SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA	:	
	:	
v.	:	Case No. 2021 CA 004450 2
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META PLATFORMS, INC.	:	

ORDER

The Court grants the District of Columbia's petition for enforcement of an investigative subpoena to Meta Platforms, Inc., formerly known as Facebook, Inc. ("Meta" or "Facebook").

Through the Office of the Attorney General ("OAG"), the District has responsibility for enforcing the D.C. Consumer Protection Procedures Act ("CPPA"). OAG is investigating whether Meta made any false or misleading public statements about its efforts to enforce its "content moderation policies" prohibiting misinformation about COVID-19 vaccines in Facebook posts. OAG issued an investigative subpoena to Meta that seeks, among other things, the identities of Facebook users that Meta determined violated its content moderation policies for vaccine misinformation through public posts. Meta has refused to disclose this information. The Court concludes that this request for public posts is a reasonable and lawful exercise of the District's subpoena power and that it is consistent with the federal Stored Communications Act ("SCA") and with the First Amendment to the United States Constitution.

Meta accuses the District of trying "to target and unmask private citizens based on a government regulator's disapproval of the content of their online speech." Opp. at 2. However, the target of the District's investigation is not Facebook users but Meta. It is not the District but Meta that identified individual Facebook users as responsible for publicly disseminating misinformation about COVID-19 vaccines. OAG's investigation focuses on whether Meta's public statements about its enforcement efforts are false or misleading, not on whether Facebook

users made any false or misleading statements about vaccines in public posts. Meta does not dispute (at least in this case) that its public statements about its content moderation policies are within the scope of the CPPA,[1] and the District does not dispute that public statements by Facebook users about COVID-19 vaccines are outside the CPPA's scope (unless made by a merchant of COVID-19 vaccines). Nor is the District trying to "unmask" Facebook users – it is simply seeking information about Meta's enforcement actions against users who were never masked because they publicly posted content about vaccines using the identities that the District seeks to obtain. The Court expects the District to protect, to the extent appropriate, the confidentiality of personal information that it obtains in the course of its investigation.

Meta also accuses the District of engaging in "the regulation of disfavored consumer speech." Opp. at 22. If either party can be said to be regulating consumer speech, it is Meta through enforcement of its content moderation policies. All that the District is seeking is to determine whether Meta's public statements about its aggressiveness in regulating Facebook posts with negative information about vaccines are false or misleading. OAG expressly represents that it is not seeking to regulate consumer speech, to punish any Facebook user for posting information, or to "moderate content posted on Facebook." Reply at 2, 11.

[1] As a result of random assignment of cases, the same judge was assigned both this case and *Muslim Advocates v. Facebook, Inc.*, Case No. 2021 CA 001114 B. The plaintiff in the latter case alleges that Facebook made false and misleading statements about its enforcement of its content moderation policies concerning anti-Muslim hate speech, and Facebook argued that the CPPA does not apply to it because it is not a merchant within the meaning of the CPPA. The Court did not reach this issue in that case because it resolved the case on other, separate grounds involving the plaintiff's standing.

I. BACKGROUND

Meta operates Facebook, a widely used social media platform. As the Court stated above, the District, through OAG, is conducting an investigation about whether Meta's statements about its enforcement of its content moderation policies concerning COVID-19 vaccine misinformation on Facebook tended to mislead consumers. Both parties agree that a substantial number of Facebook users have publicly posted content that contains misinformation about the safety and effectiveness of COVID-19 vaccines. Meta has a policy to remove or take other actions against misinformation about COVID-19 vaccines on Facebook when it becomes aware of the violation of its content moderation policies. Meta has taken millions of actions against violative content under its COVID-19 policies, including vaccine-related content. *See* Opp. at 1.

On June 21, 2021, OAG issued a subpoena to Meta requiring it to produce various categories of documents relating to its efforts to address COVID-19 vaccine misinformation in violation of its content moderation policies. D.C. Code §§ 1-301.88d and 28-3910 give OAG authority to issue subpoenas as part of investigations into possible violations of the CPPA. After discussions with OAG, Meta produced some documents. However, Meta refused to produce any documents in response to Request No. 2. It is this refusal that is the subject of the District's petition for enforcement.

Request No. 2 seeks:

> Documents sufficient to identify all Facebook groups, pages, and accounts that have violated Facebook's COVID-19 misinformation policy with respect to content concerning vaccines, including the identity of any individuals or entities associated with the groups, pages, and accounts; the nature of the violation(s); and the consequences imposed by Facebook for the violation, including whether content was removed or banned from these sources.

