SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In The Matter of the Application Of	:	
MALCOLM HARRIS,	:	
Petitioner,	:	
For A Judgment Under Article 78 of the CPLR,	:	
- against -	:	
MATTHEW A. SCIARRINO, Judge, Criminal Court Of The City Of New York, County of New York,	:	
Respondent,	:	INDEX No. _____
And	:	
CYRUS R. VANCE, JR., ESQ., District Attorney, New York County,	:	
And	:	
TWITTER, INC.,	:	
Additional Parties Respondent.	:	

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VERIFIED ARTICLE 78 PETITION

PETITIONER MALCOLM HARRIS, by and through his attorneys, Martin R. Stolar and Emily M. Bass, Esqs., alleges the following as and for his Verified Petition:

PRELIMINARY STATEMENT

1. This action arises out of a march in support of the "Occupy Wall Street" movement held on October 1, 2011. Thousands participated in the march. Seven hundred (700) were arrested. Petitioner Harris (hereinafter "Harris") was one of them.

2. Harris was charged with a single count of "disorderly conduct" under N.Y. Penal Law § 240.20[5] for having "obstructed vehicular … traffic."

3. Several months after filing its criminal complaint, the District Attorney's Office served a "trial subpoena" on Twitter, demanding the production of 3½ months' worth of information and materials from Harris' social media account, @destructuremal. Over the course of the succeeding months, the District Attorney served two additional trial subpoenas on Twitter for information from and regarding Harris' accounts.

4. Harris moved to quash each of the subpoenas.

5. Although noting that "New York courts have yet to specifically address whether a criminal defendant has standing to quash a subpoena issued to a third-party online social networking service," (Exh. 10 at 4),[1] Respondent denied Harris' challenges without reaching their merits.

6. Analogizing to "bank records cases," Respondent held that only the recipient of a subpoena in a criminal case has standing to challenge it.

[1] All references to Exhibits ("Exh. __") are to Exhibits attached to this Petition. A reference in the form (Exh. 17 at p. 11) refers to a particular page in an Exhibit. A reference in the form (Exh. 3 at ¶10) refers to a particular paragraph in an Exhibit. And, a reference in the form (Exh. 14-D) or (Exh. 16-3) refers to an exhibit *attached* to an Exhibit.

See (Exh. 10 at p. 4, Exh. 10 at p. 3 n.5). According to Respondent, Harris did not have standing.

7. Respondent made this holding, notwithstanding the fact that he recognized that Harris had "privacy rights" in the information (Exh. 10 p. 4), and that the information sought implicated Harris' rights of speech and association.

8. In this latter regard, Respondent acknowledged that Harris was engaged in "protest" activity, (Exh. 10 at p. 1), that social media has become "one of the most prominent methods of exercising free speech," (Exh. 17 at p. 10) and that the information the subpoenas here sought included the "contents" of Harris' communications concerning the OWS protest.

9. Because they implicated his rights of speech and association, Petitioner had a clear right to challenge the "trial subpoenas" and 18 U.S.C. §2703(d) Orders under the First Amendment, Fourth Amendment, New York State Constitution, Electronic Communications Privacy Act, Criminal Procedure Law and common law.

10. Harris had a clear legal right to move to quash the subpoenas and Orders under each of these authorities. In other words, he had standing.

11. Accordingly, through this action, Petitioner seeks relief pursuant to Article 78 of the CPLR,

- declaring that, by its terms, the "third party doctrine" was inapplicable to this case and did not deprive Harris of standing;

- compelling Respondent to acknowledge Harris' standing, under the First Amendment, Fourth Amendment, New York Constitution, Electronic Communications Privacy Act, Criminal Procedure Law and common law, to challenge the trial subpoenas and Orders, and

- compelling Respondent to reach and to rule on the substance of Harris' constitutional, statutory and common law challenges.

