IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT

Criminal No. 1:13EC297

ORDER

This matter comes before the Court on the Government's Motion that Ladar Levinson, the owner and operator of Lavabit, LLC show cause as to why Lavabit, LLC has failed to comply with the Court's Order of June 28, 2013 and why this Court should not hold Mr. Levinson and Lavabit, LLC in contempt, and Ladar Levinson's oral Motion To Unseal. For the reasons stated from the bench, it is hereby

ORDERED that Ladar Levinson's Motion To Unseal is DENIED and this matter is continued to Friday, July 26, 2013 at 10:00 a.m. for further proceedings.

/s/
Claude M. Hilton
United States District Judge

Alexandria, Virginia
July 16, 2013

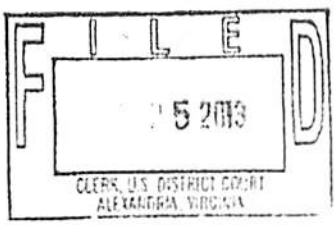
EXHIBIT 15

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	**FILED UNDER SEAL** No. 1:13EC297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH [redacted] THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC	No. 1:13SW522
In re Grand Jury	No. 13-1



MOTION TO QUASH SUBPOENA AND SEARCH WARRANT AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

Lavabit LLC ("Lavabit") and Mr. Ladar Levinson ("Mr. Levinson") move this Court to quash the grand jury subpoena and search and seizure warrant served on them by the Federal Bureau of Investigation and the Office of the United States Attorney (collectively "Government").

BACKGROUND

Lavabit is an encrypted email service provider. As such, Lavabit's business model focuses on providing private and secure email accounts to its customers. Lavabit uses various encryption methods, including secured socket layers ("SSL"), to protect its users' privacy. Lavabit maintains an encryption

key, which may be used by authorized users decrypt data and communications from its server ("Master Key"). The Government has commanded Lavabit, by a subpoena[1] and a search and seizure warrant, to produce the encryption keys and SSL keys used by lavabit.com in order to access and decrypt communications and data stored in one specific email address [redacted] ("Lavabit Subpoena and Warrant").

ARGUMENT

If the Government gains access to Lavabit's Master Key, it will have unlimited access to not only [redacted] ("Email Account"), but all of the communications and data stored in each of Lavabit's 400,000 email accounts. None of these other users' email accounts are at issue in this matter. However, production of the Master Key will compromise the security of these users. While Lavabit is willing to cooperate with the Government regarding the Email Account, Lavabit has a duty to maintain the security for the rest of its customers' accounts. The Lavabit Subpoena and Warrant are not narrowly tailored to seek only data and communications relating to the Email Account in question. As a result, the Lavabit Subpoena and Warrant are unreasonable under the Fourth Amendment.

a. The Lavabit Subpoena and Warrant Essentially Amounts to a General Warrant.

[1] The grand jury subpoena not only commanded Mr. Levinson to appear before this Court on July 16, 2013, but also to bring Lavabit's encryption keys. Mr. Levinson's subpoena to appear before the grand jury was withdrawn, but the government continues to seek the encryption keys. Lavabit is only seeking to quash the Court's command that Mr. Levinson provide the encryption keys.

Though the Lavabit Subpoena and Warrant superficially appears to be narrowly tailored, in reality, it operates as a general warrant by giving the Government access to every Lavabit user's communications and data. It is not what the Lavabit Subpoena and Warrant defines as the boundaries for the search, but the *method* of providing access for the search which amounts to a general warrant.

It is axiomatic that the Fourth Amendment prohibits general warrants. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). Indeed "it is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980) (footnote omitted). To avoid general warrants, the Fourth Amendment requires that "the place to be searched" and "the persons or things to be seized" be described with particularity. *United States v. Moore*, 775 F. Supp. 2d 882, 898 (E.D. Va. 2011) (quoting *United States v. Grubbs*, 547 U.S. 90, 97 (2006)).

The Fourth Amendment's particularity requirement is meant to "prevent[] the seizure of one thing under a warrant describing another." *Andresen*, 427 U.S. at 480. This is precisely the concern with the Lavabit Subpoena and Warrant and, in this circumstance, the particularity requirement will not protect Lavabit. By turning over the Master Key, the Government will have the ability to search each and every "place," "person [and] thing" on Lavabit's network.

The Lavabit Subpoena and Warrant allows the Government to do a "general, exploratory rummaging" through any Lavabit user account. *See id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)) (describing the issue with general warrants "is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings"). Though the Lavabit Subpoena and Warrant is facially limited to the Email Address, the Government would be able to seize communications, data and information from any account once it is given the Master Key.

There is nothing other than the "discretion of the officer executing the warrant" to prevent an invasion of other Lavabit user's accounts and private emails. *See id.* at 492 (quoting Stanford v. Texas, 379 U.S. 476, 485 (1965)) (explaining that the purpose of the particularity requirement of the Fourth Amendment is to ensure, with regards to what is taken that, "nothing is left to the discretion of the officer executing the warrant.") (internal citation omitted). Lavabit has no assurance that any searches conducted utilizing the Master Key will be limited solely to the Email Account. *See Groh v. Ramirez*, 540 U.S. 551, 561-62 (2004) (citing *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 532 (1967)) (noting that a particular warrant is to provide individuals with assurance "of the lawful authority of the executing officer, his need to search, and the *limits* of his power to search) (emphasis added). Lavabit has a duty to its customers to protect their accounts from the possibility of unlawful intrusions by third parties, including government entities.

As the Lavabit Subpoena and Warrant are currently framed they are invalid as they operate as a general warrant, allowing the Government to search individual users not subjection to this suit, without limit.

b. The Lavabit Subpoena and Warrant Seeks Information that Is Not Material to the Investigation.

Because of the breadth of Warrant and Subpoena, the Government will be given access to data and communications that are wholly unrelated to the suit. The Government, by commanding Lavabit's encryption keys, is acquiring access to 400,000 user's private accounts in order to gain information about one individual. 18 U.S.C. § 2703(d) states that a court order may be issued for information "relevant and material to an ongoing criminal investigation." However, the Government will be given unlimited access, through the Master Key, to several hundred thousand user's information, all of who are not "material" to the investigation. *Id.*

Additionally, the Government has no probable cause to gain access to the other users accounts. "The Fourth Amendment...requires that a warrant be no broader than the probable cause on which it is based." *Moore*, 775 F. Supp. 2d at 897 (quoting *United States v. Hurwitz*, 459 F.3d 463, 473 (4th Cir. 2006)). Probable cause here is based on the activities of the individual linked to the Email Address. Other Lavabit users would be severely impacted by the Government's access to the Master Key and have not been accused of wrongdoing or criminal activity in relation to this suit. Their privacy interests should not suffer because of the alleged misdeeds of another Lavabit user.

c. Compliance with Lavabit Subpoena and Warrant Would Cause an Undue Burden.

As a non-party and unwilling participant to this suit, Lavabit has already incurred legal fees and other costs in order to comply with the Court's orders. Further compliance, by turning over the Master Key and granting the Government access to its entire network, would be unduly burdensome. *See* 18 U.S.C. § 2703(d) (stating that "the service provider may [move to] quash or modify [an] order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an *undue burden* on such provider.") (emphasis added).

The recent case of *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. 2703(d)* ("*Twitter*") addresses similar issues. 830 F. Supp. 2d 114 (E.D. Va. 2011). In that case, the Petitioners failed to allege "a personal injury cognizable by the Fourth Amendment." *Id.* at 138. However, Lavabit's circumstances are distinguishable. The Government, in pursuit of information date and communications related to the Email Address, has caused and will continue to cause injury to Lavabit. Not only has Lavabit expended a great deal of time and money in attempting to cooperate with the Government thus far, but, Lavabit will pay the ultimate price—the loss of its customers' trust and business—should the Court require that the Master Key be turned over. Lavabit's business, which is founded on the preservation of electronic privacy, could be destroyed if it is required to produce its Master Key.

Lavabit is also a fundamentally different entity than Twitter, the business at issue in *Twitter*. The Twitter Terms of Service specifically allowed user information to be disseminated. *Id.* at 139. Indeed, the very purpose of Twitter is for users to publically post their musings and beliefs on the Internet. In contrast, Lavabit is dedicated to keeping its user's information private and secure. Additionally, the order in *Twitter* did not seek "content information" from Twitter users, as is being sought here. *Id.* The Government's request for Lavabit's Master Key gives it access to data and communications from 400,000 email secure accounts, which is much more sensitive information that at issue in the *Twitter*.

The Government is attempting, in complete disregard of the Fourth Amendment, to penetrate a system that was founded for the sole purpose of privacy. *See Katz v. United States*, 389 U.S. 347, 360 (1967) (stating that "the touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy") (internal citations omitted). For Lavabit to grant the Government unlimited access to every one of its user's accounts would be to disavow its duty to its users and the principals upon which it was founded. Lavabit's service will be rendered devoid of economic value if the Government is granted access to its secure network. The Government does not have any proper basis to request that Lavabit blindly produce its Master Key and subject all of its users to invasion of privacy.

