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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF 381 SEARCH WARRANTS DIRECTED
TO FACEBOOK, INC. (NEW YORK COUNTY
DISTRICT ATTORNEY'S OFFICE)

No. 16

20 Eagle Street
Albany, New York
February 07, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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1 CHIEF JUDGE DIFIORE: The first matter on today's
2 calendar is appeal number 16, Matter of 381 Search Warrants
3 Directed to Facebook.

4 Counsel.

5 MR. DUPREE: Thank you, Your Honor. May it
6 please the court, Tom Dupree on behalf of Facebook, and I
7 would like to reserve four minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. DUPREE: We are here today challenging 381
10 carbon copy digital warrants that demanded everything that
11 hundreds of Facebook users did on Facebook from the moment
12 they opened their accounts.

13 JUDGE RIVERA: So did - - - did you want to
14 challenge the - - - the warrants on the basis under the
15 statute or on the basis of your users' Fourth Amendment
16 rights?

17 MR. DUPREE: Well, it - - - it's a bit of both,
18 Your Honor. We think that what gives us standing as a
19 statutory matter is the Stored Communications Act, which
20 specifically grants a service provider, like Facebook, the
21 right to move to quash a digital warrant.

22 JUDGE RIVERA: Yes. But on only two bases,
23 right, the voluminous nature of the materials or the undue
24 burden. How do you get the Fourth Amendment users' rights
25 as a basis for standing?

1 MR. DUPREE: Under the undue burden standard,
2 Your Honor.

3 JUDGE RIVERA: Is that usually described as
4 encompassing a constitutional right?

5 MR. DUPREE: Oh, absolutely, Your Honor. Undue
6 burden, as - - - as this court knows, is one of the most
7 widely used phrases in law, and certainly where it has been
8 discussed in the abortion context, among others, it talks
9 about the violation of constitutional rights. The Supreme
10 Court, in fact, has held - - -

11 JUDGE RIVERA: But in the context of subpoenas
12 and warrants and - - - and document - - - accessing
13 documents.

14 MR. DUPREE: They - - - they're - - -

15 JUDGE RIVERA: Or accessing potential evidence.
16 Doesn't undue burden refer to something other than the
17 constitutionality of the request?

18 MR. DUPREE: Well, it could. It could - - - it's
19 a capacious phrase, Your Honor, and certainly when Congress
20 used the phrase in the statute, it wanted courts like this
21 one to follow the usual common law process, which is to
22 decide on a case-by-case basis in light of changing,
23 evolving technology what could constitute an undue burden.
24 I would point out that in the Microsoft case, which is the
25 case which just went on back to the Second Circuit, every

1 judge on the Second Circuit - - - although there were
2 dissenters on the merits, every judge accepted the premise
3 that undue burden encompassed Microsoft's challenge to the
4 legality of these digital warrants. We know that this
5 court has long held - - -

6 JUDGE STEIN: Though wasn't there another issue
7 there? There - - - there was a contempt finding? So is it
8 really that clear that the court was - - - was addressing
9 the same issue that - - - that you're asking us to address
10 today?

11 MR. DUPREE: Your Honor, it - - - you're right in
12 that there were differences in the case. Another
13 difference is that case concerned the extraterritorial
14 application of these warrants. But what, I think, we can
15 all take away from the Second Circuit's opinion are two
16 general premises. One, that service providers, like
17 Facebook and Microsoft, have a statutory right to quash on
18 grounds of legality or grounds of unconstitu - - -

19 JUDGE STEIN: Well, do - - - do we have to
20 address that issue first before we address the issue of
21 whether - - - whether it is or is not a right to quash,
22 whether there - - - it's appealable, whether the order's
23 appealable?

24 MR. DUPREE: I - - - I think both are threshold
25 questions, Your Honor. I don't know that the court

1 necessarily has to decide one before the other, but we
2 would ask this court - - -

3 JUDGE STEIN: But if we dec - - - if we were to
4 decide that it is not an appealable order, do we get to - -
5 - to that first question?

6 MR. DUPREE: Probably not. In other words, if
7 the question Your Honor is positing is if it's not
8 appealable and there's no jurisdiction could it reach that,
9 I - - - I guess the answer is probably not. Although, I
10 would point out there are aspects of our challenge that I
11 think there is - - - should be no debate as to
12 appealability, for example, our challenge to the gag
13 provision and our challenge to the DA's failure to disclose
14 the - - - the underlying affidavit. So even if this court
15 were to - - -

16 JUDGE STEIN: Well, why aren't those, as with the
17 warrants, part of a criminal proceeding for which there is
18 no statutory or constitutional basis to appeal to this
19 court?

20 MR. DUPREE: Well - - - well, our argument, Your
21 Honor, and I think it is very consistent with what this
22 court has said in Abrams and other courts have held, is
23 that in a situation where you have an order from a court
24 directing a third party to produce documents, even in the
25 context of a criminal investigation, that's an appealable

1 order.

2 JUDGE STEIN: Well, but they related to
3 subpoenas. And - - - and so then don't we have to get into
4 the question of whether this is or is not a subpoena?