On November 30, 2021, the District filed its petition for enforcement and a supporting memorandum ("Mem."). Pursuant to an agreed-on briefing schedule, Meta filed its opposition ("Opp.") on January 31, 2022, and the District filed its reply ("Reply") on February 22.

II. JUDICIAL ENFORCEMENT OF ADMINISTRATIVE SUBPOENAS

A. General principles

Resolution Trust Corp. v. Thornton, 41 F.3d 1539, 1544 (D.C. Cir. 1994), summarizes the general principles concerning judicial enforcement of administrative subpoenas:

> Administrative agencies wield broad power to gather information through the issuance of subpoenas. Like a grand jury, an agency "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). Accordingly, "the court's role in a proceeding to enforce an administrative subpoena is a strictly limited one." *FTC v. Texaco, Inc.*, 180 U.S. App. D.C. 390, 555 F.2d 862, 871-72 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977). We consider only whether "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Morton Salt Co.*, 338 U.S. at 652. If an agency's subpoena satisfies these requirements, we must enforce it. … While our role is circumscribed, however, our function in conducting the narrow inquiry with which we are charged is "neither minor nor ministerial." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209, 217 n.57 (1946).

"Usually, scrutiny under the Morton Salt standard results in routine subpoena enforcement when the information sought falls within the purview of the regulatory agency's authority." *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 385 (D.C. Cir. 1981) ("*MNPL*"). Limited scrutiny of administrative subpoenas reflects courts' "awareness that the very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate." *Id.* (cleaned up).

B. First Amendment considerations

When administrative subpoenas implicate First Amendment rights, additional factors come into play.

"Compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as other forms of governmental action." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382 (2021). "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *MNPL*, 655 F.2d at 387 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957)).

The First Amendment requires "exacting scrutiny" of government requirements compelling blanket disclosure of non-public activity that is constitutionally protected. *Americans for Prosperity Foundation,* 141 S. Ct. at 2382-83. The "exacting scrutiny" standard "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest," and a regime mandating disclosure to the government of non-public information about First Amendment activities must "be narrowly tailored to the government's asserted interest, even if it is not the least restrictive means of achieving that end." *Id.* at 2382-83 & 2384; *see MNPL*, 655 F.2d at 387 ("Current first amendment jurisprudence makes clear that before a state or federal body can compel disclosure of information which would trespass upon first amendment freedoms, a subordinating interest of the State must be proffered, and it must be compelling.") (cleaned up); *see Federal Election Commission v. The Larouche Campaign, Inc.*, 644 F. Supp. 120, 122 (S.D.N.Y. 1986) (where the agency's "demand for

information will implicate a protected First Amendment interest, it must proffer a compelling governmental interest before the court will compel disclosure.").

III. DISCUSSION

The Court grants the District's petition to enforce the subpoena for the identities of users who Meta determined publicly posted content that violated its policy against vaccine misinformation. First, for the reasons explained in Section III.A below, any content that Meta must divulge in response to the subpoena was publicly posted and is therefore covered by the consent exception in the SCA. Second, for the reasons explained in Section III.B below, the District's investigative subpoena does not infringe the First Amendment rights of Meta or of Facebook users. Third, for the reasons explained in Section III.C. below, the District's subpoena otherwise complies with applicable legal requirements.

A. The SCA

The SCA protects the privacy rights of users of electronic communication services, including social media platforms like Facebook. "As a provider of electronic communication services, Facebook must comply with the provisions of the SCA governing its disclosure of customer communications and records." *Facebook, Inc. v. Pepe*, 241 A.3d 248, 253 (D.C. 2020); *see* Mem. at 9 ("For purposes of this motion, the District does not dispute that Facebook is an electronic communications service provider that is subject to the SCA."). "The SCA broadly prohibits providers from disclosing the contents of covered communications, stating that providers 'shall not knowingly divulge to any person or entity the contents' of covered communications, except as provided." *Facebook, Inc. v. Wint*, 199 A.3d 625, 628 (D.C. 2019) (quoting 18 U.S.C. § 2702(a)(1)). "The SCA contains nine enumerated exceptions to this

prohibition." *Id.* (citing 18 U.S.C. § 2702(b)(1)-(9)). "[T]he prohibition on disclosure was meant to be comprehensive, except as specifically provided." *See id.* at 631.

1. Does the subpoena seek content of user communications?

The District argues that the SCA does not apply because its subpoena seeks only the identities of Facebook users and not the content of their communications. The Court disagrees.