Moreover, the Master Key itself is an encryption developed and owned by Lavabit. As such it is valuable proprietary information and Lavabit has a

reasonable expectation in protecting it. Because Lavabit has a reasonable expectation of privacy for its Master Key, the Lavabit Subpoena and Warrant violate the Fourth Amendment. *See Twitter*, 830 F. Supp. 2d at 141 (citing *United States v. Calandra*, 414 U.S. 338, 346 (1974)) (noting "The grand jury is...without power to invade a legitimate privacy interest protected by the Fourth Amendment" and that "a grand jury's subpoena...will be disallowed if it is far too sweeping in its terms to be...reasonable under the Fourth Amendment.").

CONCLUSION

For the foregoing reasons, Lavabit and Mr. Levinson respectfully move this Court to quash the search and seizure warrant and grand jury subpoena. Further, Lavabit and Mr. Levinson request that this Court direct that Lavabit does not have to produce its Master Key. Alternatively, Lavabit and Mr. Levinson request that they be given an opportunity to revoke the current encryption key and reissue a new encryption key at the Government's expense. Lastly, Lavabit and Mr. Levinson request that, if they is required to produce the Master Key, that they be reimbursed for its costs which were directly incurred in producing the Master Key, pursuant to 18 U.S.C. § 2706.

LAVABIT LLC
By Counsel

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Counsel for Lavabit LLC

Certificate of Service

I certify that on this 25th day of July, 2013, this Motion to Quash Subpoena and Search Warrant and Memorandum of Law in Support was hand delivered to the person at the addresses listed below:

[redacted]
United States Attorney's Office
Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, VA 22314
[redacted]

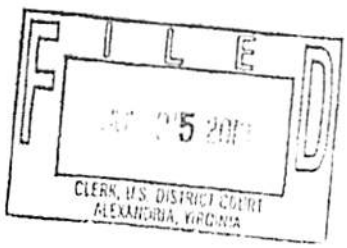
Jesse R. Binnall

EXHIBIT 16

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division



IN THE MATTER OF THE APPLICATION OF THE UNITED STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	**FILED UNDER SEAL** No. 1:13EC297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH [redacted] THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC	No. 1:13SW522
In re Grand Jury	No. 13-1

MOTION FOR UNSEALING OF SEALED COURT RECORDS AND REMOVAL OF NON-DISCLOSURE ORDER AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

Lavabit, LLC ("Lavabit") and Mr. Ladar Levinson ("Mr. Levinson") (collectively "Movants") move this Court to unseal the court records concerning the United States government's attempt to obtain certain encryption keys and lift the non-disclosure order issued to Mr. Levinson. Specifically, Movants request the unsealing of all orders and documents filed in this matter before the Court's issuance of the July 16, 2013 Sealing Order ("Sealing Order"); (2) all orders and documents filed in this matter after the issuance of the Sealing Order; (3) all grand jury subpoenas and search and seizure warrants issued before or after issuance of the Sealing Order; and (4) all documents filed in

connection with such orders or requests for such orders (collectively, the "sealed documents"). The Sealing Order is attached as Exhibit A. Movants request that all of the sealed documents be unsealed and made public as quickly as possible, with only those redactions necessary to secure information that the Court deems, after review, to be properly withheld.

BACKGROUND

Lavabit was formed in 2004 as a secure and encrypted email service provider. To ensure security, Lavabit employs multiple encryption schemes using complex access keys. Today, it provides email service to roughly 400,000 users worldwide. Lavabit's corporate philosophy is user anonymity and privacy. Lavabit employs secure socket layers ("SSL") to ensure the privacy of Lavabit's subscribers through encryption. Lavabit possesses a master encryption key to facilitate the private communications of its users.

On July 16, 2013, this Court entered an Order pursuant to 18 U.S.C. 2705(b), directing Movants to disclose all information necessary to decrypt communications sent to or from and data stored or otherwise associated with the Lavabit e-mail account [redacted], including SSL keys (the "Lavabit Order"). The Lavabit Order is attached as Exhibit B. The Lavabit Order precludes the Movants from notifying any person of the search and seizure warrant, or the Court's Order in issuance thereof, except that Lavabit was permitted to disclose the search warrant to an attorney for legal advice.

ARGUMENT

In criminal trials there is a common law presumption of access to judicial records, like the sealed documents in the present case. Despite the government's legitimate interests, it cannot meet its burden and overcome this presumption because it has not explored reasonable alternatives. Furthermore, the government's notice preclusion order constitutes a content-based restriction on free speech by prohibiting public discussion of an entire topic based on its subject matter.

I. THE FIRST AMENDMENT AND NON-DISCLOSURE ORDERS

The Stored Communications Act ("SCA") authorizes notice preclusion to any person of a § 2705(b) order's existence, but only if the Court has reason to believe that notification will result in (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction or tampering with evidence; (4) intimidating of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. § 2705(b)(1)-(5). Despite this statutory authority, the § 2705(b) gag order infringes upon freedom of speech under the First Amendment, and should be subjected to constitutional case law.

The most searching form of review, "strict scrutiny", is implicated when there is a content-based restriction on free speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 403 (1992). Such a restriction must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Id.* The Lavabit Order's non-disclosure provision is a content-based restriction that is not narrowly tailored to achieve a compelling state interest.

a. The Lavabit Order Regulates Mr. Levinson's Free Speech

The notice preclusion order at issue here limits Mr. Levinson's speech in that he is not allowed to disclose the existence of the § 2705(b) order, or the underlying investigation to any other person including any other Lavabit subscriber. This naked prohibition against disclosure can fairly be characterized as a regulation of pure speech. *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001). A regulation that limits the time, place, or manner of speech is permissible if it serves a significant governmental interest and provides ample alternative channels for communication. *See Cox v. New Hampshire*, 312 U.S. 569, 578 (1941) (explaining that requiring a permit for parades was aimed at policing the streets rather than restraining peaceful picketing). However, a valid time, place, and manner restriction cannot be based on the content or subject matter of the speech. *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980).

The gag order in the present case is content-based because it precludes speech on an entire topic, namely the search and seizure warrant and the underlying criminal investigation. *See id.* at 537 ("The First Amendment's hostility to content-based regulation extends...to prohibition of public discussion of an entire topic"). While the nondisclosure provision may be viewpoint neutral on its face, it nevertheless functions as a content-based restriction because it closes off an "entire topic" from public discourse.

It is true that the government has a compelling interest in maintaining the integrity of its criminal investigation [redacted]. However, Mr.

Levinson has been unjustly restrained from contacting Lavabit subscribers who could be subjected to government surveillance if Mr. Levinson were forced to comply the Lavabit Order. Lavabit's value is embodied in its complex encryption keys, which provide its subscribers with privacy and security. Mr. Levinson has been unwilling to turn over these valuable keys because they grant access to his entire network. In order to protect Lavabit, which caters to thousands of international clients, Mr. Levinson needs some ability to voice his concerns, garner support for his cause, and take precautionary steps to ensure that Lavabit remains a truly secure network.

b. The Lavabit Order Constitutes A Prior Restraint On Speech

Besides restricting content, the § 2705(b) non-disclosure order forces a prior restraint on speech. It is well settled that an ordinance, which makes the enjoyment of Constitutional guarantees contingent upon the uncontrolled will of an official, is a prior restraint of those freedoms. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). By definition, a prior restraint is an immediate and irreversible sanction because it "freezes" speech. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). In the present case, the Lavabit Order, enjoins Mr. Levinson from discussing these proceedings with any other person. The effect is an immediate freeze on speech.

The Supreme Court of the United States has interpreted the First Amendment as providing greater protection from prior restraints. *Alexander v. United States*, 509 U.S. 544 (1993). Prior restraints carry a heavy burden for

justification, with a presumption against constitutional validity. *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305 (1983); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Here, the government and the Court believe that notification of the search warrant's existence will seriously jeopardize the investigation, by giving targets an opportunity to flee or continue flight from prosecution, will destroy or tamper with evidence, change patterns of behavior, or notify confederates. *See* Lavabit Order. However, the government's interest in the integrity of its investigation does not automatically supersede First Amendment rights. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (holding the confidentiality of judicial review insufficient to justify encroachment on the freedom of speech).

In the present case, the government has a legitimate interest in tracking the account [redacted]. However, if Lavabit were forced to surrender its master encryption key, the government would have access not only to this account, but also every Lavabit account. Without the ability to disclose government access to users' encrypted data, public debate about the scope and justification for this secret investigatory tool will be stifled. Moreover, innocent Lavabit subscribers will not know that Lavabit's security devices have been compromised. Therefore the § 2705(b) non-disclosure order should be lifted to provide Mr. Levinson the ability to ensure the value and integrity of Lavabit for his other subscribers.

