COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
No. ____________________

SHAWN MUSGRAVE
and NASSER ELEDROOS,

Plaintiffs,

v.

CLERK OF THE SUPERIOR COURT FOR CRIMINAL BUSINESS IN SUFFOLK COUNTY, in her Official Capacity; THE OFFICE OF THE ATTORNEY GENERAL, and THE OFFICE OF THE SUFFOLK COUNTY DISTRICT ATTORNEY,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TERMINATE ORDER OF IMPOUNDENT

INTRODUCTION

More than five years ago, in the wake of the "Occupy Boston" protest, the Suffolk County District Attorneys' Office issued an administrative subpoena demanding the identities of anonymous users of the Twitter social media platform. Among other things, the District Attorney's December 2011 subpoena demanded the subscriber information of anyone who used a "hashtag" referencing the Boston Police Department around the time it was forcibly removing the protesters from Dewey Square Park.

The same month, an anonymous user referenced in the subpoena filed an action in this court objecting to the effort to unmask him, *In re Administrative Subpoena to Twitter, Inc.*, SUCR2011-11308. Despite widespread public interest in the case, on December 29, 2011, the

court impounded the entire case file. For the last five years, the public has been unable to determine why law enforcement authorities sought to invade the Twitter users' First Amendment right to speak anonymously. The Suffolk Superior Court clerk's office has even responded to an inquiry about the case by stating that it does not exist.

Plaintiffs Shawn Musgrave, an investigative journalist, and Nasser Eledroos, a technologist focusing on government surveillance, have brought this action to terminate the impoundment of the file in *In re Administrative Subpoena to Twitter, Inc.*, SUCR2011-11308. Court records are subject to a "rigorous presumption of openness"—a presumption that requires the Commonwealth to bear the burden of showing "good cause" for continued impoundment. *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 608 (2000). It cannot do so here. The passage of five years since the events at issue have eliminated any potential state interest in secrecy, whereas the public interest in government subpoenas that encroach on the First Amendment right to speak anonymously remains profound. The order of impoundment should be terminated and the case file released.

BACKGROUND

A. The Underlying Case

On September 30, 2011, a group of protesters occupied Dewey Square Park in Boston's financial district. Over the next several weeks, they and others formed "Occupy Boston," a live-in protest encampment modeled after "Occupy Wall Street," which was taking place concurrently in New York. On December 10, 2011, Boston Police moved in, cleared the park, and arrested dozens of people.

On December 14, 2011, the Suffolk County District Attorney's Office issued an administrative subpoena to Twitter, Inc. (*See* Affidavit of Shawn Musgrave ("Musgrave Aff."),

Ex. 1.)[1] The subpoena demanded "all available subscriber information" for the "account or accounts associated with" certain user names, proper names, and "hashtags" during the period just before and after the clearing of Occupy Boston, specifically, "Guido Fawkes" "@p0isAn0N," "@OccupyBoston," "#d0xcak3" and "#BostonPD." (Ex. 1.)

The subpoena demanded exceptionally broad categories of information. It did not merely seek subscriber information concerning the identified accounts "@p0isAn0N" (tweeting under the proper name "Guido Fawkes") and "@OccupyBoston." Rather, by seeking all information concerning users "associated with" these accounts, it sought to identify persons who merely "followed" them, meaning they "subscribed" to the user's tweets,[2] or who "retweeted" tweets from those accounts.[3] Moreover, the subpoena sought to identify persons who had used the keyword ("hashtag," in Twitter parlance), "#BostonPD" during the period in which the police were clearing out Dewey Square Park.[4] The subpoena, therefore, carried a risk of identifying critics of the police who preferred to remain anonymous, whether or not they were suspected of criminal activity.

Soon after the subpoena was served, an anonymous Twitter subscriber filed an action objecting to the subpoena in the Suffolk Superior Court, *In re Administrative Subpoena to Twitter, Inc.*, SUCR2011-11308. The matter received widespread media attention, with articles appearing in the *Boston Globe*, on CNN.com, and on Wired.com, among other outlets. (Ex. 2.)

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[1] "Ex. __" shall refer to the exhibits to the Affidavit of Shawn Musgrave.

[2] *See* "FAQs About Following" https://support.twitter.com/articles/14019

[3] *See* "FAQs about Retweets," https://support.twitter.com/articles/77606 ("A Retweet is a re-posting of a Tweet. Twitter's Retweet feature helps you and others quickly share that Tweet with all of your followers. You can Retweet your own Tweets or Tweets from someone else.")