18 U.S.C. § 2510(8) defines "contents" of electronic communications: "'contents', when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication." The dictionary definitions of these words "indicate that Congress intended the word 'contents' to mean a person's intended message to another (i.e., the 'essential part" of the communication, the 'meaning conveyed,' and the 'thing one intends to convey')." *In re Zynga Privacy Litigation*, 750 F.3d 1098, 1106 (9th Cir. 2014). This definition of "contents" includes not only the literal text of electronic communications but also identifying information that would have the "logical effect" of revealing the substance or intended message. *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1448 (Cal. App. 2006) (defining "contents" to include the identity of any person who supplied information regarding an unreleased Apple product).

The District agrees that the SCA generally prohibits disclosure of information that would reveal "'the essential part of the communication'" and that this prohibition applies when "disclosure of identifying information would reveal content that the user communicated to a website." Reply at 5 (quoting *Zynga Privacy Litigation*, 750 F.3d at 1106). The District asserts that "revealing the identities of users who violated Facebook's policies on vaccine misinformation would not reveal the contents of their communications on Facebook's platform." Reply at 6. But the logical and practical effect of revealing the identities of these users is to

reveal the contents of their communications. That is because the District wants Meta to identify individual users based on the contents of their communications. The District seeks the identity only of users who Meta determined provided information about vaccines that was false, so identifying them necessarily means disclosing that they communicated information about vaccines.[2]

Although the District contends that this case is distinguishable (Reply at 6), *Rainsy v. Facebook, Inc.*, 311 F. Supp.3d 1101, 1114-15 (N.D. Cal. 2018), supports the Court's conclusion. *Rainsy* found that disclosure of the identities of users who "liked" a social networking page involved the contents of communications because the "like" conveyed approval of a particular message. Similarly, the inclusion of the users whose identities are sought by the District on Meta's list of violators conveys information about the content of their postings – specifically, that they provided false information about COVID-19 vaccines. *See In re Zynga Privacy Litigation*, 750 F.3d at 1108-09 (acknowledging that in some circumstances, divulging a URL containing a search term could amount to disclosure of the contents of a communication).

According to the District, "[t]he violations are not tied to one particular message," Reply at 7, but they are – a message about whether people should get vaccinated against COVID-19. As the District says (Reply at 7), the specifics of the message may vary: for example, some users may encourage vaccines use, and others may discourage it; some users may talk about side effects, and some may not; some may encourage interference with vaccine administration, and

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[2] Meta acknowledges that its judgment calls about violations of its content moderation policies "are subject to disagreement and error." Opp. at 1; *see id.* at 17 n.12. However, neither Meta nor the District contends that Meta's false positive error rate is high – that Meta is wrong in a substantial percentage of cases when it determines that a user violated its content moderation policies, and that these users in fact provided only accurate information about vaccines in their public posts. Neither party suggests that Meta does not reliably determine whether contents relates to COVID-19 vaccines.

some encourage cooperation. But "the essential part of the communication" is the same, even if the details vary.

2. Does the SCA apply to content deleted by Facebook?

The District argues that content removed from Facebook's platform pursuant to its content moderation policies is not subject to the SCA. For the reasons explained in *Republic of The Gambia v. Facebook, Inc.*, 2021 U.S. Dist. LEXIS 232240 at *10-20 (D.D.C. Dec. 3, 2021), "Facebook pages … and their associated communications that have been deleted by Facebook and are maintained on its servers to prevent their destruction are stored 'for purposes of backup protection' under the plain meaning of those words" in 8 U.S.C. § 2510(17)(B)." As a result, § 2702(a)(1) of the SCA prohibits their disclosure unless they fall within the consent exception in 18 U.S.C. § 2702(b)(3).

3. Does the consent exception apply to subpoenas from government agencies?

Even though the information sought by the District involves the disclosure of content, it is permissible under the SCA because the information is subject to the consent exception in 18 U.S.C. § 2702(b)(3). Paragraph (b)(3) permits a provider of electronic communication services to disclose content "with the lawful consent of the originator or an addressee or intended recipient of such communication." Meta argues that disclosure of content with the user's consent is permitted only to private parties and not to governmental entities, and that when a governmental entity wants information that includes content, § 2703(a) requires it to obtain a search warrant, even if the user has consented to disclosure and not restricted its consent to disclosure to private parties. Opp. at 9.[3] The Court is not persuaded.