II. THE LAW SUPPORTS THE RIGHT OF PUBLIC ACCESS TO THE SEALED DOCUMENTS

Despite any statutory authority, the Lavabit Order and all related documents were filed under seal. The sealing of judicial records imposes a limit on the public's right of access, which derives from two sources, the First Amendment and the common law. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004); *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (press and public have a First Amendment right of attend a criminal trial); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 2 (1986) (right of access to preliminary hearing and transcript).

a. The Common Law Right Of Access Attaches To The Lavabit Order

For a right of access to a document to exist under either the First Amendment or the common law, the document must be a "judicial record." *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 63-64 (4th Cir. 1989). Although the Fourth Circuit Court of Appeals has never formally defined "judicial record", it held that § 2703(d) orders and subsequent orders issued by the court are judicial records because they are judicially created. *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 707 F.3d 283, 290 (4th Cir. 2013) ("*Twitter*"). The § 2705(b) order in the present case was issued pursuant to § 2703(d) and can properly be defined as a judicial record. Although the Fourth Circuit has held there is no First Amendment right to access § 2703(d) orders, it held that the common law presumption of access attaches to such documents. *Twitter*, 707 F.3d at 291.

The underlying investigation in *Twitter*, involved a § 2703(d) order, which directed Twitter to provide personal information, account information, records, financial data, direct messages to and from email addresses, and Internet Protocol addresses for eight of its subscribers. *In re: § 2703(d) Order*, 787 F. Supp. 2d 430, 435 (E.D. Va. 2011). Citing the importance of investigatory secrecy and integrity, the court in that case denied the petitioners Motion to Unseal, finding no First Amendment or common law right to access. *Id.* at 443.

Unlike Twitter, whose users publish comments on a public forum, subscribers use Lavabit for its encrypted features, which ensure security and privacy. In *Twitter* there was no threat that any user would be subject to surveillance other than the eight users of interest to the government. However, a primary concern in this case is that the Lavabit Order provides the government with access to every Lavabit account.

Although the secrecy of SCA investigations is a compelling government interest, the hundreds of thousands of Lavabit subscribers that would be compromised by the Lavabit Order are not the subjects of any justified government investigation. Therefore access to these private accounts should not be treated as a simple corollary to an order requesting information on one criminal subject. The public should have access to these orders because their effect constitutes a seriously concerning expansion of grand jury subpoena power.

To overcome the common law presumption of access, a court must find that there is a "significant countervailing interest" in support of sealing that

outweighs the public's interest in openness. *Twitter*, 707 F.3d at 293. Under the common law, the decision to seal or grant access to warrant papers is within the discretion of the judicial officer who issued the warrant. *Media General Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005). If a judicial officer determines that full public access is not appropriate, she must consider alternatives to sealing, which may include granting some public access or releasing a redacted version of the documents. *Id.*

In *Twitter* the court explained that because the magistrate judge individually considered the documents, and redacted and unsealed certain documents, he satisfied the procedural requirements for sealing. *Twitter*, 707 F.3d at 294. However, in the present case, there is no evidence that alternatives were considered, that documents were redacted, or that any documents were unsealed. Once the presumption or access attaches, a court cannot seal documents or records indefinitely unless the government demonstrates that some significant interest heavily outweighs the public interest in openness. *Wash. Post*, 386 F.3d at 575. Despite the government's concerns, there are reasonable alternatives to an absolute seal that must be explored in order to ensure the integrity of this investigation.

b. There Is No Statutory Authority To Seal The § 2705(d) Documents

There are no provisions in the SCA that mention the sealing of orders or other documents. In contrast, the Pen/Trap Statute authorizes electronic surveillance and directs that pen/trap orders be sealed "until otherwise

ordered by the court". 18 U.S.C. §§ 3121-27. Similarly, the Wiretap Act, another surveillance statute, expressly directs that applications and orders granted under its provisions be sealed. 18 U.S.C. § 2518(8)(b). The SCA's failure to provide for sealing is not a congressional oversight. Rather, Congress has specifically provided for sealing provisions when it desired. Where Congress includes particular language in one section of a statute but omits it in another, it is generally assumed that Congress acts intentionally. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Therefore, there is no statutory basis for sealing an application or order under the SCA that would overcome the common law right to access.

c. Privacy Concerns Demand A Common Law Public Right Of Access To The Sealed Documents

The leaking of classified government practices by Edward Snowden and the ensuing mass surveillance scandal have sparked an intense national and international debate about government surveillance, privacy rights and other traditional freedoms. It is concerning that suppressing Mr. Levinson's speech and pushing its subpoena power to the limits, the government's actions may be viewed as accomplishing another unfounded secret infringement on personal privacy. A major concern is that this could cause people worldwide to abandon American service providers in favor of foreign businesses because the United States cannot be trusted to regard privacy.[1] It is in the best interests of the Movant's and the government that the documents in this matter not be

[1] *See* Dan Roberts, *NSA Snooping: Obama Under Pressure as Senator Denounces 'Act of Treason'*, The Guardian, June 10, 2013, http://www.guardian.co.uk/world/2013/jun/10/obama-pressured-explain-nsa-surveillance.

shrouded in secrecy and used to further unjustified surveillance activities and to suppress public debate.

CONCLUSION

For the foregoing reasons, Lavabit respectfully moves this Court to unseal the court records concerning the United States government's attempt to obtain certain encryption keys and lift the non-disclosure order issued on Mr. Levinson. Alternatively, Lavabit requests that all of the sealed documents be redacted to secure only the information that the Court deems, after review, to be properly withheld.

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By Counsel

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Certificate of Service

I certify that on this 25th day of July, 2013, this Motion For Unsealing Of Sealed Court Records And Removal Of Non-Disclosure Order And Memorandum Of Law In Support was hand delivered to the person at the addresses listed below:

[redacted]
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Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, VA 22314
[redacted]

Jesse R. Binnall

EXHIBIT 17

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	NO. 1:13 EC 297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH [redacted] THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC	NO. 1:13 SW 522
IN RE GRAND JURY SUBPOENA	NO. 13-1
	UNDER SEAL

RESPONSE OF THE UNITED STATES IN OPPOSITION TO LAVABIT'S MOTION TO QUASH SUBPOENA AND MOTION TO FOR UNSEALING OF SEALED COURT RECORDS

INTRODUCTION

This Court has ordered Lavabit, LLC to provide the government with the technical assistance necessary to implement and use a pen register and trap and trace device ("pen-trap device"). A full month after that order, and after an order to compel compliance, a grand jury subpoena, and a search warrant for that technical assistance, Lavabit has still not complied. Repeated efforts to seek that technical assistance from Lavabit's owner have failed. While the government continues to work toward a mutually acceptable solution, at present there does not appear to be a way to implement this

Court's order, as well as to comply with the subpoena and search warrant, without requiring Lavabit to disclose an encryption key to the government. This Court's orders, search warrant, and the grand jury subpoena all compel that result, and they are all lawful. Accordingly, Lavabit's motion to quash the search warrant and subpoena should be denied.

Lavabit and its owner have also moved to unseal all records in this matter and lift the order issued by the Court preventing them from disclosing a search warrant issued in this case. Because public discussion of these records would alert the target and jeopardize an active criminal investigation, the government's compelling interest in maintaining the secrecy and integrity of that investigation outweighs any public right of access to, or interest in publicly discussing, those records, and this motion should also be denied.

TECHNICAL BACKGROUND

Pen registers and trap and trace devices

To investigate Internet communications, Congress has permitted law enforcement to employ two surveillance techniques—the pen register and the trap and trace device—that permit law enforcement to learn information about an individual's communications. *See* 18 U.S.C. §§ 3121-27 ("Pen-Trap Act"). These techniques, collectively known as a "pen-trap," permit law enforcement to learn facts about e-mails and other communications as they are sent—but not to obtain their content. *See, e.g., United States v. Forrester*, 512 F.3d 500, 509-13 (9th Cir. 2008) (upholding government's use of a pen-trap that "enabled the government to learn the to/from addresses of Alba's e-mail

messages, the IP addresses of the websites that Alba visited and the total volume of information sent to or from his account").

The Pen-Trap Act "unambiguously authorize[s] the use of pen registers and trap and trace devices on e-mail accounts." *In Matter of Application of U.S. For an Order Authorizing the Installation & Use of a Pen Register & a Trap & Trace Device on E-Mail Account*, 416 F. Supp. 2d 13, 14 (D.D.C. 2006) (Hogan, J.) ("*Hogan Order*"). It authorizes both the installation of a "device," meaning, a separate computer attached to the provider's network, and also a "process," meaning, a software program run on the provider. *Id.* at 16; 18 U.S.C. § 3127.