5 MR. DUPREE: Yes. I think at the end of the day,
6 we would ask this court to find that the warrants are more
7 similar to subpoenas for the very reasons we articulated in
8 our brief. They're executed like subpoenas in that it's
9 the service provider whose obligation is to go out and pull
10 together the information. It's also different subpoenas in
11 that unlike an ordinary - - - or similar to subpoenas in
12 that unlike an ordinary search warrant, which is really
13 executed as soon as it's issued when law enforcement comes
14 to the door and takes everything away - - -

15 JUDGE ABDUS-SALAAM: But wouldn't we - - -
16 wouldn't we be looking at a term that said - - - that
17 called it subpoena as opposed to warrant? You've said it
18 yourself, counsel, it's a warrant, and you're saying that
19 it's like a subpoena, but it's not a subpoena, right?

20 MR. DUPREE: Well, I - - - I take your point,
21 Your Honor. It's - - - it's not - - - it's neither fish
22 nor fowl. It's not exactly a subpoena, and it is not
23 exactly a warrant. But - - -

24 JUDGE ABDUS-SALAAM: Well, it's a warrant but you
25 said it's treated like a subpoena. You - - - you just said

1 that I think.

2 MR. DUPREE: I said it's a warrant in the sense
3 that that is the name of what this order is, but it is not
4 a warrant in the sense of a traditional search warrant
5 which is the context in which this case - - -

6 JUDGE ABDUS-SALAAM: But to get this warrant, you
7 have to go through the traditional means or the People have
8 to go through traditional means to get it, and only the
9 government can do that, correct? It's not an individual
10 who can just get a search warrant.

11 MR. DUPREE: That's - - - that's - - -

12 JUDGE ABDUS-SALAAM: They don't have probable
13 cause, right?

14 MR. DUPREE: That's - - - that's correct, Your
15 Honor. But what I would point out to you is that when
16 congress created this new tool that is used commonly by law
17 enforcement, they expressly designed it so that it would
18 have many of the aspects, in terms of protecting
19 constitutional rights, of a subpoena. For example, unlike
20 a traditional search warrant, congress specifically gave
21 us, the service provider, the right to move to quash. That
22 takes this case out of the warrant universe - - -

23 JUDGE RIVERA: Yes. But on very narrow grounds.
24 This is where I started. It's on very narrow grounds,
25 which makes sense in the context of the kind of information

1 the People are seeking, right, this electronic material and
2 the scope of - - - the potential scope, excuse me, of the
3 warrant requests so it makes sense in this context.

4 MR. DUPREE: But - - -

5 JUDGE FAHEY: It - - - it seems like you're using
6 the materials that are being sought to find the nature of
7 the writ. So in - - - in other words, because you're - - -
8 you're looking for particular stored information, you're
9 comparing it to a normal civil subpoena where you go in and
10 you say I want - - - I want to go through all your files
11 here, and I want you to find for me - - - we're saying
12 Facebook - - - the government's saying Facebook, we want
13 you to find for us this particular and - - - and overturn -
14 - - and turn it over to us just like you would in any other
15 subpoena that's asking somebody for their business records
16 that can be issued. But for us, that can't be
17 determinative on the nature of what it is because the
18 procedural rights and the substantive rights that attach to
19 each are different and they have different
20 responsibilities. And if you can't get beyond that issue,
21 it's hard for me to see how we can get to the other, very
22 compelling and interesting issues, but nonetheless,
23 difficult for us to get at if it's not appealable in the
24 first instance.

25 MR. DUPREE: Right. Your Honor, what - - - what

1 I would say to that is that the test that this court
2 articulated for appealability was set forth in the Abrams
3 decision. What - - -

4 JUDGE FAHEY: But Abrams was a subpoena, wasn't
5 it?

6 MR. DUPREE: It was a subpoena. But the legal
7 test - - - it was applied to a subpoena in that case but
8 the legal test that this court articulated in Abrams is you
9 need to look not to the label but to the nature of the
10 proceeding and the relief sought. And the Second Circuit
11 again - - -

12 JUDGE STEIN: But aren't you exactly seeking
13 relief that is in the nature of a warrant, a Fourth
14 Amendment protection? Isn't that essentially what you're
15 seeking here?

16 MR. DUPREE: I - - - Your Honor, I - - - I don't
17 think so. In other words, we are not seeking - - - this is
18 not a motion to suppress. In fact, I think even the
19 government would concede that the consequence of our
20 prevailing on the motion would not at all be like a motion
21 to suppress because the government has not used the fruits
22 of this massive search in a single prosecution. So - - -

23 JUDGE STEIN: But you are looking for certain
24 relief, whether it's suppression or something else, based
25 upon a Fourth Amendment violation.

1 MR. DUPREE: I - - -

2 JUDGE STEIN: And - - - and to me that - - - that
3 sounds more like a warrant than a subpoena.

4 MR. DUPREE: Well, again, at the end of the day
5 what we are challenging is an order from a court directing
6 us to produce something, and if you look at this court's
7 decisions, again in Abrams, which did arise in the subpoena
8 context, People v. Marin, which is a lower court decision
9 that also applied the rule. What this court and other
10 courts have said is that if the third-party provider
11 doesn't have any other way of achieving an appellate remedy
12 - - - because we're not a party to the underlying
13 proceeding. We are not going to be able to notice an
14 appeal from a final judgment in the case. So this is our
15 day in court. This is not going to be appealed any other
16 way. And it's not just Facebook's interests that are at
17 stake, but it's, frankly, the rights of the more than 300
18 New Yorkers whose material was seized and will have no
19 legal recourse to vindicate the violation of their
20 constitutional rights.