[3] Meta suggests that the Fourth Amendment requires the District to obtain a search warrant to get this information. *See* Opp. at 8. One sufficient response is that the Fourth

Nothing in the text of § 2702(b)(3) limits the consent exception to disclosure to non-governmental entities. Other exceptions in § 2702(b) limit disclosure to certain entities – whether governmental or non-government. For example, paragraph (b)(6) authorizes disclosure only to the National Center for Missing and Exploited Children, and paragraph (b)(7) permits disclosure to law enforcement agencies or other governmental entities if the content involves a crime or imminent danger of death or serious physical injury. Congress knew how to limit the types of recipients of authorized disclosures in the exceptions in § 2702(b), and its decision not to incorporate any such limits into § 2702(b)(3) indicates that the consent exception authorizes disclosure to anyone if the originator, addressee, or intended recipient of the communication consents.

Congress also knows how to authorize disclosure to any person except governmental entities, because that it was it did in § 2702(c)(6). Paragraph (c)(6) authorizes disclosure of customer records (but not content) "to any person other than a governmental entity." The absence of this limiting language in paragraph (b)(3) indicates that the consent exception authorizes disclosure to governmental entities. Moreover, § 2702(c)(2) allows disclosure of customer records "with the lawful consent of the customer or subscriber," and the separate exception in (c)(6) for disclosures to non-governmental entities further indicates that the consent exception in (c)(2) covers disclosures by consent to governmental entities; paragraph (c)(2) would otherwise not serve a purpose because paragraph (c)(6) authorizes disclosure to non-governmental entities without consent.

Amendment protects only privacy interests that society accepts as objectively reasonable, *see United States v. Kyle*, 2022 D.C. App. LEXIS 58, at *3-4 (D.C. Feb. 10, 2022), and Facebook users do not have an objectively reasonable expectation of privacy in information that they include in public posts about COVID-19 vaccines and their identities.

Furthermore, the text of the SCA does not state explicitly that § 2703 provides the *exclusive* method by which government agencies can obtain content from electronic communication service providers. For example, § 2703 does not have a prefatory clause stating "Notwithstanding anything in § 2702." It is not surprising that § 2703 does not contain such a qualification because (as the Court explains above) the exceptions in paragraphs (b)(7), (b)(8), and (c)(4) of § 2702 expressly provide for disclosure to government agencies without a search warrant. It is appropriate to interpret §§ 2702 and 2703 holistically and consistently. *See Wint*, 199 A.3d at 628 ("Read together, §§ 2702 and 2703 appear to comprehensively address the circumstances in which providers may disclose covered communications.").

Meta does not suggest any reason why Congress would have prevented disclosure of content to government agencies with user consent. Not even Meta contends that even if a Facebook user *explicitly* agreed that Meta could disclose its identity to the District, § 2702 would require Meta to refuse unless the District obtained a search warrant. Suppose OAG were investigating a potential CPPA violation involving the sale of a consumer product, the consumer did not have a copy of a relevant post on the merchant's Facebook page, and the consumer gave OAG written authorization to get from Meta any post of which the customer was the originator or an addressee or intended recipient of a post about the sale. Section 2702(c)(3) cannot reasonably be interpreted to prohibit Meta from honoring this explicit authorization, and the SCA does not require OAG to obtain a search warrant in these circumstances.

Pepe applied "the weighty and well-settled presumption against inferring that Congress silently intended to foreclose or restrict the availability of a core component of the judicial process such as the subpoena power." *See* 241 A.3d at 257. The enforceability of administrative subpoenas is also well established, and courts recognize that "the very backbone of an

administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate." *MNPL*, 655 F.2d at 385. The Court is not willing to infer that Congress silently intended to foreclose the availability of a core tool of civil law enforcement agencies even if the user of an electronic communication service consented to disclosure. Meta does not identify any reason why Congress would have prohibited the use of investigative subpoenas to obtain information from electronic communication service providers that user had posted publicly on social media platforms and thereby implicitly consented to further disclosure.

Pepe, 241 A.3d at 258, holds that the SCA does not authorize Facebook to refuse to comply with subpoena for information that §§ 2702(b)(1), (b)(3), and (c)(6) allow Facebook to divulge to the subpoenaing party:

> That the SCA grants providers certain exemptions from its general prohibition on disclosure does not imply that it grants providers exemptions from mandatory disclosure requirements imposed by other law. Although the SCA preempts other disclosure laws to the extent they would require providers to *violate* the SCA, that is no reason to think the SCA also preempts laws that require disclosures the SCA expressly *permits*.

Thus, *Pepe* holds that if disclosure by Facebook is *permitted* under paragraph (c)(3), the same disclosure can be *compelled* by subpoena.