Secure Socket Layer (SSL) or Transport Layer Security (TLS) Encryption

Encrypting communications sent across the Internet is a way to ensure that only the sender and receiver of a communication can read it. Among the most common methods of encrypting Web and e-mail traffic is Secure Socket Layer (SSL), which is also called Transport Layer Security (TLS) encryption. "The Secure Socket Layer ('SSL') is one method for providing some security for Internet communications. SSL provides security by establishing a secure channel for communications between a web browser and the web server; that is, SSL ensures that the messages passed between the client web browser and the web server are encrypted." *Disney Enterprises, Inc. v. Rea*, No. 1:12-CV-687, 2013 WL 1619686 *9 (E.D. Va. Apr. 11, 2013); *see also Stambler v RSA Sec., Inc.*, 2003 WL 22749855 *2-3 (D. Del. 2003) (describing SSL's technical operation).

As with most forms of encryption, SSL relies on the use of large numbers known as "keys." Keys are parameters used to encrypt or decrypt data. Specifically, SSL

encryption employs public-key cryptography, in which both the sender and receiver each have two mathematically linked keys: a "public" key and a "private" key. "Public" keys are published, but "private" keys are not. Sending an encrypted message to someone requires knowing his or her public key; decrypting that message requires knowing his or her private key.

When Internet traffic is encrypted with SSL, capturing non-content information on e-mail communication from a pen-trap device is possible only after the traffic is decrypted. Because Internet communications closely intermingle content with non-content, pen-trap devices by necessity scan network traffic but exclude from any report to law enforcement officers all information relating to the subject line and body of the communication. *See* 18 U.S.C. § 3127; *Hogan Order*, 416 F. Supp. 2d at 17-18. A pen-trap device, by definition, cannot expose to law enforcement officers the content of any communication. *See id.*

FACTS

The information at issue before the court is relevant to an ongoing criminal investigation of [redacted] for violations of numerous federal statutes [redacted]

A. Section 2703(d) Order

The criminal investigation has revealed that [redacted] has utilized and continues to utilize an e-mail account, [redacted] obtained through Lavabit, an electronic communications service provider. [redacted] On June 10, 2013, the United States obtained an order pursuant to 18 U.S.C. § 2703(d) directing Lavabit to provide, within ten days, additional records and information about [redacted] e-mail account. Lavabit's owner and operator, Mr. Ladar Levison, provided very little of the information sought by the June 10, 2013 order.

B. Pen-Trap Order

On June 28, 2013, the Honorable Theresa C. Buchanan entered an Order pursuant to 18 U.S.C. § 3123 authorizing the installation and use of pen-trap device on all electronic communications being sent from or sent to the electronic mail account [redacted] ("Pen-Trap Order"). The Pen-Trap Order authorized the government to capture all (i) "non-content" dialing, routing, addressing, and signaling information sent to or from [redacted] and (ii) to record the date and time of the initiation and receipt of such transmissions, to record the duration of the transmissions, and to record user log-in data on the [redacted] all for a period of sixty days. Judge Buchanan further ordered Lavabit to furnish agents of the Federal Bureau of Investigation ("FBI"), "forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen-trap

device." Pen-Trap Order at 2. The government was also ordered to "take reasonable steps to ensure that the monitoring equipment is not used to capture any" content-related information. *Id.* Pursuant to 18 U.S.C. § 3123(d), Judge Buchanan ordered that the Pen-Trap Order and accompanying application be sealed. *Id.*

Later on June 28, 2013, two FBI Special Agents served a copy of the Pen-Trap Order on Mr. Levison. Mr. Levison informed the FBI Special Agents that emails were encrypted as they were transmitted to and from the Lavabit server as well as when they were stored on the Lavabit server. In addition, decryption keys would be necessary to access any e-mails. Mr. Levison did not provide the keys to the Agents in that meeting. In an email to Mr. Levison on July 6, 2013, a FBI Special Agent re-affirmed the nature of the information requested in the pen-trap order. In a response on the same day, Levison claimed "we don't record this data".

C. Compliance Order

Mr. Levison did not comply with the Pen-Trap Order. Accordingly, in the evening of June 28, 2013, the government obtained an Order Compelling Compliance Forthwith from U.S. Magistrate Judge Theresa C. Buchanan ("Compliance Order") The Compliance Order directed Lavabit to comply with the Pen-Trap Order and to "provide the Federal Bureau of Investigation with unencrypted data pursuant to the Order." Lavabit was further ordered to provide "any information, facilities, or technical assistance are under the control of Lavabit [that] are needed to provide the FBI with the unencrypted data." Compliance Order at 2. The Compliance Order indicated that failing to comply would subject Lavabit to any penalty in the power of the court, "including the possibility of criminal contempt of Court." *Id.*

D. Order to Show Cause

Mr. Levison did not comply with the Compliance Order. On July 9, 2013, this Court ordered Mr. Levison to appear on July 16, 2013, to show cause why Lavabit has failed to comply with the Pen-Trap Order and Compliance Order.

The following day, on July 10, 2013, the United States Attorney's Office arranged a conference call involving the United States Attorney's Office, the FBI, Mr. Levison and Mr. Levison's attorney at the time, Marcia Hofmann. During this call, the parties discussed implementing the pen-trap device in light of the encryption in place on the target e-mail account. The FBI explained, and Mr. Levison appeared to agree, that to install the pen-trap device and to obtain the unencrypted data stream necessary for the device's operation the FBI would require (i) access to Lavabit's server and (ii) encryption keys.

E. Grand Jury Subpoena

On July 11, 2013, the United States Attorney's Office issued a grand jury subpoena for Mr. Levison to testify in front of the grand jury on July 16, 2013. The subpoena instructed Mr. Levison to bring to the grand jury his encryption keys and any other information necessary to accomplish the installation and use of the pen-trap device pursuant to the Pen-Trap Order.[1] The FBI attempted to serve the subpoena on Mr. Levison at his residence. After knocking on his door, the FBI Special Agents witnessed Mr. Levison exit his apartment from a back door, get in his car, and drive away. Later in the evening, the FBI successfully served Mr. Levison with the subpoena.

[1] The grand jury subpoena was subsequently sealed on July 16, 2013.

On July 13, 2013, Mr. Levison sent an e-mail to Assistant United States Attorney [redacted] stating, in part:

> In light of the conference call on July 10th and after subsequently reviewing the requirements of the June 28th order I now believe it would be possible to capture the required data ourselves and provide it to the FBI. Specifically the information we'd collect is the login and subsequent logout date and time, the IP address used to connect to the subject email account and the following non-content headers (if present) from any future emails sent or received using the subject account. The headers I currently plan to collect are: To, Cc, From, Date, Reply-To, Sender, Received, Return-Path, Apparently-To and Alternate-Recipient. Note that additional header fields could be captured if provided in advance of my implementation effort.
>
> $2,000 in compensation would be required to cover the cost of the development time and equipment necessary to implement my solution. The data would then be collected manually and provided at the conclusion of the 60 day period required by the Order. I may be able to provide the collected data intermittently during the collection period but only as my schedule allows. If the FBI would like to receive the collected information more frequently I would require an additional $1,500 in compensation. The additional money would be needed to cover the costs associated with automating the log collection from different servers and uploading it to an an FBI server via "scp" on a daily basis. The money would also cover the cost of adding the process to our automated monitoring system so that I would notified automatically if any problems appeared.

The e-mail again confirmed that Lavabit is capable of providing the means for the FBI to install the pen-trap device and obtain the requested information in an unencrypted form. AUSA [redacted] replied to Mr. Levison's e-mail that same day, explaining that the proposal was inadequate because, among other things, it did not provide for real-time transmission of results, and it was not clear that Mr. Levison's request for money constituted the "reasonable expenses" authorized by the statute.

F. Search Warrant & 2705(b) Non-Disclosure Order

On July 16, 2013, this Court issued a search warrant to Lavabit for (i) "[a]ll information necessary to decrypt communications sent to or from the Lavabit e-mail account [redacted] including encryption keys and SSL keys" and (ii)

"[a]ll information necessary to decrypt data stored in or otherwise associated with the Lavabit account [redacted]." Pursuant to 18 U.S.C. § 2705(b), the Court ordered Lavabit to not disclose the existence of the search warrant upon determining that "there is reason to believe that notification of the existence of the . . . warrant will seriously jeopardize the investigation, including by giving target an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates." July 16, 2013 Order ("Non-Disclosure Order") at 1.

G. Rule 49 Sealing Order

The search warrant and accompanying materials were further sealed by the Court on July 16, 2013, pursuant to a Local Rule 49(B) ("Rule 49 Order"). In the Rule 49 Order, the Court found that "revealing the material sought to be sealed would jeopardize an ongoing criminal investigation." The sealing order was further justified by the Court's consideration of "available alternatives that are less drastic than sealing, and finding none would suffice to protect the government's legitimate interest in concluding the investigation; and having found that this legitimate government interest outweighs at this time any interest in the disclosure of the material." Rule 49 Order at 1.