21 JUDGE STEIN: Why - - - why can't they challenge
22 - - - challenge these - - - these warrants, these orders?

23 MR. DUPREE: Because the vast majority of the
24 persons whose information that the DA seized were never
25 charged. There's no criminal proceeding.

1 JUDGE STEIN: So?

2 JUDGE RIVERA: But doesn't the federal statute
3 allow them?

4 MR. DUPREE: I beg your pardon, Your Honor?

5 JUDGE RIVERA: Doesn't the federal statute allow
6 for them to proceed if - - - if indeed the People have
7 acted in violation of the scope of the authority under the
8 statute?

9 MR. DUPREE: The argument the DA has made is that
10 these individuals have a remedy under Section 1983 of
11 Federal Law. And what this court has said, and all courts
12 have said, is in that determining whether to permit third-
13 party standing, you have to ask whether it is realistic to
14 expect the absent right holders to assert their rights. We
15 would submit that it is simply unrealistic to expect the
16 hundreds of New Yorkers whose information was seized to go
17 out, retain lawyers, publicly sue the district attorney - -
18 -

19 JUDGE STEIN: What about a class action?

20 MR. DUPREE: Again, I don't think it's going to
21 happen. It has - - - certainly hasn't happened with regard
22 to a single person. We're talking close to 400 people.
23 Not one single action has been filed in this case. If - -
24 -

25 JUDGE STEIN: Well, may - - - maybe because

1 Facebook is doing it for them at this point, and they don't
2 have to.

3 MR. DUPREE: Well, again, if this court were to
4 recognize, as the Section Circuit has, that Facebook does
5 have the right to bring these types of challenges, then
6 you're right. The individuals - - -

7 CHIEF JUDGE DIFIORE: Mr. Dupree, if we were to
8 treat the order as a - - - akin to a subpoena, what would
9 the impact be on the underlying criminal actions?

10 MR. DUPREE: I think the answer to that, Your
11 Honor, is zero. And the reason why is that, to the best of
12 our knowledge, and Mr. Vance can correct me if I'm
13 mistaken, but that the DA has not used the fruits of this
14 search and seizure in a single prosecution. In fact, when
15 some of the indicted users said to the DA we'd like to
16 challenge this warrant, the DA said we're not going to use
17 any of that evidence. So to the best of our knowledge, it
18 would have no effect on the proceedings because they're
19 simply not using this evidence.

20 JUDGE STEIN: What about delay of proceedings?

21 MR. DUPREE: I don't think it would delay the
22 proceedings, Your Honor. This - - - these seizures
23 happened several years ago. They have all been wrapped up
24 except for a handful.

25 JUDGE STEIN: And that may be in this case, but

1 in other cases that we also have to consider, if we were to
2 say that this is an appealable order, then aren't we
3 risking the possibility that - - - that criminal
4 prosecutions are going to be inordinately delayed while
5 third parties or - - - or first parties start appealing
6 warrants?

7 MR. DUPREE: I don't - - - I don't think that's a
8 real risk, Your Honor. Here's why. First, congress
9 provided for service providers to move to quash, so to the
10 extent that there could be a slight increase in litigation,
11 that's something that congress expressly contemplated when
12 it gave us the statutory right to file these motions. But
13 beyond that, Your Honor, I think it's important to
14 underscore that Facebook, like many service providers,
15 receives tens of thousands of these requests. This one, in
16 this case, is far and away the largest we have ever
17 received. We've never seen anything like this, 381
18 warrants. We don't make a habit of litigation. In fact,
19 we work cooperatively with law enforcement on a daily basis
20 to facilitate these requests, to object where we think they
21 are overbroad - - -

22 CHIEF JUDGE DIFIORE: So is that moved Facebook,
23 sir, that the voluminous number? What if the court had
24 staggered out the issuance of those
25 orders/warrants/subpoenas?

1 MR. DUPREE: Let - - - let me put it this way,
2 Your Honor. The voluminous number was a major red flag.
3 381 warrants, no one's ever seen anything like this. But
4 beyond that, the warrants themselves were the equivalent of
5 the Eighteenth-century general warrant in that they had no
6 time restrictions, no content restrictions. They didn't
7 link the material they sought to the alleged crime.

8 CHIEF JUDGE DIFIORE: Would your response had
9 been different if the judge had issued five of them, five
10 of them the next week?

11 MR. DUPREE: I don't think our response would
12 have been different because it's our position that these
13 warrants, even if it was just one, is patently
14 unconstitutional on its face. Because they made absolutely
15 no effort to link the vast quantities of information they
16 sought to the alleged crimes at issue. These are carbon
17 copy warrants that seized everything. And if I can make
18 one last point - - -

19 CHIEF JUDGE DIFIORE: Okay.

20 MR. DUPREE: - - - since I know my red light is
21 on. I want to make sure I preserve my rebuttal time. I
22 think it's important to underscore what's at stake here,
23 Your Honors. This case involves the DA's seizure of the
24 most personal and intimate information imaginable. These
25 are people's private thoughts and communications on their

1 lives, their identities, their families, their politics,
2 their religion, their sexuality, all capture in the DA's
3 dragnet. If these people don't have a remedy in this
4 court, they have no remedy at all.