Therefore, if the contents sought by the District in its subpoena are within the scope of the consent exception in paragraph (c)(3), Meta is obligated to produce them in response to the District's subpoena, even though the District is a governmental entity.

4. Did users consent to disclosure?

The information sought by the District concerning the identities of users is within the scope of the consent exception in paragraph (c)(3).

The Court understands the District to have limited its request to information about *public* posts that violated Meta's COVID-19 vaccine misinformation policies. *See* Mem. at 12. If the District had not limited Request No. 2 in this way, the Court would have limited it because the SCA prohibits Meta from complying to the extent that Request No. 2 seeks non-public content: as the Court ruled in Sections III.A.1 and III.A.2 above, the subpoenaed information includes content even if Facebook deleted it; the only exception invoked by the District to the general prohibition on disclosure of contents is the consent exception in paragraph (c)(3); and implied consent can exist only if a Facebook user chose to make the content available to the general public or a broad range of other users.

As the District contends, when a user posts content on Facebook that is generally accessible to the public, the user implicitly consents to disclosure by an electronic communication service provider. "'[O]ne who posts a communication with a reasonable basis for knowing that it will be available to the public should be considered to have implicitly consented to such disclosure under section 2702(b)(3).'" *Republic of The Gambia v. Facebook, Inc.*, 2021 U.S. Dist. LEXIS 182596 at *27 (D.D.C. Sep. 21, 2021) (quoting *Facebook, Inc. v. Superior Court*, 417 P.3d 725, 742 (2018)), *vacated on other grounds*, 2021 U.S. Dist. LEXIS 232240 (D.D.C. Dec. 3, 2021). "This is because the SCA was intended to cover and protect only private and not public posts." *See Republic of The Gambia*, 2021 U.S. Dist. LEXIS 182596 at *27. "Passed in 1986, the SCA 'creates a set of Fourth Amendment-like protections by statute, regulating the relationship between government investigators and service providers in possession of users' *private information*.'" *Republic of the Gambia*, 2021 U.S. Dist. LEXIS 232240 at *8-9 (emphasis added, quoting Orin S. Kerr, *A User's Guide to the Stored Communications Act and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1212 (2004)). "The legislative

history of the [SCA] suggests that Congress wanted to protect electronic communications that are configured to be private, such as email and private electronic bulletin boards." *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 875 (9th Cir. 2002) (citing a Senate committee report). More specifically, the legislative history states that "a subscriber who places a communication on a computer electronic bulletin board, with a reasonable basis for knowing that such communications are freely made available to the public, should be considered to have given consent to the disclosure or use of the information." H. Rep. No. 99-647 at 66 (1986).

In some cases, whether a user implicitly consented to disclosure by an electronic communication service provider "turns on the fact-intensive inquiry as to whether the posts had been configured by the user as being sufficiently restricted that they are not readily available to the general public." *Republic of The Gambia*, 2021 U.S. Dist. LEXIS 182596 at *28 (cleaned up). The District defines "public posts" to mean (a) posts to pages or public groups that are inherently visible to the public regardless of whether the user has a Facebook account and (b) posts to nominally private groups that either have so many members that they are functionally public or otherwise evince an intent to reach the public. Mem. at 12 n.22. It does not require a fact-intensive inquiry to determine whether a post was visible to members of the public who do not have Facebook accounts. Whether a group is "nominally" public or whether a private group otherwise evinced an intent to reach the public may be more problematic. The Court expects OAG and Meta to try to reach agreement on an approach that identifies public posts in a way that protects non-public posts from disclosure and that does not impose an undue burden on Meta. The District presumes that the vast majority of posts that Meta took down were public and that Meta can identify users who made public posts (Mem. at 12 n.22), and Meta does not expressly take issue with these presumptions or contend that it cannot reliably and reasonably easily

identify posts that were public and that it determined violated its content moderation policies. *See* Opp. at 12 (discussing the need for a fact-based inquiry – without any claim that this inquiry is impossible or unduly burdensome with respect to Request No. 2).

There does not appear to be a dispute that all or at least a large majority of the vaccine-related content that Meta determined violated its content moderation policies was included in public posts available to thousands if not millions of other users, and the consent exception applies to these posts.

B. First Amendment issues

Meta argues that Request No. 2 violates both its First Amendment rights and those of its users. The Court is compelled to disagree.

1. Meta's First Amendment rights

Meta argues that the Court should not enforce Request No. 2 because "the First Amendment protects Meta's right **as a private entity** to make content moderation decisions about what third-party content to remove (or not) from its platform." Opp. at 15. The Court assumes for purposes of this motion that Meta is correct that the First Amendment gives it the right to adopt and modify its content moderation policy as it sees fit. *See id.* at 15 n.9 (collecting cases). However, enforcement of the District's subpoena would not infringe any such right.