H. Show Cause Hearing

At the Show Cause Hearing on July 16, 2013, Mr. Levison made an oral motion to unseal the proceedings and related filings. The government objected since unsealing the proceedings would jeopardize the ongoing criminal investigation of [redacted]. The Court denied Mr. Levison's motion. Mr. Levison subsequently indicated to the Court that he would permit the FBI to place a pen-trap device on his server. The government requested that the Court further order Mr. Levison to provide his SSL keys since placing

a pen-trap device on Lavabit's server would only provide encrypted information that would not yield the information required under the Pen-Trap Order. The government noted that Lavabit was also required to provide the SSL keys pursuant to the search warrant and grand jury subpoena. The Court determined that the government's request for the SSL keys was premature given that Mr. Levison had offered to place the pen-trap device on his server and the Court's order for a show cause hearing was only based on the failure to comply with the Pen-Trap Order. Accordingly, the Court scheduled a hearing for July 26, 2013, to determine whether Lavabit was in compliance with the Pen-Trap Order after a pen-trap device was installed.

I. Motion to Unseal and Lift Non-Disclosure Order

On July 25, 2013, Mr. Levison filed two motions—a Motion for Unsealing of Sealed Court Records ("Motion to Unseal") and a Motion to Quash Subpoena and Search Warrant ("Motion to Quash"). In the motions, Mr. Levison confirms that providing the SSL keys to the government would provide the data required under the Pen-Trap Order in an unencrypted form. Nevertheless, he refuses to provide the SSL keys. In order to provide the government with sufficient time to respond, the hearing was rescheduled for August 1, 2013.

On a later date, and after discussions with Mr. Levison, the FBI installed a pen-trap device on Lavabit's Internet service provider, which would capture the same information as if a pen-trap device was installed on Lavabit's server. Based on the government's ongoing investigation, it is clear that due to Lavabit's encryption services the pen-trap device is failing to capture data related to all of the e-mails sent to and from the account as well as other information required under the Pen-Trap Order. During

Lavabit's over one month of noncompliance with this Court's Pen-Trap Order, [redacted]

[redacted]

ARGUMENT

I. THE SEARCH WARRANT AND THE GRAND JURY SUBPOENA ARE LAWUL AND REQUIRE LAVABIT TO PRODUCE THE SSL KEYS

A. The search warrant and grand jury subpoena are valid because they merely re-state Lavabit's pre-existing legal duty, imposed by the Pen-Trap Order, to produce information necessary to accomplish installation of the pen-trap device.

The motion of Lavabit and Mr. Levison (collectively "Lavabit") to quash both the grand jury subpoena and the search warrant should be denied because the subpoena and warrant merely re-state and clarify Lavabit's obligation under the Pen-Trap Act to provide that same information. In total, four separate legal obligations currently compel Lavabit to produce the SSL keys:

1. The Pen-Trap Order pursuant to the Pen Register and Trap and Trace Device Act (18 U.S.C. §§ 3121-27);
2. The Compliance Order compelling compliance forthwith with the Pen-Trap Order;
3. The July 16, 2013, grand jury subpoena; and
4. The July 16, 2013, search warrant, issued by this Court under the Electronic Communications Privacy Act ("ECPA").

The Pen-Trap Act authorizes courts to order providers such as Lavabit to disclose "information" that is "necessary" to accomplish the implementation or use of a pen-trap. *See* 18 U.S.C. §§ 3123(b)(2); 3124(a); 3124(b). Judge Buchanan, acting under that authority, specifically required in the Pen-Trap Order that: "IT IS FURTHER

ORDERED, pursuant to 18 U.S.C. § 3123(b)(2), that Lavabit shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device unobtrusively and with minimum interference." Pen-Trap Order at 2.

In this case, the SSL keys are "information... necessary to accomplish the installation and use of the [pen-trap]" because all other options for installing the pen-trap have failed. In a typical case, a provider is capable of implementing a pen-trap by using its own software or device, or by using a technical solution provided by the investigating agency; when such a solution is possible, a provider need not disclose its key. *E.g., In re Application of the U.S. for an Order Authorizing the Use of a Pen Register and Trap On [XXX] Internet Serv. Account/User Name [xxxxxxx@xxx.com]*, 396 F. Supp. 2d 45, 49 (D. Mass. 2005) (suggesting language in a pen-trap order "to impose upon the internet service providers the necessity of making sure that they configure their software in such a manner as to disclose only that which has been authorized"). In this case, given Lavabit's use of SSL encryption and Lavabit's lack of a software solution to implement the pen-trap on behalf the government, neither the government nor Mr. Levison have been able to identify such a solution.

Because the search warrant and grand jury subpoena require nothing that the Pen-Trap Act does not already require, they are not unreasonably burdensome. Moreover, a court's constitutional authority to require a telecommunications provider to assist the government in implementing a pen-trap device is well-established. *See United States v. New York Tel. Co.*, 434 U.S. 159, 168-69 (1977) (in a pre-Pen-Trap Act case, holding that district court had the authority to order a phone company to assist in the installation of a

pen-trap, and "no claim is made that it was in any way inconsistent with the Fourth Amendment.").

B. Lavabit's motion to quash the search warrant must be denied because there is no statutory authority for such motions, and the search warrant is lawful in any event.

1. Lavabit lacks authority to move to suppress a search warrant.

Lavabit lacks authority to ask this Court to "quash" a search warrant before it is executed. The search warrant was issued under Title II of ECPA, 18 U.S.C. §§ 2701-2712. ECPA allows providers such as Lavabit to move to quash *court orders*, but does not create an equivalent procedure to move to quash search warrants. 18 U.S.C. § 2703(d). The lack of a corresponding motion to quash or modify a search warrant means that there is no statutory authority for such motions. *See* 18 U.S.C. § 2708 ("[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter."); *cf. In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 830 F. Supp. 2d 114, 128-29 (E.D. Va. 2011) (holding that the lack of a specific provision in ECPA permitting users to move to quash court orders requires "the Court [to] infer that Congress deliberately declined to permit [such] challenges.").

2. The search warrant complies with the Fourth Amendment and is not general.

The Fourth Amendment requires that a search warrant "particularly describe[e] the place to be searched, and the persons or things to be seized." U.S. Const. Am. IV. This "particularity requirement is fulfilled when the warrant identifies the items to be seized by their relation to designated crimes and when the description of the items leaves

nothing to the discretion of the officer executing the warrant." *United States v. Williams*, 592 F.3d 511, 519 (4th Cir. 2010).

The July 16, 2013, search warrant's specification easily meets this standard, and therefore is not impermissibly general. It calls for only:

> a. All information necessary to decrypt communications sent to or from the Lavabit e-mail account [redacted] including encryption keys and SSL keys;
>
> b. All information necessary to decrypt data stored in or otherwise associated with the Lavabit account [redacted]

That specification leaves nothing to discretion; it calls for encryption and SSL keys and nothing else.

Acknowledging this specificity, Lavabit nonetheless argues that the warrant "operates as a general warrant by giving the Government access to every Lavabit user's communications and data." Mot. to Quash at 3. To the contrary, the warrant does not grant the government the legal authority to access *any* Lavabit user's communications or data. After Lavabit produces its keys to the government, Federal statutes, such as the Wiretap Act and the Pen-Trap Act, will continue to limit sharply the government's authority to collect any data on any Lavabit user—except for the one Lavabit user whose account is currently the subject of the Pen-Trap Order. *See* 18 U.S.C. § 2511(1) (punishing as a felony the unauthorized interception of communications); § 3121 (criminalizing the use of pen-trap devices without a court order). It cannot be that a search warrant is "general" merely because it gives the government a tool that, *if abused contrary to law*, could constitute a general search. Compelling the owner of an apartment building to unlock the building's front door so that agents can search one apartment is not

a "general search" of the entire apartment building—even if the building owner imagines that undisciplined agents will illegally kick down the doors to apartments not described in the warrant.

C. *Lavabit's motion to quash the subpoena must be denied because compliance would not be unreasonable or oppressive*

A grand jury subpoena "may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates," but the court "may quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(1) & (2); *see In re Grand Jury, John Doe No. G.J.2005-2*, 478 F.3d 581, 585 (4th Cir. 2007) (recognizing courts may quash subpoenas that are "abusive or harassing").[2]

Lavabit argues the subpoena should be quashed because it "grant[s] the Government unlimited access to every one of its user's accounts." Mot. to Quash at 7. As explained above, the subpoena does no such thing: It merely reaffirms Lavabit's existing obligation to provide information necessary to implement this Court's Pen-Trap Order on a single Lavabit customer's e-mail account. The Pen-Trap Order further restricts the government's access by preventing the government from collecting the content of that Lavabit customer's e-mail communications.