12. In the alternative, Harris seeks relief in the nature of prohibition,

- enjoining Respondent from affording the District Attorney discovery to which he is not entitled under state law and which it was beyond Respondent's power to grant;

- enjoining Respondent from enforcing Orders that it was beyond his power to enter under 18 U.S.C. § 2703(d); and

- enjoining Respondent from conducting an *in camera* inspection it is beyond his power to conduct.

JURISDICTION AND VENUE

13. This Court has jurisdiction of this proceeding pursuant to C.P.L.R. §§ 7801 – 7806.

14. Venue properly lies in New York County under C.P.L.R. §506(b) because that is where Respondent made the determinations complained of and refused to perform the duties specifically enjoined upon him by law.

THE PARTIES

15. Petitioner MALCOLM HARRIS (hereinafter "Harris" or "Petitioner") is a 23-year old writer who has been very vocal in supporting the Occupy

Wall Street ("OWS") Movement. He is also a Twitter user, a blogger and participant in other social media. He is the defendant in the case entitled *People Of The State of New York against Malcolm Harris*, Docket No. 2011NY080152, currently pending in the Criminal Court of the City of New York, New York County. Harris is a resident of Kings County.

16. Respondent MATTHEW A. SCIARRINO (hereinafter "Respondent") is a duly appointed Criminal Court Judge, assigned to the Criminal Court of the City of New York in New York County. He is the presiding judge in Part Jury 7 of that Court, where the case entitled *People of the State of New York against Malcolm Harris,* New York County Docket No. 2011NY080152, is pending. In his capacity as the presiding Judge in that case, Respondent Sciarrino issued three rulings that are the subject of this Petition. (Exhs. 10, 13, and 17).

17. Additional party Respondent CYRUS R. VANCE, JR. (hereinafter "Vance") is the duly elected District Attorney of New York County who is prosecuting the case entitled *People of the State of New York against Malcolm Harris,* New York County Docket No. 2011NY080152. In that capacity, Respondent Vance authorized the issuance of the three subpoenas addressed to Twitter (Exhs. 3, 4-A, 9-A) that sought information regarding Harris and from his accounts. Vance is an additional party Respondent in this proceeding pursuant to NY CPLR §§7802(a) and 7804(i).

18. Additional party Respondent TWITTER, INC. (hereinafter "Twitter") is a social media site, an Internet access provider and a "service provider" within the meaning of 17 U.S.C. §511(k), an "electronic communications service" within the meaning of 18 U.S.C. §2510(15), and a "remote computing service" within the meaning of 18 U.S.C. §2711(2). It is also the recipient of the subpoenas and Orders that are the focus of this proceeding. It is headquartered in and a resident of the state of California. Twitter is an additional party Respondent in this proceeding pursuant to NY CPLR §§7802(a) and 7804(i).

FACTUAL BACKGROUND AND STATEMENT OF PROCEEDINGS

Plaintiff Gets Arrested At An OWS Protest March

19. Harris is a 23-year old writer and ardent supporter of the Occupy Wall Street Movement. Along with thousands of others, he participated in a peaceful protest march in support of the Movement on October 1, 2011. The march proceeded north from Zuccotti Park intending to cross the Brooklyn Bridge to Brooklyn.

20. As long as the marchers were still in Manhattan, the streets were able to accommodate their numbers and the march proceeded in an orderly fashion. At the Brooklyn Bridge, there was a bottleneck. When the pedestrian walkway proved too narrow for the marchers, the Police and the marchers spilled over into the roadway.

21. Marchers have asserted the Police led them into the roadway. The Police have asserted they did no such thing. The Police say they warned the marchers they would be arrested if they went onto the roadway and that the marchers went regardless.

22. Seven hundred marchers were arrested. Harris was one of them. He was charged with a single count of having "obstructed vehicular and pedestrian traffic" in violation of Penal Law 240.20[5]. The Criminal Court Complaint for the single count of "Disorderly Conduct" was filed on October 2, 2011. (Exh. 1). Harris was arraigned on November 16, 2011 and pleaded "not guilty" to the charge.