5 CHIEF JUDGE DIFIORE: Thank you, sir.
6 Counsel.

7 MR. VANCE: Good afternoon, Your Honors. My name
8 is Cy Vance. I'm the Manhattan District Attorney, and I'm
9 appearing on behalf of the respondents, the People of the
10 State of New York and our office.

11 JUDGE ABDUS-SALAAM: Do the - - - do the users of
12 Facebook and other social media, do they have a remedy if
13 we don't give them one - - -

14 MR. VANCE: Yes.

15 JUDGE ABDUS-SALAAM: - - - in this case, Mr.
16 Vance?

17 MR. VANCE: Yes. Yes. They do. They have two.
18 In 2707, which I believe was referenced by Justice Rivera,
19 they have the opportunity to file an action for damages
20 against, presumably me, since I stand as, you know, the
21 person who is sued in the case the DA's office is sued, and
22 secondly, a 1983 action. So the statute contemplates both
23 the Stored Communications Act and federal law contemplates
24 a remedy for individuals who are - - - who believed they
25 are grieved. And - - - and in this case, notice was

1 provided - - - there were three sets of indictments.

2 JUDGE RIVERA: And the users you prosecute would
3 have - - -

4 MR. VANCE: And - - - and the users, you're - - -

5 JUDGE RIVERA: - - - whatever rights they have
6 under the CPL or other - - -

7 MR. VANCE: The users would have the right to
8 challenge the warrants. And - - - and if convicted, appeal
9 on the admissibility of that evidence and also the remedy
10 of a 1983 action.

11 JUDGE FAHEY: You - - - you know what I wonder,
12 though, is - - - is could this information have been
13 obtained through the use of subpoenas rather than a
14 warrant? And it - - - it seems like the kind of
15 information that would be interchangeable that - - - that
16 could be obtained through both a warrant or a subpoena.

17 MR. VANCE: Your Honor, I think - - - let me, if
18 I may, a little background. This was a three-year
19 investigation examining several decades' worth of alleged
20 fraud of individuals principally former law enforcement or
21 - - - or firefighters who were in the - - - in the view of
22 our office at the time and later in the indictments
23 fictionalizing that they were so damaged that they could
24 not work outside the home, that they could not function and
25 therefore received Social Security and disability.

1 JUDGE FAHEY: Sure. I - - - I can understand
2 that. We're pretty familiar with the facts - - -

3 MR. VANCE: Well - - -

4 JUDGE FAHEY: - - - of why - - - why you wanted
5 to get the - - - their Facebook accounts. I understand
6 that.

7 MR. VANCE: Be - - - number - - - so number one,
8 Your Honor, a search warrant enabled us to access the
9 documents, as we do in a search warrant. The nondisclosure
10 order also permitted us to have that information without
11 alerting the individuals whose accounts were identified in
12 the search warrant that a warrant had taken place. It was
13 our concern, and I believe it was - - - I believe Justice
14 Jackson at the trial who examined this, concurred that we
15 had presented sufficient cause to be concerned that if - -
16 - if individual account holders were notified, that there
17 was a risk that information on those sites could be
18 deleted, altered, and changed. That's the answer.

19 JUDGE FAHEY: So - - - so the answer is no. It's
20 not interchangeable because the evidence could be
21 destroyed, and you wouldn't have a gag order?

22 MR. VANCE: Better said than me. Exactly, yeah.
23 So the remedies are available and the individuals have all
24 been notified. In one sense, I believe this is moot. In
25 July of 2014, the - - - we - - - we issued the final order

1 to Judge FitzGerald, and at that point all of the account
2 holders were capable to be notified, Facebook said they did
3 on page 16 of their brief, so that all the account holders
4 as of July of 2014, which was one year after Justice
5 Jackson issued the first search warrant. So it was a - - -
6 you know, it's a - - - it was a very large, I'd say almost
7 a massive case. But I believe that - - -

8 JUDGE RIVERA: So if they wanted to challenge,
9 you said they'd have remedies. Would they have access to
10 the affidavit?

11 MR. VANCE: They would not have access to the
12 affidavit unless they were a criminal defendant. They
13 could pursue civil litigation and they could, you know,
14 seek under Foyle - - -

15 JUDGE RIVERA: In discovery or something - - -

16 MR. VANCE: - - - seek under Foyle or - - - or
17 some mandamus alternate - - - alternate means of trying to
18 get access to the affidavit. But they would not have
19 access to the affidavit unless they were the criminal
20 defendants.

21 CHIEF JUDGE DIFIORE: Mr. Vance, what about the
22 concern about the indefinite retention of the seized
23 information from the users accounts for people who were not
24 charged?

25 MR. VANCE: Your Honor, I don't think that our

1 statutes have yet caught up with what exact
2 responsibilities are placed upon the prosecution or the
3 court in such a circumscribed. In fact, that doesn't
4 really exist under New York State law, and I'm not sure it
5 exists under federal law. Judge FitzGerald did not unseal
6 the affidavit, and - - - and he did not - - - he - - - he
7 simply indicated that it could be used for the purposes of
8 the trial. So - - - so to answer your question, we don't
9 have precise guidance. I think we could look for precise
10 guidance, but this is also information that's not quite
11 like taking someone's notes or papers. The individuals
12 already have that information. In other words, they - - -
13 they have the information that was seized because it's on
14 their Facebook account. So it's not as if we are giving
15 back to them something that they don't have. They've had
16 it all along.