Lavabit also argues that it will lose customers' trust and business if it they learn that Lavabit provided the SSL keys to the government. But Lavabit finds itself in the position of having to produce those keys only because, more than a month after the Pen-Trap Order, Lavabit has failed to assist the government to implement the pen-trap device.

[2] Lavabit cites 18 U.S.C. § 2703(d) as authority for its motion to quash, but that section by its terms only permits motions to quash court orders issued under that same section.

Any resulting loss of customer "trust" is not an "unreasonable" burden if Lavabit's customers trusted that Lavabit would refuse to comply with lawful court orders. All providers are statutorily required to assist the government in the implementation of pen-traps, *see* 18 U.S.C. § 3124(a), (b), and requiring providers to comply with that statute is neither "unreasonable" nor "oppressive." In any event, Lavabit's privacy policy tells its customers that "Lavabit will not release any information related to an individual user *unless legally compelled to do so.*" *See* http://lavabit.com/privacy_policy.html (emphasis added).

Finally, once court-ordered surveillance is complete, Lavabit will be free to change its SSL keys. Vendors sell new SSL certificates for approximately $100. *See, e.g.*, GoDaddy LLC, SSL Certificates, https://www.godaddy.com/ssl/ssl-certificates.aspx. Moreover, Lavabit is entitled to compensation "for such reasonable expenses incurred in providing" assistance in implementing a pen-trap device. 18 U.S.C. § 3124(c).

II. THE NON-DISCLOSURE ORDER IS CONSISTENT WITH THE FIRST AMENDMENT BECAUSE IT IS NARROWLY TAILORED TO SERVE WHAT ALL PARTIES AGREE IS A COMPELLING GOVERNMENT INTEREST

Lavabit has asked the Court to unseal all of the records sealed by this Court's Order to Seal, and to lift the Court's Order dated July 16, 2013, directing Lavabit not to disclose the existence of the search warrant the Court signed that day ("Non-Disclosure Order"). Motion for Unsealing of Sealed Court Records and Removal of Non-Disclosure Order ("Mot. to Unseal") at 1-2. Lavabit, however, has not identified (and cannot) any compelling reason sufficient to overcome what even Lavabit concedes is the government's compelling interest in maintaining the secrecy and integrity of its active investigation [redacted]. Moreover, the restrictions are narrowly tailored to restrict

Lavabit from discussing only a limited set of information disclosed to them as part of this investigation. Because there is no reason to jeopardize the criminal investigation, this motion must be denied.

A. The Non-Disclosure Order survives even strict scrutiny review by imposing necessary but limited secrecy obligations on Lavabit

The United States does not concede that strict scrutiny must be applied in reviewing the Non-Disclosure Order. There is no need to decide this issue, however, because the Non-Disclosure Order is narrowly tailored to advance a compelling government interest, and therefore easily satisfies strict scrutiny.

The Government has a compelling interest in protecting the integrity of on-going criminal investigations. *Virginia Dep't of State Police v. Wash. Post*, 386 F.3d 567, 579 (4th Cir. 2004) ("We note initially our complete agreement with the general principle that a compelling governmental interest exists in protecting the integrity of an ongoing law enforcement investigation"); *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) ("requirements ... that a State's interest must be 'compelling' ...are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen ...."). Indeed, it is "obvious and unarguable that no government interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (internal quotation marks omitted); *see also Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business"). Likewise, here, the United States clearly has a compelling interest in ensuring that the target of lawful surveillance is not aware that he is being monitored.

United States v. Aguilar, 515 U.S. 593, 606 (1995) (holding that a statute prohibiting disclosure of a wiretap was permissible under the First Amendment, in part because "[w]e think the Government's interest is quite sufficient to justify the construction of the statute as written, without any artificial narrowing because of First Amendment concerns"). As the Non-Disclosure Order makes clear, publicizing "the existence of the [search] warrant will seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates."

Lavabit acknowledges that "the government has a compelling interest in maintaining the integrity of its criminal investigation of [redacted]". Mot. to Unseal at 4; *id.* at 6 ("the government has a legitimate interest in tracking" [redacted] account); *id.* at 8 ("the secrecy of [Stored Communications Act] investigations is a compelling government interest"). In spite of this recognition, Lavabit states it intends to disclose the search warrant and order should the Court grant the Motion to Unseal. *Id.* at 5 ("Mr. Levinson needs some ability to voice his concerns [and] garner support for his cause"); *id.* at 6. Disclosure of electronic surveillance process *before the electronic surveillance has finished*, would be unprecedented and defeat the very purpose of the surveillance. Such disclosure would ensure that [redacted], along with the public, would learn of the monitoring of [redacted] e-mail account and take action to frustrate the legitimate monitoring of that account.

The Non-Disclosure Order is narrowly tailored to serve the government's compelling interest of protecting the integrity of its investigation. The scope of information that Lavabit may not disclose could hardly be more narrowly drawn: "the

existence of the attached search warrant" and the Non-Disclosure Order itself. Restrictions on a party's disclosure of information obtained through participation in confidential proceedings stand on a different *and firmer* constitutional footing from restrictions on the disclosure of information obtained by independent means. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (order prohibiting disclosure of information learned through judicial proceeding "is not the kind of classic prior restraint that requires exacting First Amendment scrutiny"); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (distinguishing between a witness' "right to divulge information of which he was in possession before he testified before the grand jury" with "information which he may have obtained as a result of his participation in the proceedings of the grand jury"); *see also Hoffman-Pugh v. Keenan*, 338 F.3d 1136, 1140 (10th Cir. 2003) (finding prohibition on disclosing information learned through grand jury process, as opposed to information person already knew, does not violate First Amendment). In *Rhinehart*, the Court found that "control over [disclosure of] the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." 467 U.S. at 32.

Further, the Non-Disclosure Order is temporary. The nondisclosure obligation will last only so long as necessary to protect the government's ongoing investigation.

B. The Order neither forecloses discussion of an "entire topic" nor constitutes an unconstitutional prior restraint on speech

The limitation imposed here does not close off from discussion an "entire topic," as articulated in *Consolidated Edison*. Mot. to Unseal at 4. At issue in that case was the constitutionality of a state commission's order prohibiting a regulated utility from including inserts in monthly bills that discussed *any* controversial issue of public policy,

such as nuclear power. *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 532 (1980). The Non-Disclosure Order, by contrast, precludes a single individual, Mr. Levison, from discussing a narrow set of information he did not know before this proceeding commenced, in order to protect the integrity of an ongoing criminal investigation. *Cf. Doe v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2009) ("although the nondisclosure requirement is triggered by the content of a category of information, that category, consisting of the fact of receipt of [a National Security Letter] and some related details, is far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions."). Mr. Levison may still discuss everything he could discuss before the Non-Disclosure Order was issued.

Lavabit's argument that the Non-Disclosure Order, and by extension all § 2705(b) orders, are unconstitutional prior restraints is likewise unavailing. Mot. To Unseal at 5-6. As argued above, the Non-Disclosure Order is narrowly tailored to serve compelling government interests, and satisfies strict scrutiny. *See supra*, Part II.A. Regardless, the Non-Disclosure Order does not fit within the two general categories of prior restraint that can run afoul of the First Amendment: licensing regimes in which an individual's right to speak is conditioned upon prior approval from the government, *see City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988), and injunctions restraining certain speech and related activities, such as publishing defamatory or scandalous articles, showing obscene movies, and distributing leaflets, *see Alexander v. United States*, 509 U.S. 544, 550 (1993). A prior restraint denies a person the ability to express viewpoints or ideas they could have possessed without any government involvement. Section 2705(b) orders, by contrast, restrict a recipient's ability to disclose limited

information that the recipient only learned from the government's need to effectuate a legitimate, judicially sanctioned form of monitoring. Such a narrow limitation on information acquired only by virtue of an official investigation does not raise the same concerns as other injunctions on speech. *Cf. Rhinehart*, 467 U.S. at 32, *Doe v. Mukasey*, 549 F.3d at 877 ("[t]he non-disclosure requirement" imposed by the national security letter statute "is not a typical prior restraint or a typical content-based restriction warranting the most rigorous First Amendment scrutiny").

III. NO VALID BASIS EXISTS TO UNSEAL DOCUMENTS THAT, IF MADE PUBLIC PRE-MATURELY, WOULD JEOPARDIZE AN ON-GOING CRIMINAL INVESTIGATION

A. Any common law right of access is outweighed by the need to protect the integrity of the investigation.

Lavabit asserts that the common law right of access necessitates reversing this Court's decision to seal the search warrant and supporting documents. Mot. to Unseal at 7-10. The presumption of public access to judicial records, however, is "qualified," *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989), and rebuttable upon a showing that the "public's right of access is outweighed by competing interests," *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 707 F.3d 283, 290 (4th Cir. 2013) ("*Twitter*"). In addition to considering substantive interests, a judge must also consider procedural alternatives to sealing judicial records. *Twitter*, 707 F.3d at 294. "Adherence to this procedure serves to ensure that the decision to seal materials will not be made lightly and that it will be subject to meaningful appellate review." *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 576 (4th Cir. 2004). This standard is met easily here.

