S. at 118. Here, where Facebook has every reason to vigorously defend the rights of its users who would otherwise face significant obstacles to asserting their rights, there is no reason for this Court to refrain from deciding the constitutionality of the 381 warrants on this appeal.

IV. THIS APPEAL IS NOT MOOT.

The District Attorney cannot avoid litigating the merits of this appeal by arguing that the appeal is moot because Facebook has complied with the warrant and because the gag order was lifted during the course of appellate briefing. As to Facebook's compliance with the warrant, the privacy and personal interests of Facebook's users in the seized information endure, and the government can be ordered to return the information and prohibited from using it. *See Matter of Grand Jury Subpoenas for Locals 17, 135, 257, and 608 of the United Bhd. of Carpenters and Joiners of Am., AFL-CIO*, 72 N.Y. 2d 307 (1988) ("[A]n appeal is

not rendered moot if there remain undetermined rights or interests which the respective parties are entitled to assert. In this case, the rights of the parties remain undetermined because the membership lists…remain under the control of the Assistant District Attorney and continue to be used by him in the investigation.") (internal citation omitted); *cf. Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) ("Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred . . . a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession.") (holding that "this possible remedy" prevented case from being moot); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 561 (S.D.N.Y. 2004) (rejecting the argument that compliance with a subpoena moots a timely filed motion to quash). This is particularly true with respect to the unindicted users who have no ongoing proceedings available to them in which they could object to the retention of materials and seek their return. As to these individuals, the District Attorney makes absolutely no promise to return their records. Serino Aff. ¶ 13 ("Once all the criminal cases have become final, this Office will negotiate with the account-holders about the disposition of the evidence seized from their accounts."). Thus, the ongoing seizure of Facebook users' communications remains a live controversy, properly before this court.

The recent lifting of the gag order also does not render Facebook's First Amendment challenge to it unreviewable under the mootness doctrine. On Friday, June 20, 2014, Facebook filed its opening brief challenging the gag order, which had been in effect for ten months. AOB. The following Monday, June 23, the government moved for the gag to be lifted. Serino Aff. ¶ 10. The government has not disclaimed, and in fact has adamantly defended, its ability to seek gag orders of the exact nature sought in this case. A54-55 (Mem. of Law in Opposition to Facebook Mot. at 2-3). These facts situate this controversy squarely within two exceptions to the mootness doctrine.

First, as a general rule, where the government undertakes a "voluntary cessation" of allegedly unlawful conduct but refuses to disavow its intent to repeat the challenged conduct, the case is not moot. *See Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979) ("[A]s a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.'" (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953))); *see also Havre Daily News, LLC v. City of Havre*, 333 Mont. 331, 349, 142 P.3d 864, 876-77 (2006) (applying "voluntary cessation" exception because "if a substantially similar situation occurs, the agency will repeat the obstructive tactics that the plaintiff challenges, perpetrating a substantially similar, though not identical, wrong"). The government carries the "heavy" burden of

demonstrating "that there is no reasonable expectation . . . that the alleged violation will recur" and that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles Cnty*, 440 U.S. at 631 (internal quotations and citation omitted). The government has made no such showing, and this Court should not permit the government to avoid the force of this appeal by its unilateral decision to have the gag lifted in this case while aggressively maintaining its claimed authority to seek such gag orders in future cases.

Second, to the extent that the government will continue to seek indefinite gag orders and only lift them when facing an appeal, the issues presented by this case fall within the exception to mootness of conduct capable of repetition yet evading review. *See Matter of Hearst Corp. v. Clyne,* 50 N.Y.2d 707, 714-15 (1980) (explaining this exception to mootness as one in which there is "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues."). Indeed, courts have traditionally applied this exception to conclude that media challenges to prior restraints were not moot even though the pertinent trial or hearing had ended and the prior restraint had expired. *See, e.g., Globe Newspaper Co. v. Superior Court for Norfolk Co.,* 457 U.S. 596 (1982);

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979); *Neb. Press Ass'n v. Stuart,* 427 U.S. 539 (1976). The lesson of those cases is applicable here, where substantial First Amendment protections are likewise at play. The controversy surrounding the constitutionality of the gag order thus is not moot and is properly before this Court.

CONCLUSION

For the above stated reasons, the Court should deny the motion to dismiss the appeal and should address, on the merits, the constitutionality of the warrants and the "gag orders" that are challenged in this appeal.

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