[4] Twitter users employ "hashtags" in front of "a relevant keyword or phrase in their Tweet to categorize those Tweets and help them show more easily in Twitter search." *See* "Using hashtags on Twitter," https://support.twitter.com/articles/49309

Despite this intense public interest, at a hearing on December 29, 2011, the Court (Ball, J.) ordered the case file impounded in its entirety. (Ex. 2).

On February 27, 2012, the Court (McIntyre, J.) ordered Twitter to comply with the subpoena. Shortly thereafter, the party objecting to it sought to terminate impoundment of the court file. On March 1, Judge McIntyre vacated impoundment of her February 27 order. However, on March 2, 2012, she entered a memorandum of decision and order impounding every other document and transcript in the case. Attorneys for the objecting party were permitted to view and take notes on that March 2 order, but were not permitted to obtain a copy of it. Musgrave understands that the papers that remain impounded include briefing concerning the right of the Suffolk District Attorney's office to subpoena Twitter account information, *ex parte* submissions regarding the reasons for the subpoena, and the constitutional and statutory arguments of the anonymous user.

B. Shawn Musgrave, an Investigative Journalist, Requests the Court File.

Shawn Musgrave is a freelance investigative journalist who has written extensively on issues related to law enforcement surveillance of social media and uses of technology that may invade reasonable expectations of privacy. Among other things, Musgrave has investigated the unrestrained monitoring of social media by Texas law enforcement officials (Ex. 3), the study of social media by national security agencies, (Ex. 4), and the Boston Police Department's use of covert cell phone trackers. (Ex. 5).

Musgrave has a particular interest in government attempts to unmask users of social media platforms—an issue that has continuing relevance today. In April 2017, for example, Twitter brought a lawsuit against the Department of Homeland Security after it demanded disclosure of the identity of the user behind "@ALT_uscis," an account allegedly run by current and former

Citizenship and Immigration Services employees who were critical of the Trump administration. Senator Ron Wyden, among others, objected to the demand, noting the DHS "appears to have abused its authority and wasted taxpayer resources, all to uncover an anonymous critic on Twitter." (Ex. 6). The DHS later dropped its demand for this information.

On May 15, 2017, Musgrave went to the Criminal Clerk's Office at the Suffolk Superior Court and asked to view the case file in *In re Administrative Subpoena to Twitter*, 2011-CR-11308. After multiple attempts to locate information on the case, an assistant clerk told Musgrave that no case with that docket number exists.

C. Nasser Eledroos's Interest in the Impounded Case File

Nasser Eledroos is a technologist at the American Civil Liberties Union of Massachusetts whose work focuses on matters of digital security and government surveillance. He uses his skills first to investigate data-driven and technological questions, and then to present the answers in a way that the general public can understand.

Eledroos is currently working on a white paper designed to educate the public about the government's use of administrative subpoenas. He has already analyzed generalized data reflecting the overall frequency with which certain government offices use these subpoenas. It is his understanding that the case file in *In re Administrative Subpoena to Twitter*, 2011-CR-11308 is impounded. Eledroos has a particular interest in these documents because they will help him explain to the public how the Commonwealth actually uses this technique in practice.

ARGUMENT

I. THERE IS NO GOOD CAUSE FOR CONTINUED IMPOUNDMENT OF THE CASE FILE.

A. Impoundment Principles.

The press and the public have longstanding and vital common-law and First Amendment rights of access to judicial documents in criminal proceedings. *Republican Co. v. Appeals Court,* 442 Mass. 218, 222-223 (2004); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) ("This circuit, along with other circuits, has established a First Amendment right of access to records submitted in connection with criminal proceedings."). The courts apply a "rigorous presumption of openness" to court records, *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 608 (2000), which derives from the principle "that [judicial proceedings] should take place under the public eye . . . because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Republican Co.*, 442 Mass. at 222, quoting *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.); see *Adams v. Adams*, 459 Mass. 361, 363 n.1 (2010) (noting that the "public's right under [the] First Amendment . . . to access traditionally open proceedings and records preserves its function as 'effective check' on [the] judiciary"), citing *Pokaski*, 868 F.2d at 502, 509. As a result, "most judicial records—including transcripts, evidence, memoranda, court orders and . . . material relating to the issuance of search warrants (after the warrant is returned)—are presumptively public documents." *New England Internet Cafe, LLC v. Clerk of Superior Court for Criminal Bus. in Suffolk Cty.*, 462 Mass. 76, 83 (2012).