"[T]he common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment." *Twitter*, 707 F.3d at 290 (internal quotation marks omitted). With respect to the substantive equities at stake, the United States' interest in maintaining the secrecy of a criminal investigation to prevent the target of the surveillance from being alerted and altering behavior to thwart the surveillance clearly outweighs any public interest in learning about specific acts of surveillance. *Id.* at 294 (rejecting common law right of access because, *inter alia*, the sealed documents "set forth sensitive non-public facts, including the identity of targets and witnesses in an ongoing criminal investigation"). "Because secrecy is necessary for the proper functioning of the criminal investigation" prior to indictment, "openness will frustrate the government's operations." *Id.* at 292. Lavabit concedes that ensuring "the secrecy of [Stored Communications Act] investigations," like this, "is a *compelling government interest*." Mot. to Unseal at 8 (emphasis added). Lavabit does not, however, identify any compelling interests to the contrary. Far from presenting "a seriously concerning expansion of grand jury subpoena power," as Lavabit's contents, *id.*, a judge issued the Pen-Trap Order, which did not authorize monitoring of any Lavabit e-mail account other than [redacted]

In addition, the Court satisfied the procedural prong. It "considered the available alternatives that are less drastic than sealing, and [found] none would suffice to protect the government's legitimate interest in concluding the investigation." Rule 49 Order.

The Fourth Circuit's decision in *Twitter* is instructive. That case arose from the Wikileaks investigation of Army Pfc. Bradley Manning. Specifically, the government obtained an order pursuant to 18 U.S.C. § 2703(d) directing Twitter to disclose electronic

communications and account and usage information pertaining to three subscribers. When apprised of this, the subscribers asserted that a common law right of access required unsealing records related to the § 2703(d) order. The Fourth Circuit rejected this claim, finding that the public's interest in the Wikileaks investigation and the government's electronic surveillance of internet activities did not outweigh "the Government's interests in maintaining the secrecy of its investigation, preventing potential suspects from being tipped off, or altering behavior to thwart the Government's ongoing investigation." 707 F.3d at 293. "The mere fact that a case is high profile in nature," the Fourth Circuit observed, "does not necessarily justify public access." *Id.* at 294. Though *Twitter* involved a § 2703(d) order, rather than a § 2705(b) order, the Court indicated this is a distinction without a difference. *Id.* at 294 (acknowledging that the concerns about unsealing records "accord" with § 2705(b)). Given the similarities between *Twitter* and the instant case—most notably the compelling need to protect otherwise confidential information from public disclosure and the national attention to the matter—there is no compelling rationale currently before the Court necessitating finding that a common law right of access exists here.

B. Courts have inherent authority to seal ECPA process

Lavabit asserts that this Court must unseal the Non-Disclosure Order because 18 U.S.C. § 2705(b) does not explicitly reference the sealing of non-disclosure orders issued pursuant to that section. Mot. to Unseal at 9-10. As an initial matter, the Court has inherent authority to seal documents before it. *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984) ("[t]he trial court has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing

interests"); *see also Media General Operations, Inc. v. Buchanan*, 417 F3d. 424, 430 (4th Cir. 2005); *United States v. U.S. Dist. Court*, 407 U.S. 297, 321 (1972) ("a warrant application involves no public or adversary proceedings: it is an ex parte request before a magistrate or judge."). In addition, the Court here exercised its authority to seal pursuant to Local Rule 49(B), the validity of which Lavabit does not contest.

Even if the Court did not have this authority, Lavabit's reading of § 2705(b) must be rejected, because it would gut the essential function of non-disclosure orders and thereby disregard Congress' clear intent in passing § 2705. The Section allows courts to delay notification pursuant to § 2705(a) or issue a non-disclosure order pursuant to § 2705(b) upon finding that disclosure would risk enumerated harms, namely danger to a person's life or safety, flight from prosecution, destruction of evidence, intimidation of witnesses, or seriously jeopardizing an investigation. 18 U.S.C. §§ 2705(a)(2)(A)-(E), (b)(1)-(5). It would make no sense for Congress to purposefully authorize courts to limit disclosure of sensitive information while simultaneously intending to allow the same information to be publicly accessible in an unsealed court document.

Finally, the implications Lavabit attempts to draw from the mandatory sealing requirements of 18 U.S.C. §§ 2518(8)(b) and 3123(a)(3)(B) are mistaken. While Lavabit characterizes those statutes as granting courts the authority to seal Wiretap Act and pen-trap orders, courts already had that authority. Those statutes have another effect: they removed discretion from courts by *requiring* that courts seal Wiretap Act orders and pen-trap orders. *See* 18 U.S.C. § 2518(8)(b) ("Applications made and orders granted under this chapter *shall be sealed* by the judge") (emphasis added); *id.* § 3123(a)(3)(B) ("The record maintained under subparagraph (A) *shall be provided ex parte and under seal* to

the court") (emphasis added). Congress' decision to leave that discretion in place in other situations does not mean that Congress believed that only Wiretap Act and pen-trap orders may be sealed.

C. *Supposed privacy concerns do not compel a common law right of access to the sealed documents.*

Lavabit's brief ends with an argument that privacy interests require a common law right of access. Mot. to Unseal at 10-11. Lavabit, however, offers no legal basis for this Court to adopt such a novel argument, nor do the putative policy considerations Lavabit references outweigh the government's compelling interest in preserving the secrecy of its ongoing criminal investigation. Indeed, the most compelling interest currently before the Court is ensuring that the Court's orders requiring that Mr. Levison and Lavabit comply with legitimate monitoring be implemented forthwith and without additional delay, evasion, or resistance by Mr. Levison and Lavabit.

CONCLUSION

For the foregoing reasons, Lavabit's motions should be denied. Furthermore, the Court should enforce the Pen-Trap Order, Compliance Order, search warrant, and grand jury subpoena by imposing sanctions until Lavabit complies.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2013, I e-mailed a copy of the foregoing document to Lavabit's Counsel of Record:

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EXHIBIT 18

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	NO. 1:13 EC 297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH [redacted] THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT, LLC	NO. 1:13 SW 522
IN RE GRAND JURY SUBPOENA	NO. 13-1
	UNDER SEAL
	Alexandria, Virginia August 1, 2013 10:00 a.m.

TRANSCRIPT OF HEARING

BEFORE THE HONORABLE CLAUDE M. HILTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States: James Trump, Esq.
Michael Ben'Ary, Esq.
Josh Goldfoot, Esq.

For the Respondent: Jesse R. Binnall, Esq.

Court Reporter: Tracy L. Westfall, RPR, CMRS, CCR
Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE CLERK: *In re:* Case Nos. 1:13 EC 297, 1:13 SW 522, and Grand Jury No. 13-1.

MR. TRUMP: Good morning. Jim Trump on behalf of the United States.

THE COURT: Good morning.

MR. BINNALL: Good morning, Your Honor. Jesse Binnall on behalf of Lavabit and Mr. Levison.

THE COURT: All right.

MR. BINNALL: May it please the Court. We're before the Court today on two separate motions, a motion to quash the requirement of Lavabit to produce its encryption keys and the motion to unseal and lift the nondisclosure requirements of Mr. Levison.

Your Honor, the motion to quash in this arises because the privacy of users is at -- of Lavabit's users are at stake. We're not simply speaking of the target of this investigation. We're talking about over 400,000 individuals and entities that are users of Lavabit who use this service because they believe their communications are secure.

By handing over the keys, the encryption keys in this case, they necessarily become less secure. In this case it is true that the face of the warrant itself does limit the documents or -- and communications to be viewed and the specific metadata to be viewed to the target of the case, [redacted]

However, there is a lack of any sort of check or balance in order to ensure that the -- that the encrypted data of other Lavabit users remain secure. The encryption in this case doesn't protect only content. It protects login data and the other -- some of the other metadata involved in this case.

We believe that this is not the least restrictive means in order to provide the government the data that they are looking for. Specifically --

THE COURT: You have two different encryption codes, one for the logins and the messages that are transmitted. You have another code that encrypts the content of the messages, right?

MR. BINNALL: Your Honor, I believe that that is true.

From my understanding of the way that this works is that there is one SSL key. That SSL key is what is issue in this case, and that SSL key specifically protects the communication, the over -- the breadth of the communication itself from the user's actual computer to the server to make sure that the user is communicating with exactly who the user intends to be communicating with, the server.

And that's one of the things that SSL does. It ensures that you're talking to the right person via e-mail and there's not a so-called man in the middle who's there to take that message away.