The District is only at the information-gathering stage of its investigation, and compliance with the subpoena would have no effect whatsoever on Meta's content moderation polices or how it applies and enforces them. The District does not claim any right to dictate to Meta what content should remain on, or what content should be removed from, Facebook. *See* Reply at 11. The District represents that it is investigating whether Meta's public statements concerning enforcements of its content moderation policies comply with the CPPA, not whether

these policies are too weak or too strict, *see, e.g.*, Reply at 13, and Meta offers no reason to question this representation. Nor would enforcement of the subpoena require Meta to disseminate the District's preferred message. *But see* Opp. at 16. Meta does not claim a right under the First Amendment or otherwise to disseminate false or misleading information about whether and how it enforces its content moderation policies.[4]

2. Facebook users' First Amendment rights

Meta asserts that compliance with the District's subpoena would unmask users who violated its policies against vaccine misinformation and thereby chill conduct protected by the First Amendment, so the District's attempt to extract this information from Meta is subject to exacting scrutiny. Opp. at 18-19. Compelled disclosure to the government of confidential information about activities protected by the First Amendment may be subject to exacting scrutiny. The Court questions whether exacting scrutiny is warranted in this case where the only information sought by the District involves speech that Facebook users themselves chose to post publicly, but the Court nevertheless assumes for purposes of this discussion that it should apply exacting scrutiny to Request No. 2. Even under this standard, the District's subpoena to Meta passes constitutional muster.

It is unquestionably true that public advocacy about COVID-19 vaccines is protected by the First Amendment because people have a right to engage in robust, uninhibited, and wide-open debate about the effectiveness or ineffectiveness of vaccines, about their benefits and costs, and about federal, state, and local policies concerning vaccination. *See generally New York*

[4] Meta is correct that "government investigations targeted at the exercise of a First Amendment right can chill speech. Opp. at 17 n.12. The District's investigation is not targeted at Meta's exercise of any First Amendment right and in any event, Meta does not suggest that compliance with the subpoena would in fact inhibit it from exercising its right to control its content moderation policies.

Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). It is equally true that people on all sides of this debate may be (and probably have been) subjected to harsh or unfair criticism or even threats by others who disagree with them. *See Americans for Prosperity Foundation*, 141 S. Ct. at 2388 (noting that risks from disclosure of anonymous speakers or financial contributors "are heightened in the 21st century and seem to grow with each passing year, as anyone with access to a computer can compile a wealth of information about anyone else"). In addition, if there is public disclosure of the identities of Facebook users who Meta determined used the platform to spread verifiably false information relating to vaccines (whether the misinformation is negative or positive), those users may be at greater risk than others whose public posts Meta did not decide violated its content moderation policies. Just as "[c]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as other forms of governmental action," *Americans for Prosperity Foundation*, 141 S. Ct. at 2382 (cleaned up), so too may compelled disclosure of speakers espousing unpopular points of view restrain freedom of expression.

However, OAG's subpoena to Meta does not violate the First Amendment rights of Facebook users to express themselves in the on-going public debate on COVID-19 vaccines. Request No. 2 is consistent with First Amendment constraints on compelled disclosures for four reasons.

First, the District has a compelling interest in investigating a company has made false and misleading statements that violate the CPPA. *See MNPL*, 655 F.2d at 389 (assuming "arguendo that if the FEC has statutory jurisdiction to conduct this investigation, then a compelling interest for the subpoenaed information can be shown"); *The Larouche Campaign*, 644 F. Supp. at 122.

Consumers and other members of the public have a strong interest in complete and accurate information about Meta's efforts to limit vaccine misinformation.

Second, OAG's subpoena is narrowly tailored to its investigative goals. OAG is not seeking information about the identity of all Facebook users who have posted any information about COVID-19 vaccines; OAG is seeking information only about Facebook users who Meta has determined violated its content moderation policies with respect to vaccines (and not its content moderation policies concerning other matters, such as hate speech). This information is relevant to whether Meta's public statements about its enforcement of its content moderation policies concerning vaccine misinformation has a tendency to mislead to Facebook users, as well as other members of the consuming public. The District admits that "with respect to COVID-19 *vaccine* misinformation in particular, Facebook has not publicly disclosed the total volume of content reviewed, identified as false, demoted, or removed, or the total number of accounts pages, and groups suspended or banned." Mem. at 5. But Meta does not dispute that it has made public statements about its zeal in enforcing its policies and about the amount of content that it has taken down. *See* Petition at 3-6 (discussing Meta's public statements); Reply at 2 & n.2 (same). OAG has a reasonable explanation for seeking the identities of Facebook users who it determined violated its policies: it has information that a small number of users are responsible for a disproportionate share of vaccine misinformation; and it wants to assess whether and how Facebook enforces its policies against repeat violators and people or organizations that have been publicly identified as repeat violators. Reply at 3. There does not appear to be any less intrusive means that the District could employ to determine whether and how Meta enforces its content moderation policies against repeat violators or users who have been publicly identified as repeat violators.