17 JUDGE ABDUS-SALAAM: Mr. Vance, do you agree with
18 what your adversary said that you have not used any of this
19 information in a single prosecution?

20 MR. VANCE: I - - - I believe that - - - I can't
21 say we have not used it in a single prosecution. What I
22 can say is no one has controverted to litigation the
23 affidavit. And so the affidavit has not gone through a - -
24 - you know, a - - -

25 JUDGE ABDUS-SALAAM: But the information that was

1 gathered through these warrants has been used to indict - -
2 -

3 MR. VANCE: Yes. It - - - it - - -

4 JUDGE ABDUS-SALAAM: - - - individuals and they
5 have - - -

6 MR. VANCE: Well, it's been used as part of the
7 evidence. It's been used as part of the evidence of
8 framing, ultimately, the indictment, but I do not believe
9 that information from the affidavits has been introduced in
10 court or in legal proceedings at trial.

11 JUDGE ABDUS-SALAAM: Is that - - - is that
12 something that we should be concerned about?

13 MR. VANCE: You know, I don't think so, Your
14 Honor. I - - - first of all, when you look at on the scape
15 - - - on the - - - you know, on the - - - on the scale of
16 cases, this falls on the very large. And you're going to
17 seek in a large investigation information that you are not
18 going to necessarily use in court. You're trying to obtain
19 information that gives you enough information and knowledge
20 and evidence to make charging decision. But once those
21 charging decisions are made, that doesn't mean that
22 everything that - - -

23 JUDGE RIVERA: So is it - - -

24 MR. VANCE: - - - you have subpoenaed like our
25 case is - - -

1 JUDGE RIVERA: Is it useful to - - -

2 MR. VANCE: - - - going to be introduced into
3 evidence.

4 JUDGE RIVERA: I'm sorry to interrupt you. Is it
5 useful to secure pleas because several people took pleas;
6 did they not?

7 MR. VANCE: Is what useful, Your Honor?

8 JUDGE RIVERA: I'm sorry. The - - - the
9 information, I was sort of responding to his point that
10 it's not being used in court - - -

11 MR. VANCE: I - - -

12 JUDGE RIVERA: - - - is information that's being
13 used for purposes of negotiating a plea bargain - - -

14 MR. VANCE: I think ultimately, Your Honor, the
15 evidence - - - the - - - there were many - - - there were
16 many kinds of evidence. And the reason why these Face - -
17 - the reason why these accounts and the information were -
18 - - were obtained is - - - is the nature of - - - of the
19 investigation. These were individuals who were faking
20 lifestyles. They were claiming that they couldn't leave
21 the house, they couldn't go bowling, they couldn't see
22 their family. And so Facebook, the medium on which these
23 very pictures are posted and was - - - you know, was
24 designed to give us an indication of whether they were, in
25 fact, disadvantaged or disabled as they were.

1 JUDGE WILSON: Mr. Vance, can I ask you two
2 things?

3 MR. VANCE: Sure.

4 JUDGE WILSON: One, regarding the use of
5 subpoenas, if you'd served a subpoena wouldn't Facebook
6 have the obligation to preserve the information so that
7 Judge Fahey's question about destruction or loss is really
8 not relevant?

9 MR. VANCE: I think you - - - the - - - you know,
10 that Facebook would be under an obligation to preserve that
11 which - - -

12 JUDGE WILSON: As soon as you serve the subpoena.

13 MR. VANCE: - - - it had, not necess - - - but
14 I'm not - - - I'm not entirely sure how Facebook - - - I
15 simply don't know whether Facebook could, in fact, prevent
16 a user from changing a portion of the information on their
17 Facebook page and account.

18 JUDGE WILSON: Okay. Second question is have you
19 looked at all in - - - Article 1 Section 12 of the New York
20 State Constitution is different from the Fourth Amendment.
21 Are you aware of that?

22 MR. VANCE: I'm generally aware, Your Honor.

23 JUDGE WILSON: And that there's a - - - it - - -
24 it copies it verbatim but then it adds a provision that was
25 added in 1938 as a result of the Constitutional Convention

1 that - - - that concerns electronic communication. Are the
2 protections under New - - - under the New York Constitution
3 different?

4 MR. VANCE: Your Honor, I'm not aware that they
5 are different. Perhaps you - - - you have a view that they
6 are, and I'd be happy to answer to it.

7 JUDGE WILSON: Have you looked at the records of
8 the convention to see, for example, whether - - - when the
9 provision was added one of the things the convention
10 rejected was the argument that civil suits would be
11 sufficient?