THE COURT: Does that key also contain the code of the

message and interpret the message as well?

MR. BINNALL: My understanding is that it does, Your Honor, but because that's not my technical expertise, I'm not going to represent to the Court anything on that one way or another. But my understanding is there is one general key here that is at issue.

THE COURT: Well, why would you set up such? I mean, a telephone, you've got telephone numbers and --

MR. BINNALL: Correct.

THE COURT: -- those can be traced very easily without any look at the content of the message that's there. You-all could have set up something the same way.

MR. BINNALL: We could have, Your Honor. Actually, if you're to --

THE COURT: So if anybody's -- you're blaming the government for something that's overbroad, but it seems to me that your client is the one that set up the system that's designed not to protect that information, because you know that there needs to be access to calls that go back and forth to one person or another. And to say you can't do that just because you've set up a system that everybody has to -- has to be unencrypted, if there's such a word, that doesn't seem to me to be a very persuasive argument.

MR. BINNALL: I understand the Court's point, and this is the way that I understand why it's done that way.

There's different security aspects involved for people who want to protect their privacy, and there certainly is the actual content of the message themselves. That's certainly what I would concede is the highest security interest.

But there's also the security interest to make sure that they're communicating with who you want to be communicating with. That is equally of a concern for privacy issues because that is, at the end of the day, one of the things that secures the content of the message.

In this case it is true that most Internet service providers do log, is what they call it, a lot of the metadata that the government wants in this case without that necessarily being encrypted, things such as who something is going to, who it's going from, the time it's being sent, the IP address from which it is being sent.

Lavabit code is not something that you buy off the shelf. It is code that was custom made. It was custom made in order to secure privacy to the largest extent possible and to be the most secure way possible for multiple people to communicate, and so it has chosen specifically not to log that information.

Now, that is actually information that my client has offered to start logging with the particular user in this case. It is, however, something that is quite burdensome on him. It is something that would be custom code that would take between 20 to 40 hours for him to be able to produce. We believe that

is a better alternative than turning over the encryption key which can be used to get the data for all Lavabit users.

I hope that addresses the Court's concern kind of with regard to the metadata and why it is not more -- why Lavabit hasn't created an encryption system that may honestly be more within the mainstream, but this is a provider that specifically was started in order to have to protect privacy interests more than the average Internet service provider.

THE COURT: I can understand why the system was set up, but I think the government is -- government's clearly entitled to the information that they're seeking, and just because you-all have set up a system that makes that difficult, that doesn't in any way lessen the government's right to receive that information just as they would from any telephone company or any other e-mail source that could provide it easily. Whether it's -- in other words, the difficulty or the ease in obtaining the information doesn't have anything to do with whether or not the government's lawfully entitled to the information.

MR. BINNALL: It is -- and we don't disagree that the government is entitled to the information. We actually --

THE COURT: Well, how are we going to get it? I'm going to have to deny your motion to quash. It's just not overbroad. The government's asking for a very narrow, specific bit of information, and it's information that they're entitled to.

Now, how are we going to work out that they get it?

MR. BINNALL: Your Honor, what I would still say is the best method for them to get it is, first of all, there be some way for there to be some sort of accountability other than just relying on the government to say we're not going to go outside the scope of the warrant.

This is nothing that is, of course, personal against the government and the, you know, very professional law enforcement officers involved in this case. But quite simply, the way the Constitution is set up, it's set up in a way to ensure that there's some sort of checks and balances and accountability.

THE COURT: What checks and balances need to be set up?

MR. BINNALL: Well --

THE COURT: Suggest something to me.

MR. BINNALL: I think that the least restrictive means possible here is that the government essentially pay the reasonable expenses, meaning in this case my client's extensive labor costs to be capped at a reasonable amount.

THE COURT: Has the government ever done that in one of these pen register cases?

MR. BINNALL: Not that I've found, Your Honor.

THE COURT: I don't think so. I've never known of one.

MR. BINNALL: And Your Honor's certainly seen more of these than I have.

THE COURT: So would it be reasonable to start now with your client?

MR. BINNALL: I think everyone would agree that this is an unusual case. And that this case, in order to protect the privacy of 400,000-plus other users, some sort of relatively small manner in which to create a log system for this one user to give the government the metadata that they're looking for is the least restrictive mean here, and we can do that in a way that doesn't compromise the security keys.

This is actually a way that my client --

THE COURT: You want to do it in a way that the government has to trust you --

MR. BINNALL: Yes, Your Honor.

THE COURT: -- to come up with the right data.

MR. BINNALL: That's correct, Your Honor.

THE COURT: And you won't trust the government. So why would the government trust you?

MR. BINNALL: Your Honor, because that's what the basis of Fourth Amendment law says is more acceptable, is that the government is the entity that you really need the checks and balances on.

Now, my --

THE COURT: I don't know that the Fourth Amendment says that. This is a criminal investigation.

MR. BINNALL: That is absolutely correct.

THE COURT: A criminal investigation, and I don't know that the Fourth Amendment says that the person being investigated here is entitled to more leeway and more rights than the government is. I don't know.

MR. BINNALL: There certainly is a balance of power there. I, of course, am not here to represent the interest of [redacted] I'm here specifically looking over my client who has sensitive data --

THE COURT: I understand. I'm trying to think of working out something. I'm not sure you're suggesting anything to me other than either you do it and the government has to trust you to give them whatever you want to give them or you have to trust the government that they're not going to go into your other files.

Is there some other route?

MR. BINNALL: I would suggest that the government -- I'm sorry -- that the Court can craft an order to say that we can -- that we should work in concert with each other in order to come up with this coding system that gives the government all of the metadata that we can give them through this logging procedure that we can install in the code, and then using that as a least restrictive means to see if that can get the government the information that they're looking for on the specific account.

THE COURT: How long does it take to install that?

MR. BINNALL: I mean, 20, 40 hours. So I would suggest that would probably be a week to a week and a half, Your Honor, although I would be willing to talk to my client to see if we can get that expedited.

THE COURT: To install it?

MR. BINNALL: Well, to write the code.

THE COURT: You don't have a code right at the moment. You would have to write something?

MR. BINNALL: That's correct. And the portion of the government's brief that talks about the money that he was looking for is that reasonable expense for him basically to do nothing for that period of time but write code to install in order to take the data from [redacted] and put it in a way that the government will see the logged metadata involved.

THE COURT: All right. I think I understand your position. I don't think you need to argue this motion to unseal. This is a grand jury matter and part of an ongoing criminal investigation, and any motion to unseal will be denied.

MR. BINNALL: If I could have the Court's attention just on one issue of the nondisclosure provision of this. And I understand the Court's position on this, but there is other privileged communications if the Court would be so generous as to allow me very briefly to address that issue?

There's other First Amendment considerations at issue with not necessarily just the sealing of this, but what

Mr. Levison can disclose and to whom he may disclose it.

The First Amendment, of course, doesn't just cover speech and assembly, but the right to petition for a redress of grievances. We're talking about a statute here, and, honestly, a statute that is very much in the public eye and involving issues that are currently pending before Congress.

I think the way that the order currently is written, besides being --

THE COURT: You're talking about the sealing order?

MR. BINNALL: I'm talking about the sealing order and the order that prohibits Mr. Levison from disclosing any information.

Now, we don't want to disclose -- we have no intention of disclosing the target, but we would like to be able to, for instance, talk to members of the legislature and their staffs about rewriting this in a way that's --

THE COURT: No. This is an ongoing criminal investigation, and there's no leeway to disclose any information about it.

MR. BINNALL: And so at that point it will remain with only Mr. Levison and his lawyers, and we'll keep it at that.

THE COURT: Let me hear from Mr. Trump.

Is there some way we can work this out or something that I can do with an order that will help this or what?

MR. TRUMP: I don't believe so, Your Honor, because

you've already articulated the reason why is that anything done by Mr. Levison in terms of writing code or whatever, we have to trust Mr. Levison that we have gotten the information that we were entitled to get since June 28th. He's had every opportunity to propose solutions to come up with ways to address his concerns and he simply hasn't.

We can assure the Court that the way that this would operate, while the metadata stream would be captured by a device, the device does not download, does not store, no one looks at it. It filters everything, and at the back end of the filter, we get what we're required to get under the order.

So there's no agents looking through the 400,000 other bits of information, customers, whatever. No one looks at that, no one stores it, no one has access to it. All we're going to look at and all we're going to keep is what is called for under the pen register order, and that's all we're asking this Court to do.

THE COURT: All right. Well, I think that's reasonable. So what is this before me for this morning other than this motion to quash and unseal which I've ruled on?

MR. TRUMP: The only thing is to order the production of the encryption keys, which just --

THE COURT: Hasn't that already been done? There's a subpoena for that.

MR. TRUMP: There's a search warrant for it, the motion