

IN RE: FACEBOOK, INC.,  
APPELLANT,  
v.  
UNITED STATES OF AMERICA,  
APPELLEE.

Case Nos. 17-SS-388  
17-SS-389  
17-SS-390

**BRIEF FOR *AMICI CURIAE* TECHNOLOGY COMPANIES AND  
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS  
IN SUPPORT OF APPELLANT FACEBOOK, INC.**

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## **CORPORATE DISCLOSURES FOR *AMICI CURIAE***

Pursuant to Rule 29(a)(4) of the Rules of the District of Columbia Court of Appeals, we certify as follows:

1. Microsoft Corporation (“Microsoft”) has no parent corporation and no publicly held corporate entity owns 10% or more of its stock.
2. Apple Inc. (“Apple”) has no parent corporation and no publicly held corporate entity owns 10% or more of its stock.
3. Avvo, Inc. (“Avvo”) has no parent corporation and no publicly held corporate entity owns 10% or more of its stock.
4. Dropbox, Inc. (“Dropbox”) has no parent corporation and no publicly held corporate entity owns 10% or more of its stock.
5. Google Inc. (“Google”) is a wholly owned subsidiary of Alphabet Inc., a publicly held corporation.
6. Snap, Inc. (“Snap”) has no parent corporation and no publicly held corporate entity owns 10% or more of its stock.
7. The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

8. Twitter Inc. (“Twitter”) has no parent corporation and no publicly held corporate entity owns 10% or more of its stock.
9. Yelp Inc. (“Yelp”) has no parent corporation and no publicly held corporate entity owns 10% or more of its stock.

### **INTEREST OF *AMICI***<sup>1</sup>

*Amici curiae* Microsoft, Apple, Avvo, Dropbox, Google, Snap, Twitter, and Yelp are eight leading technology companies. All have been subject to legal process issued at the request of law enforcement requiring disclosure of user<sup>2</sup> information—including the contents of communications—often accompanied by court orders precluding them from notifying their users (or anyone else) of the government’s demands. This case presents a fact pattern familiar to these *amici*: Facebook has been served with warrants under 18 U.S.C. § 2703, accompanied by an order pursuant to 18 U.S.C. § 2705(b) “requiring that Facebook and its employees not disclose the existence of the Warrants to anyone before Facebook produces documents

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<sup>1</sup> No counsel for a party authored this brief, in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the brief’s preparation or submission. Counsel for party Facebook has consented to the filing of this brief, and counsel for the government has stated that the government does not oppose this filing.

<sup>2</sup> We use the term “users” to refer to customers and account holders of online service providers, as well as individuals who use or interact with the provider’s website.



and information to the government in response to the Warrants.” Notice to Potential *Amici Curiae* at 2.

*Amicus* The Reporters Committee for Freedom of the Press is an association of reporters and editors that defends the First Amendment rights of the media, who publish on many online platforms (including Facebook) and are dedicated to open debate on matters of public concern.

*Amici* write to emphasize the First Amendment principles at stake when the government seeks to prevent an online service provider from notifying its users that the government has demanded disclosure of their account information, including the contents of their communications. As discussed below, providers have the right to speak about government actions—which are quintessential matters of public concern—and users have the right to speak anonymously. Moreover, the government interests justifying any restraint on speech are undercut where, as appears to be the case here, the events underlying the government’s investigation—and perhaps even the investigation itself—are public. Although the Court’s files in this case are sealed, the publicly available information makes it clear that the government should bear an especially heavy burden to justify the prior restraint of speech here. Based on the available information, the government does not appear to have met that burden.

## ARGUMENT

### **NON-DISCLOSURE ORDERS ARE CONTENT-BASED PRIOR RESTRAINTS ON PROVIDERS' SPEECH SUBJECT TO STRICT SCRUTINY, WHICH THIS ORDER DOES NOT APPEAR TO SATISFY**

#### **A. The Non-Disclosure Order Is Subject to Strict Scrutiny.**

The non-disclosure order entered by the trial court—an order that bars Facebook from telling its users that the government has ordered it to turn over their communications—requires the most searching scrutiny applicable under the First Amendment. The order is both a classic prior restraint and a content-based restriction of speech. It therefore triggers strict scrutiny, and the trial court erred in failing to require the government to establish that the order could meet that demanding standard.

A prior restraint is any “administrative [or] judicial order[] forbidding certain communications when issued in advance of the time that such communications are to occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation, internal quotation marks, and emphasis omitted). Because of the gravity of the First Amendment interests at stake when the government prohibits speech *before* it is uttered, a prior restraint comes to court “with a ‘heavy presumption’ against its constitutional validity.” *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *see also Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (prior restraints are “the most

serious and the least tolerable infringement on First Amendment rights”). Similarly, “[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Non-disclosure orders like the one here constitute content-based restrictions because they “effectively preclude speech on an entire topic: the electronic surveillance order and its underlying criminal investigation.” *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 881 (S.D. Tex. 2008) (“*In re Sealing*”).