12 MR. VANCE: I'm - - - I'm not aware of that, Your
13 Honor. But that said, I think civil suits have been
14 effective in any number of instances where individuals
15 believe that their rights have been violated. And - - -
16 and clearly, the - - - the historic Communications Act
17 provides for that - - - for that very - - - very thing.
18 So, Your Honors, I - - - there's a question of whether
19 Facebook has standing here. My belief is, and I believe
20 this court has consistently over the course of its opinion
21 said no. Facebook is not a party to the underlying
22 litigation. This court has limited the appeal rights to
23 only enumerated statutory rights. The reason being, I
24 believe because you did not want to have litigation, pre -
25 - - interlocutory appeals slowing down the process of - - -

1 of criminal cases. Facebook is a repository but it is not
2 - - - their Fourth Amendment interests, their personal
3 privacy interests are not implicated.

4 JUDGE RIVERA: But they can seek to have it
5 quashed if it's voluminous.

6 MR. VANCE: They - - - absolutely.

7 JUDGE RIVERA: You concede to that?

8 MR. VANCE: Absolutely. And they didn't.

9 JUDGE RIVERA: What's set out in the statute.

10 MR. VANCE: And they didn't. Once - - - which I
11 think is - - - is relevant. I don't think Facebook
12 actually based upon the time of production - - - when they
13 - - - when they exhausted their orders - - - their
14 challenges at the Appellate Division, I believe that the
15 production of the information was within a matter of weeks.
16 Now other - - -

17 JUDGE WILSON: Well, so burden means - - - must
18 mean something different than voluminous, no? The statute
19 says both.

20 MR. VANCE: I'm not sure - - - I'm not, Your
21 Honor - - - I'm not sure what burden - - - what - - - what
22 is the difference - - -

23 JUDGE WILSON: That's what I was going to ask
24 you.

25 MR. VANCE: - - - between burdensome. But I

1 would agree, just as a matter of practice over thirty-five
2 years, that burdensome and voluminous tend to mean - - -
3 and I think it's entirely appropriate, that if - - - if you
4 are asking the company to do something that - - - that is
5 going - - - that - - - that simply says it feels it cannot
6 do without affecting, for example, a small business, its
7 ability to function or the Google case, for example, the
8 court may remember, in Alaska, there were six search
9 warrants. They asked for the entirety of the accounts and
10 gave - - - and gave Google the - - - essentially the search
11 criteria. Google went to the court - - - the district
12 court in Alaska and said I - - - we can't do that. We're -
13 - - we're not the ones who should be screening for
14 relevance and whether or not this information is - - - is
15 responsive. And so, Your Honor, we'd like actually the
16 federal prosecutor to do that search. So the - - - so
17 companies absolutely assert issues of overburden and
18 voluminosity, if that's a word, when it affects their
19 ability to - - - to provide the material.

20 JUDGE STEIN: So your argument is that undue
21 burden relates to difficulty - - -

22 MR. VANCE: Yes.

23 JUDGE STEIN: - - - not - - - not to
24 constitutionality or unconstitutionality.

25 MR. VANCE: Yes. And I - - - but stepping back,

1 you know, the orders that are at issue here, there is the
2 order on - - - that there's insufficient probable cause.
3 There's the order on nondisclosure. And there is a third
4 order, which I will remember. All of those come out of the
5 criminal proceeding. They all arise out of the criminal
6 proceeding. Matter of *Newsday v. Morgenthau*, I believe, is
7 the controlling case here. They arise out of the Fourth
8 Amendment criminal proceeding. Only - - - only the people,
9 the defendants can appeal in criminal case.

10 JUDGE WILSON: The - - - the proceeding in *Abrams*
11 was really no different. It was just the method used to
12 get the - - - the information, right? It was the attorney
13 general investigating criminal ticket scalping.

14 MR. VANCE: Well, *Abrams* clearly involved a
15 subpoena. I mean there's no doubt - - -

16 JUDGE WILSON: Right.

17 MR. VANCE: - - - that it was a subpoena.

18 JUDGE WILSON: Right.

19 MR. VANCE: And I believe there's no doubt that -
20 - -

21 JUDGE WILSON: But it was a criminal proceeding.

22 MR. VANCE: - - - this was a - - - in our case,
23 it is a search warrant.

24 JUDGE WILSON: But it was a criminal proceeding,
25 yes?

1 MR. VANCE: Well, it was a grand jury proceeding.
2 But the courts in New York have held that subpoenas in the
3 grand jury context can be challenged and - - - and there -
4 - - those orders can be appealed. But not in search
5 warrants. It's - - -

6 JUDGE RIVERA: Well, you've got the protections
7 up front.

8 MR. VANCE: You have the ex ante review by Judge
9 Gavin (ph.). And you have the ex post facto review by Your
10 Honors on issues of - - - of whether the material was
11 properly seized or not. So - - -

12 JUDGE RIVERA: So - - - so but why can't - - - as
13 he argued before, why - - - why can't, going back to this
14 undue burden issue, why can't you import the concepts of
15 undue burden into this statute that you - - - that you find
16 other - - - in other parts of sort of constitutional
17 discourse. Why is that inappropriate here given that we're
18 talking about the privacy of these users?

19 MR. VANCE: Law enforcement is always going to be
20 bumping up against people's privacy. That is the nature of
21 what we do in gathering evidence. So the fact that there
22 is a privacy interest in seized material is really no
23 different than if we issued a search warrant into someone's
24 house and took books and records or a car or a safety
25 deposit box.