23. According to the District Attorney's Office, the traffic stoppage lasted three hours, and "the event in question is limited to a single day …". (Exh. 5 at ¶ 33).

The District Attorney Issues A Trial Subpoena
For Harris' Twitter Records

24. Notwithstanding the abbreviated nature of the event and minor nature of the charge, on January 26, 2012, the D.A.'s Office served Twitter by fax with a trial subpoena, seeking 108 days' worth of information from Harris' @destructuremal account.

25. The subpoena sought two types of information "for the period of 9/15/2011-12/31/2011:"

"[a]ny and all user information"[2] and "any and all tweets."

(Exh. 3).

26. By the prosecution's own admission, the "user information" the subpoena sought included the following:

> The subscriber's name, address; local and long distance telephone connection records, or records of session times and durations, length of service (including start date) and types of service utilized; telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address, and the means and source of payment for such service.

(Exh. 5, at p. 10, ¶23 n.7). These are the categories of information specified in 18 U.S.C. §2703.

27. At the bottom, the subpoena carried the following legend:

> TWITTER IS DIRECTED not to disclose the existence of this subpoena
> to any party. Such disclosure would impede the investigation being conducted and interfere with the enforcement of law.

(Exh. 3).

28. The subpoena was accompanied by both a fax cover and cover letter. The cover letter notified Twitter that it could deliver the documents sought by the trial subpoena to the District Attorney's Office instead of delivering them to the Court. The letter read in pertinent part as follows:

> "In lieu of appearing personally with the requested documents, you may email them to langston@dany.nyc.gov and

[2] The People have variously referred to this information as "user information" or "subscriber information." The Court has referred to it as "non-content information." We shall refer to it as "content" and "noncontent information" because those are the terms used by the Court.

collinsc@dany.nyc.gov. You may mail or deliver them to the New York County District Attorney's Office, 80 Centre St., New York, NY 10013, for the attention of Charles Collins room 721A."

29. Although Respondent made a similar distinction in his Decisions to the distinction made in the subpoenas between communications and other types of information, he employed different terminology. Specifically, he employed the terms "content information" and "noncontent information," while the subpoenas referred to "tweets" or "public tweets" and specific categories of "subscriber information" or "user information." (Cf. Exh. 17 at p. 11 with Exh. 16-1 and Exh. 16-3).

30. Although Respondent defined the terms "content information" and "noncontent information," he did so only broadly. He defined "content information" by reference to the Wiretap Act, as "contents, when used with respect to any wire, oral or electronic communication," and as including "any information concerning the substance, purport, or meaning of that communication." (Exh. 17 at p. 2)

31. Respondent defined "noncontent information" as including, without limitation: "IP addresses, physical locations, browser type, subscriber information;" "logs of account usage, mailer header information (minus the subject line), lists of outgoing e-mail addresses sent from an account," "network generated information about … communications," and "logs maintained by the network server." (Exh. 17 at pp. 3 and 8).

32. In each instance, the plain meaning of the term Respondent used was broader than the already broad terms used in the subpoenas.

33. Thus, in addition to public tweets, the term "content information" also includes other "electronic communications." It includes tweets that are no longer public and "direct messages." "Direct messages" are messages between Twitter users that, like email, are only visible to the sender and recipient. (Direct messages shall hereinafter be referred to as "DMs").

34. Moreover, in addition to Harris' tweets, the term "content information" includes tweets posted by the persons Harris followed during the September 15 – December 30, 2011 period. All of those tweets would have appeared in Harris' @destructuremal timeline and have been available for him to read.

35. On information and belief, by correlating session data and other noncontent information with those tweets, a person reviewing information and materials returned pursuant to Respondent's June 30th Order could determine the tweets Harris read during the September 15 – December 30th period.