Because prior restraints and content-based restrictions are among the most serious types of government censorship, courts subject them to strict scrutiny. For content-based restrictions, strict scrutiny requires that the restriction be “narrowly tailored to promote a compelling Government interest,” with no “less restrictive alternative” available to preserve that interest. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000). This is “a demanding standard,” and “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.” *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 799 (2011) (citation omitted). Prior restraints, on the other hand, require the government to meet an even more exacting burden: to show “the activity restrained poses either a clear and

present danger or a serious and imminent threat to a protected competing interest.” *Levine v. U.S. Dist. Ct.*, 764 F.2d 590, 595 (9th Cir. 1985); accord *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (noting prior restraints have been permitted “only where the evil that would result from the reportage is both great and certain”) (Blackmun, J., in chambers) (citing *Neb. Press Ass’n*, 427 U.S. at 562). The “barriers to” a prior restraint are “high,” *Neb. Press Ass’n*, 427 U.S. at 570, and “[t]he Government ‘thus carries a heavy burden of showing justification for the imposition of such a restraint.’” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (citation omitted).

Non-disclosure orders prohibiting service providers from informing their users that the government seeks information about their online transactions or the contents of their communications are precisely the kinds of restrictions that warrant such exacting review. They preemptively bar the service provider from speaking (i.e., providing valuable information to its users, among others), and do so specifically because of the contents of the desired speech (i.e., information about the government’s demand). As a result, “[c]ourts considering the issue have almost uniformly found that Section 2705(b) [non-disclosure orders], or [non-disclosure orders] issued under analogous statutes, are prior restraints and/or content-based

restrictions.” *In re Search Warrant for [Redacted]@yahoo.com*, No. 16-2316M, 2017 U.S. Dist. LEXIS 67829, at \*17-18 (C.D. Cal. Mar. 31, 2017) (citing, *inter alia*, *In re Sealing*, 562 F. Supp. 2d at 882 (gag orders under Section 2703(d) are “predetermined judicial prohibition[s] restraining specific expression”) (citation and internal quotation marks omitted); *In re Grand Jury Subpoena for: [Redacted]@ yahoo.com*, 79 F. Supp. 3d 1091, 1091 (N.D. Cal. 2015) (Section 2705(b) order amounts to “undue prior restraint of Yahoo!’s First Amendment right to inform the public of its role in searching and seizing its information”); *In re Application of the U.S. for Nondisclosure Order Pursuant to 18 U.S.C. § 2705(b) for Grand Jury Subpoena #GJ2014032122836*, No. 14-480, 2014 WL 1775601, at \*2 (D.D.C. Mar. 31, 2014) (authorization of a Section 2705(b) “gag order” for “certain period of time” would constitute prior restraint and content-based restriction of speech)).

**B. Based On The Limited Record Available To Amici, The Non-Disclosure Order Does Not Appear To Withstand Strict Scrutiny.**

Based on the limited information available,<sup>3</sup> *amici* understand the trial court entered its non-disclosure order pursuant to 18 U.S.C. § 2705(b). That

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<sup>3</sup> See Notice to Potential *Amici Curiae* (“Notice to *Amici*”) (setting forth an “Abbreviated Statement of Facts” that the court has authorized for purposes of allowing *amicus* participation).

provision authorizes the issuance of non-disclosure orders *without* requiring a showing that satisfies the strict-scrutiny standard that the First Amendment mandates. Indeed, in light of the grave constitutional concerns presented by that statutory regime, *amicus* Microsoft has filed a First Amendment challenge to Section 2705. *See Microsoft Corp. v. U.S. Dep’t of Justice*, No. C16-0538JLR, 2017 WL 530353, at \*19 (W.D. Wash. Feb. 8, 2017) (denying government’s motion to dismiss First Amendment claims). That case, in which several of *amici* filed briefs in support of Microsoft, remains pending before the U.S. District Court for the Western District of Washington. Based on the facts presented in the Notice to *Amici* here, it appears unlikely the non-disclosure order issued to Facebook can satisfy strict scrutiny. As a result, this Court should reverse.

**1. The Non-Disclosure Order Strikes At The Heart Of The First Amendment.**

**a. The Non-Disclosure Order Stifles Debate On Matters Of Public Concern.**

“Customarily, First Amendment guarantees are interposed to protect communication between speaker and listener. . . . But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.” *Richmond*

*Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586-87 (1980) (Brennan, J., concurring in judgment). As Justice Brennan explained in *Richmond Newspapers*, this ensures not only that “debate on public issues [remains] uninhibited, robust, and wide-open,” but also that it is “informed” and thus contributes to “th[e] process of communication necessary for a democracy to survive.” *Id.* at 587-88 (citing, *inter alia*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); *see also* *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).

Court-issued non-disclosure orders like these—which bar a service provider from informing its users that the government has demanded their user information—restrict expression at the core of the First Amendment: discussion about government actions. “[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Moreover, First Amendment concerns are heightened by the risk that the government may use non-disclosure orders to skew the broader debate about the circumstances in which it accesses the online communications and information of ordinary citizens. The same concerns apply here, where the government has used a non-disclosure order to bar a

provider from discussing government conduct with its users, even though the facts underlying the government’s investigation appear to be public.