1 JUDGE RIVERA: I get your point, but certainly in
2 - - - under Riley and the Supreme Court has made clear that
3 these electronic - - - the world we live in, this digital
4 electronic world we live in is different when it comes to
5 privacy, right? That case, of course, involved a phone. I
6 know that is different. But nevertheless, that underlying
7 concept that the way people now maintain the most intimate
8 of details requires, perhaps, a different consideration and
9 contextualization of these constitutional protections.
10 Isn't that - - - isn't that the point that they're getting
11 to?

12 MR. VANCE: Well, I think - - -

13 JUDGE RIVERA: You're - - - you're correct. Of
14 course if one goes into someone's home, you're invading
15 their privacy, absolutely true. But it - - - it's the
16 scope, right, the magnitude and - - - and the - - - the
17 significant intimate details that become available with a
18 keystroke that I think they're arguing about.

19 MR. VANCE: Well, Your - - - Your Honor, I think
20 that whether it's a digital search or a search of someone's
21 home, obtain - - - obtaining a search warrant based on
22 probable cause that has been presented to a sitting judge
23 who has reviewed it to make sure that she believes that
24 there is probable cause, that is the protection whether it
25 is a digital document or it is a intimate diary. The fact

1 that it is digital raises issues of scope, no doubt. But I
2 don't think it changes the underlying legal issue, which is
3 law enforcement, in doing its job, is going to invade on
4 people's privacy. Under our laws, judges are supposed to
5 be the gatekeepers of privacy before that happen - - - that
6 can happen. And in that - - - in this case, that's exactly
7 what we did, and Facebook simply cannot stand in the shoes
8 of its users to assert their individual Fourth Amendment
9 rights.

10 JUDGE STEIN: Do you agree - - -

11 JUDGE ABDUS-SALAAM: That - - -

12 JUDGE STEIN: I'm sorry.

13 JUDGE ABDUS-SALAAM: No. Go ahead.

14 JUDGE STEIN: Do you agree that - - - with
15 Facebook that if - - - if we find this is not appealable we
16 don't need to address the issue of whether the motion to
17 quash was appropriate in the first place?

18 MR. VANCE: Yes. Yes. Yes. And if you find
19 it's a subpoena, then they have a right to - - - to appeal,
20 but I think this walks like a search warrant, quacks like a
21 search warrant. It is a search warrant. There was a
22 probable cause affidavit, a - - - sent to the judge. I - -
23 - I think that, in my opinion, should not be an issue for
24 this court.

25 JUDGE ABDUS-SALAAM: Could we - - - your lights

1 on - - -

2 MR. VANCE: Yeah.

3 JUDGE ABDUS-SALAAM: - - - Mr. Vance, and I - - -
4 I'd just like to return to the affidavit and why it's not
5 being disclosed because you did move the court to have it
6 unsealed, but you refused to disclose it. And - - -

7 MR. VANCE: Two - - - two reasons, Your Honor, or
8 several. Number one, we moved for its unsealing, but Judge
9 FitzGerald clarified in his ruling of, I think, August 23,
10 and it is at 38 to 40 of the appendix, that he did not
11 intend, by unsealing it, to make it a public document,
12 specifically saying that. He intended by unsealing it so
13 that it could be taken to the district attorney's office
14 and used in the - - - in the criminal litigation.

15 Secondly, I think you have to - - - in my - - -
16 respectfully, I think we have to focus on what's being
17 appealed. What's being appealed is the propriety of Judge
18 FitzGerald's order then, and that was at the initiation of
19 a very large piece of complex criminal litigation. And so
20 his order, which is what's being appealed, we have to,
21 respectfully, go back in time and look at what the
22 propriety of what he thought, what he did at that time.
23 And it hasn't been given to Facebook because they don't
24 have standing in this case. They - - - they want the
25 affidavit. They want the affidavit for a lot of reasons,

1 but they are simply not appropriately before the court.
2 The appeal should be dismissed, and if Facebook had sought
3 other ways to get the affidavit or it shows - - -

4 JUDGE RIVERA: Counsel, let me just ask you. You
5 concede - - - the light has gone off. The Chief Judge has
6 given me permission to ask this one question. The - - - do
7 you concede that at some point this affidavit will be
8 available as a public document? Maybe it will have to be
9 redacted.

10 MR. VANCE: I'm not sure, Your Honor, that it - -
11 - honestly, I'm not sure that the affidavit will become a
12 public document. Number one, we would have to go back to
13 Judge FitzGerald, and this is - - - and he would have to
14 order its release. And - - - but the fact that it does not
15 become public may be - - - is - - - is different than the
16 issue for which Judge FitzGerald made it - - - and Judge
17 Jackson authorized it and used it in - - - in issuing the
18 search warrants. And whether these - - - I - - - if the
19 individuals involved who have been charged do not seek
20 access to the document itself, those who have their own
21 Fourth Amendment rights, then neither Facebook nor others,
22 we believe, have the right. And in any event, it's not an
23 appealable order under the Criminal Procedure Law. Thanks
24 very much.

25 CHIEF JUDGE DIFIORE: Thank you, sir.

1 Mr. Dupree.

2 MR. DUPREE: Thank you. I'd like to pick up on
3 Judge Wilson's question because this court really has a
4 proud tradition of recognizing that under Article 1 Section
5 12, as well as New York common law rules of standing and
6 appealability, that New Yorkers should be afforded greater
7 protection for their constitutional rights than is often
8 afforded in the federal system. If we were litigating this
9 case in federal court, this would be an appealable order.
10 If we were litigating this case in federal court, there's
11 no question that we would have standing to move to quash.