Third, and at least equally important, the identities of these Facebook users, like the vaccine-related content they posted, is information that these Facebook users themselves chose to make public. As the Court stated above, the District is not asking Meta to "unmask" users who posted content that violates its content moderation standards for vaccine misinformation. Rather, these users chose to publicly post the content with their identities, and the District is seeking only the identities that these users themselves employed in their public posts. Meta's terms of use require users to identify themselves using the same name that they use in everyday life, *see* Reply at 14, but even if users did not comply with this requirement, Meta will provide to the District the information about their identities that the users chose to include in their posts. "[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 v. Ohio Elections Commission*, 514 U.S. 334, 341 (1995), and "[a]nonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering." *Solers, Inc. v. Doe*, 977 A.2d 941, 950-51 (D.C. 2009); *In re Search of Information Associated with Facebook Accounts*, 2017 D.C. Super. LEXIS 16, at *5 (D.C. Superior Court Nov. 9, 2017). But the users who made the posts that Meta determined violated its content moderation policies made public the identifying information that the District seeks from Meta through its subpoena.

Fourth, nothing in the record suggests that providing this user-specific information to the District will result in any reprisals against Facebook users who violated Meta's vaccine-related content moderation policies when they publicly posted the content along with their identities. First of all, the record does not suggest that the District will publicly disclose information about the identity of any of these individuals. In any event, if the District does publicly disclose the

identities of these Facebook users (for example, in a subsequent enforcement action against Meta), any criticism to which these users may be subjected is part of the price of voluntary and non-anonymous participation in public debates; just as the First Amendment protects the rights of Facebook users to publicly post positive and negative information about COVID-19 vaccines, it protects the rights of others to disagree with those public posts. Meta offers no evidence that any of the people or entities who publicly posted positive or negative content that Meta later determined violated its content moderation policies (a) were in the past subjected to threats or worse or (b) are any more likely in the future to be subjected to any response other than verbal criticism. In these circumstances, Meta's concerns about a chilling effect on Facebook users who want to post content that is negative or positive about COVID-19 vaccines is speculative.

This case therefore stands in sharp contrast to cases that struck down compelled disclosure requirements under the First Amendment. For example, *Americans for Prosperity Foundation*, a case cited several times by Meta, held unconstitutional a California statute requiring all charitable organizations to disclose to the state attorney general the identity of all major donors, including many whose identity was confidential and who reasonably feared retaliation if their identity was disclosed. The Supreme Court emphasized that subpoenas provided an alternative to this blanket disclosure requirement when the attorney general needs information about misconduct relating to charitable solicitations and donations, 141 S. Ct. at 2386, and the District has only issued a subpoena to Meta. Moreover, the California attorney general's only rationale for a blanket disclosure requirement was administrative convenience, but the District's rationale goes substantially beyond mere administrative convenience. The concern in *Americans for Prosperity Foundation* was about anonymous donors, *id.* at 2388, but the people whose identities the District wants Meta to provide to it chose to make their identities

public. And in *Americans for Prosperity Foundation*, there was evidence of an actual chilling effect on donors. *Id.* at 2388.

The Court's conclusion is consistent with federal cases deciding whether to enforce investigative subpoenas relating to political campaigns and fundraising. *The Larouche Campaign*, 644 F. Supp. at 122, recognized that compelled disclosure of political campaign contributors whose identity is *not* publicly known is not per se unconstitutional. The case held that the Federal Election Commission's "interest in obtaining information to determine whether [The Larouche Campaign] violated the Act by reporting and providing to the FEC false information concerning contributions and loans is sufficiently compelling to justify requiring disclosure of actual solicitors and contributors," and it held that the FEC's showing concerning its need for information was insufficient only with respect to *potential* contributors and lenders. *Id.* at 122. Here, the District is seeking information only about the identities of actual Facebook users who posted publicly and publicly identified themselves.

Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark. 1968), refused to enforce a subpoena by the Arkansas attorney general for bank records as part of a criminal investigation into suspected violations of Arkansas election laws allegedly committed on behalf of Republican candidates. The problem in *Pollard* was that the state tried to "compel a sweeping and indiscriminate identification of all of the members of the group in excess of the State's legitimate need for information," and it made "no showing here that the identities of Party contributors and the amounts of their contributions are reasonably relevant to defendant's investigation of alleged vote buying or that the public interest, if any, in the disclosure of that information is sufficiently cogent and compelling to outweigh the legitimate and constitutionally protected interests of the Party and its contributors in having that information remain private." *Id.* at 257. Here, the

District seeks information of a discrete subset of Facebook users who made public posts about COVID-19 vaccines that included their identities, and the information is relevant to whether Meta's public statements about its enforcement of its polices against vaccine misinformation have a tendency to mislead the consuming public.

C. Other issues

Meta makes four additional arguments against enforcement of Request No. 2: (1) the request for information about the identities of Facebook users that Meta has decided violated its content moderation policies concerning COVID-19 vaccines is not reasonably related to its stated investigative purpose, (2) if the District has statutory authority to conduct the investigation, it has not proffered a compelling interest to justify the burden on First Amendment rights; (3) the "dragnet" request is unreasonably broad, asking Meta to identify millions of users with demoted COVID-19 vaccine content; and (4) the request is vague and indefinite. Opp. at 21-25. It is worth noting that Meta does *not* contend that compliance with Request No. 2 would be unduly burdensome.

Meta's first argument is that the identities of users who violated its policies concerning vaccine misinformation are irrelevant to the truth or falsity Meta's public statements about enforcement of these policies. The Court agrees with Meta that the District must provide a reasonable explanation of why it needs information about the identities of these users against whom Meta has enforced its content moderation policies. For the reasons explained in Section III.B.3 above, the District provides a reasonable justification for its request for the public identities of these Facebook users, and Request No. 2 is narrowly tailored to achieve that investigative goal.

Second, Meta argues that the District has not proffered a compelling interest in using a consumer protection statute to target consumers. Opp. at 23-24. This is a variant of Meta's First Amendment argument, which fails for the reasons discussed in Section III.B.3 above. The argument also rests on the incorrect premise that the District's investigation is targeting Facebook's user, when the target is in fact Facebook. *See, e.g.*, Reply at 11.

Third, Meta argues that the District's "dragnet" request for identities of certain users is overbroad. Opp. at 24. This is another variant of Meta's argument that these identities are not relevant to whether Meta's public statements about its effective enforcement of its content moderation policies are false or misleading, but for the reasons explained above, the District provides a reasonable explanation of its need for this specific information.

Fourth, Meta argues that Request No. 2 is impermissibly vague and indefinite. Opp. at 23-24. Meta focuses on the ambiguity of the word "associated" in the request for the identity of any individuals or entities "associated" with the groups, pages, and accounts found by Meta to have violated its COVID-19 misinformation policy with respect to content concerning vaccines. The Court agrees that the term "associated" is ambiguous, and the District does not define this term in its briefs. However, the inclusion of one ambiguous term is not a basis for Meta to refuse to produce any responsive information. Meta may adopt any reasonable interpretation of the term that minimizes its burden in responding to the subpoena and protects users who have not given explicit or implicit consent to disclosure of their identities by making public posts. *See* Opp. at 18 (arguing that disclosure of the identities of millions of users who merely "associated" with users who actually posted the content that Meta concluded violated its content moderation policies raises separate First Amendment and overbreadth issues). As the Court stated in Section III.A.4 above, it understands that the District has limited its request to public posts, and to the

extent it did not, the SCA precludes Meta from providing the content requested by the District without the implied consent of the user who posted it publicly. If Meta cannot as a practical matter identify associates of groups, pages, and accounts it found to violate its policies, it can still identify the groups, pages, and accounts themselves.

The District contends, and Meta does not dispute, that Meta did not raise this objection concerning the term "associated" when the parties met and conferred in an attempt to reach agreement on Meta's response to the investigative subpoena, and the parties should be able to agree on a workable definition of the term. If the District is dissatisfied with Meta's response, it can file another petition for enforcement, or Meta can exercise the right that it reserved (Opp. at 25) to move to quash the subpoena.

IV. CONCLUSION

For these reasons, the Court grants the District's petition. The Court expects the parties to confer and agree on a reasonable schedule for production of information responsive to Request No. 2.

Anthony C. Epstein

Anthony C. Epstein
Judge

Date: March 9, 2022

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