Under these circumstances, this Court should exercise the utmost caution in determining whether the government has a compelling interest in secrecy that satisfies strict scrutiny.

**b. The Non-Disclosure Order Burdens Users’ First Amendment Rights To Engage In Anonymous Speech And Will Undermine The Benefits Of The Internet As The Modern Public Square.**

Like other non-disclosure orders, the order in this case also inflicts serious First Amendment harms because it has the inevitable effect of chilling users’ rights to engage in anonymous speech.

It is well established that the First Amendment affords individuals the right to speak—and listen—anonymously, without any fear of government discovery. “[A]n author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.” *Mcintyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995); *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969). And the most accessible forum for anonymous speech is the internet. “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). More than 3.2 billion people use



the internet, submitting and viewing hundreds of millions of posts, comments, photos, videos, and other content every day, disclosing their identities only by choice.<sup>4</sup>

Non-disclosure orders tied to government requests for user information discourage users from engaging in anonymous online expression. The knowledge that the government may be able to obtain information published or received anonymously will inevitably chill anonymous online speech because “[a]wareness that the Government may be watching chills associational and expressive freedoms.” *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring); *see also In re Grand Jury Subpoena to Amazon.com dated August 7, 2006*, 246 F.R.D. 570, 573 (W.D. Wis. 2007) (knowledge that government agents are seeking records concerning customer purchases of expressive material from an information service provider “would frost keyboards across America”). And that chilling effect is magnified where, as here, anonymous speakers have no assurance that they will be afforded notice and an opportunity to object to

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<sup>4</sup> International Telecommunications Union, 2016 ICT Facts & Figures, <http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2016.pdf>; Pew Research Center, Social Networking Usage: 2005-2015, <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> (as of 2015, 76% of online adults used social networking sites).

disclosures of their online activity—a result that the government’s secrecy regime would guarantee.

The upshot is that prior restraints accompanying orders to disclose user information abridge the constitutional rights of both service providers and their users. And they will undermine the unprecedented benefits of the internet as today’s preeminent forum for the free exchange of ideas—“the modern public square.” *Packingham*, 137 S. Ct. at 1737; *see also Reno v. ACLU*, 521 U.S. 844, 868 (1997) (noting the “vast democratic forums of the Internet”).

**2. Section 2705(b)’s “Reason To Believe” Standard Fails To Ensure That Non-Disclosure Orders Are Narrowly Tailored.**

The limited record available to *amici* contains nothing to suggest that an exacting inquiry preceded the prior restraint on Facebook’s speech, as the First Amendment demands. Section 2705(b) requires a court to enter a non-disclosure order if it merely has “reason to believe” disclosure would result in one of four enumerated adverse events or result in “otherwise seriously jeopardizing an investigation or unduly delaying a trial,” 18 U.S.C.

§ 2705(b), a test that falls far short of what the U.S. Supreme Court has required. Relying on that loose standard, the government has often justified non-disclosure orders by generically alleging, for example, that (1) not all

targets were aware of the underlying investigation, and (2) some relevant evidence was not stored electronically. Indeed, such “boilerplate applications” have been “routinely granted for a long time.” *In re Grand Jury Subpoena to Facebook*, No. 16-mc-1300, ECF No. 2, slip op. at 2-3, 8 n.7 (E.D.N.Y. May 12, 2016).

But generic assertions cannot satisfy the narrow-tailoring requirement of strict scrutiny. A speech restriction is “narrowly tailored” only if it “targets and eliminates *no more than* the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (emphasis added). Here, however, it appears the non-disclosure order has not been narrowly tailored to serve any legitimate—much less compelling—government interest. *Amici* understand Facebook has preserved all responsive evidence, *see* Notice to *Amici* at 2, so the targets of the government’s investigation cannot destroy evidence of their Facebook activity even if Facebook were to inform them of the government’s demand for their communications. Further, the underlying facts—and perhaps even the investigation itself—appear to be widely known, making it unlikely that disclosure of these warrants would result in an increased risk of flight or other adverse effects set forth in 18 U.S.C. § 2705(b). Allowing Facebook to inform its customers of the government’s demand for their communications would

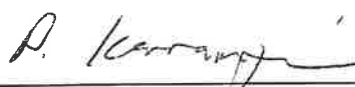
allow the users to exercise their constitutional rights to object to the government's demand and facilitate public debate.

Facebook's discussion of a widely known investigation would not result in destruction of relevant evidence, which Facebook has preserved, or in any other apparent adverse consequence justifying the "most extraordinary remed[y]," *CBS*, 510 U.S. at 1317, of a prior restraint. The nondisclosure order does not appear to satisfy strict scrutiny.

### CONCLUSION

The Court should reverse the decision below to the extent it failed to require the government to show that its requested non-disclosure order could survive the strict scrutiny required of such a content-based prior restraint of speech.

Respectfully submitted,

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