The "presumption of publicity of judicial records," may be restricted only on a showing of "good cause." *New England Internet Cafe, LLC*, 462 Mass. at 83. "To determine whether

good cause is shown, a judge must balance the rights of the parties based on the particular facts of each case," taking into account "all relevant factors, 'including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason for the request.'" *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 604 (2000), quoting Rule 7 of the Uniform Rules on Impoundment Procedure (West 2000). Once impoundment is ordered, moreover, it has "no continuing presumption of validity"—thus, where an interested person seeks to set aside an impoundment order, "the party urging . . . continued impoundment . . . bears the burden of 'demonstrating the existence of good cause.'" *New England Internet Café, LLC,* 462 Mass. at 83. In any case where good cause is found, "a judge is required to tailor the scope of the impoundment order so that it does not exceed the need for impoundment." *Boston Herald, Inc., supra* at 605.

Here, Musgrave and Eledroos's only burden is to articulate a "nonfrivolous reason" to lift the order of impoundment. *Republican*, 442 Mass. at 225. Once they do so, the court is required to determine whether "good cause" exists by "balanc[ing] the rights of the parties based on the particular facts of [the] case," considering the factors in Rule 7 of Uniform Rules of Impoundment Procedure. *Sharpe*, 432 Mass. at 604.

B. The Court Should Terminate Impoundment.

Musgrave and Eledroos easily satisfy their burden to show a "nonfrivolous reason" to terminate impoundment of this case. *Republican Co.*, 442 Mass. at 225. The public has a profound interest in government efforts to unmask users of social media in the course of a purported criminal investigation. "'Society has an understandable interest not only in the administration of criminal trials, but also in law enforcement systems and how well they work, [and has] legitimate concerns about methods and techniques of police investigation . . . .'"

Republican Co., 442 Mass. at 222 (2004), quoting *Matter of Application & Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir.), cert. denied sub nom. *Hughes v. Washington Post Co.*, 500 U.S. 944 (1991).

The investigative "technique" here—the issuance of an administrative subpoena to uncover the identity of an anonymous speaker without a showing of probable cause—impinges on the constitutional right to speak anonymously on issues of public concern. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Commonwealth v. Dennis*, 368 Mass. 92, 96-97 (1975). "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre*, 514 U.S. at 341-42. "[A]nonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 341-342, 356.

This constitutional protection unquestionably applies to social media, one of "the most important places (in a spatial sense) for the exchange of views" today. *Packingham v. North Carolina*, 582 U.S. --- Slip Op. at 4-5 (June 19, 2017) (noting that "social media users employ" websites such as Facebook, Twitter and LinkedIn "to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'"), quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997) (extending First Amendment protection to internet postings); *Best Western International, Inc. v. Doe*, No. CV–06–1537–PHX–DGC, 2006 WL 2091695, *3 (D. Ariz. Jul. 25, 2006) (observing that "anonymity is a particularly important component of Internet speech"). Because "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas," *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D.

Wash. 2001), "the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded." *Id.* at 1097.

The recent effort of the Department of Homeland Security to unmask the user(s) behind the "@ALT_uscis" Twitter account, notwithstanding their unquestionable right to speak anonymously on issues of public concern, has brought renewed interest to this issue. (Ex. 6). Disclosure of the file in this case, especially any documents revealing the reasons articulated by the Suffolk County District Attorney's Office for its subpoena, is likely to lead to newsworthy information concerning the reasons law enforcement officials have advanced in support of impinging the right to speak anonymously.

The Commonwealth, on the other hand, cannot articulate any reason for continued impoundment that could overcome the public's interest in accessing the court file. The matter was filed more than five years ago, in December 2011. At the time, it received extensive press attention, but it does not appear that the underlying investigation ever resulted in charges. (Ex. 2). The factors of the passage of time, the public disclosure of the investigation and the apparent absence of any resulting criminal charges all combine to weaken, if not eliminate, any potential state interest in continued impoundment. *Republican Co.*, 442 Mass. at 225 (terminating impoundment of file regarding ongoing murder investigation in part because of the passage of three decades and publicity given to the case). Accordingly, the Commonwealth cannot sustain its burden of demonstrating a "good cause" for continued impoundment sufficient to overcome the immense public interest in this case.

CONCLUSION

For the foregoing reasons, Shawn Musgrave and Nasser Eledroos respectfully request that their Motion to Terminate Impoundment be granted, and that the Court order the Clerk to

locate and provide Plaintiffs with a copy of the file in *In re Administrative Subpoena to Twitter, Inc.*, SUCR2011-11308.

Respectfully Submitted,

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