12 JUDGE RIVERA: But - - - but you're not the - - -
13 you're not the user so that - - - that's not necessarily
14 going to that point. But - - - but let me ask you this.
15 Let's say we agreed with you. Let's say we said yes, you
16 have a right to - - - to appeal, you have a right to quash,
17 you have a right to - - - to make the argument on behalf of
18 the users of their constitutional Fourth Amendment rights.
19 Let's say we agreed with you on all of that, and for some
20 reason, we wrote that. Does that mean that they are
21 foreclosed in the future from raising any claims? Let's
22 say you lose. Are they foreclosed from then trying to
23 assert their Fourth Amendment rights in some other - - -
24 whether it's a - - - a remedy as a user who doesn't get
25 prosecuted or one who is getting prosecuted? In other

1 words, what would be the impact of you being able to raise
2 these claims now on any future litigation?

3 MR. DUPREE: Well, the - - - the short answer,
4 Your Honor, is I don't think it would foreclose them from
5 bringing their own challenges - - -

6 JUDGE RIVERA: Why isn't it res judicata? Why
7 not in a civil suit?

8 MR. DUPREE: Well, because they - - - they would
9 not have been a party - - -

10 JUDGE RIVERA: Party?

11 MR. DUPREE: - - - to the - - - our motion to
12 quash, so I don't think they would technically be bound by
13 the judgment. But frankly, I think the larger answer to
14 Your Honor's question - - -

15 JUDGE RIVERA: Could they seek to intervene in
16 your action?

17 MR. DUPREE: Could - - - could they seek to
18 intervene?

19 JUDGE RIVERA: Yes.

20 MR. DUPREE: I think they probably could. I
21 think they probably could. Yes. But the larger answer to
22 Your Honor's question about what would the impact be if
23 this court recognized all of those rights, I think the
24 impact, honestly, is we would see law enforcement
25 respecting the Constitution when they draft warrants of

1 these nat - - - this nature. This is a massive search, 381
2 warrants. No one in the world has seen anything like this,
3 and the fact that we now know they haven't actually used
4 any of the evidence.

5 JUDGE ABDUS-SALAAM: Judge Jackson saw it. Judge
6 Jackson saw it and - - - and approved it.

7 MR. DUPREE: Well, I'm saying - - -

8 JUDGE ABDUS-SALAAM: Isn't that - - - isn't that
9 what we do for warrants? Don't we want some, you know,
10 dispassionate magistrate to look at this matter and say
11 whether or not the warrant should issue?

12 MR. DUPREE: We - - - we do, Your Honor. And
13 actually, let me answer that and also respond to a similar
14 point Judge Rivera mentioned earlier, which is, well, if
15 you that ex ante review, why shouldn't that be sufficient?
16 And the answer is because congress did not deem it
17 sufficient. That's why congress, in the federal statute
18 that authorized these warrants to issue in the first place,
19 gave service providers the right to move. Precisely
20 because that wasn't deemed sufficient in this modern age
21 where you could execute a search of this nature. Let's not
22 lose sight of the fact that in the 1980s, you couldn't even
23 begin to grab the massive volume of information. That's
24 400 people, that's seizing the entire contents of the town,
25 an entire populace of a town's personal information. You

1 would need hundreds of agents, months of going through
2 material.

3 JUDGE ABDUS-SALAAM: But what if this had been
4 not individuals but a huge company, for example, IBM or
5 ExxonMobil, which has offices around the world, and a
6 warrant was issued to one of them? That would be, like, a
7 whole country. Forget about a little town. So - - -

8 MR. DUPREE: You're - - - you're absolutely
9 right, Your Honor. And - - - and keep in mind that the
10 DA's ultimate position, in this case, is chilling because,
11 under his view, his office could seize the entire digital
12 lives of every person in New York City. And if they are
13 not criminally charged, they have no meaningful remedy.

14 JUDGE STEIN: But that - - - that assumes - - -

15 MR. DUPREE: None.

16 JUDGE STEIN: - - - that a judge would authorize
17 that, doesn't it?

18 MR. DUPREE: It - - - it does, Your Honor. But
19 the question is is given this new world we live in where
20 you can capture so much information with the single stroke
21 of the keyboard, that's why congress said we need to have a
22 little extra protection here because the world has changed.
23 The Fourth Amendment principles retain their force, but
24 they need to be adapted to the modern world we live in.
25 And this digital technology that enables law enforcement to

1 conduct these types of searches, that's what congress
2 recognized when it gave this court and all courts the power
3 to say whether a particular request is an undue burden. A
4 phrase that gives this court ample authority, just as the
5 Second Circuit did, to say that that does encompass legal
6 challenges when the service provider thinks they are being
7 conscripted to perform an unconstitutional search, they
8 have the right to take that argument to court. Because if
9 they don't, there is no stopping what the district attorney
10 did in this case and what it will do in the next case when
11 it issues 1,000 warrants.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of 381 Search Warrants Directed to Facebook, Inc. (New York County District Attorney's Office) No. 16 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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