36. Like "content information," the term "noncontent information" encompasses more than the specific categories of information sought by the May 30th subpoena and/or that are specified in 18 U.S.C. §2703(c)(2). (Exh. 16-3). At a minimum, it also includes physical locations or location data, and "log data." (Exh. 17 at pp. 3 and 8).

37. Twitter defines "log data" as: "information such as your IP address, browser type, the referring domain, pages visited, your mobile carrier, device and application IDS, and search terms. Other actions, such as interactions with our website, applications and advertisements, may also be included in Log Data… ". (Exh. 4, at p. 6).

38. Twitter's servers automatically record "log data" regarding a registered Twitter user's use of its services.

39. On April 20, 2012, Respondent ordered Twitter to "comply with the January 26, 2012 subpoena that was previously served on their offices …". (Exh. 10 at p. 11).

40. On June 30, 2012, Respondent took a different tack. He ordered Twitter "to disclose all non-content information and content information from September 15, 2011 through December 30, 2011," Exh. 17 at p. 11, pursuant to 18 U.S.C. §2703(d). (Exh. 17 at pp. 7-8, 10).

41. By so doing, Respondent broadened the compass and reach of already overbroad subpoenas, and ordered Twitter to turn over information and materials that unquestionably implicate rights of speech and association.

The Information That Is Sought And That Twitter Has Been Ordered To Turn Over Implicates Harris' First Amendment Rights

42. The order that Twitter turn over DMs or tweets that Harris wrote, read or received implicates his speech and privacy rights and rights of political belief and association.

43. The order that Twitter turn over data that would reveal Harris' whereabouts when he wrote or read, and the time he spending writing or reading, further implicates Harris' rights of speech, privacy, belief and association.

44. Such orders would enable someone to ascertain Harris' writing and reading habits, political beliefs and the identity and beliefs of the persons with whom he associated.

45. In sum, Respondent's Order that Twitter turn over content and noncontent information endangers core First Amendment values.

Harris Makes A Motion To Quash

46. Notwithstanding the directive on the subpoena that it not do so, on January 31, 2012, Twitter informed Harris that it had received the District Attorney's subpoena. It did so in accordance with its published policies. Harris advised Twitter that he intended to move to quash.

47. On February 6, 2012, Harris publicly acknowledged that the @destructuremal account was his and moved to quash the January 26th subpoena.

48. Harris' motion sought to quash the subpoena on the grounds that it was violative of the First and Fourth Amendments, the Electronic Communications Privacy Act and the Criminal Procedure Law. It further claimed that the subpoena had been issued for an improper purpose, was

overbroad and constituted an abuse of court process. (Exh. 4, at pg. 8-10, ¶¶ 16-25).

49. The Criminal Court raised the issue of "standing" *sua sponte* at an informal status conference held on February 10, 2012. Harris filed a memorandum on the standing issue a few weeks later and, on February 26, 2012, as a precaution, a motion to intervene. (Exh. 7). The District Attorney's Office opposed Harris' motion to intervene, and Harris replied on March 22, 2012.

50. Oral argument was held on the outstanding motions on March 23, 2012.

<u>The District Attorney Gives His Reasons for Issuing The Subpoena</u>

51. The District Attorney justified his issuance of the January 26th trial subpoena on the grounds that it sought information necessary "to refute … [Harris'] anticipated defense" in the case. (Exh. 5, at p. 15, ¶ 33).

52. As the District Attorney's Office explained: Harris stands accused of having 'stopped vehicular traffic' in violation of Penal Law §240.40[5]. In order to prevail on that charge, the District Attorney has to prove either that Harris acted with the "intent to cause public inconvenience, annoyance, or alarm" or "recklessly creat[ed] a risk thereof." (Exh. 5, at p. 3, ¶6).

53. The protesters have asserted that was not their intent. Rather, they say that, after initially warning them against proceeding into the roadway on the Bridge, the police "led and escorted" them there. (Exh. 5, p.

3 at ¶5) As a result, they believed they were entitled to be where they were, and had no intent to alarm, annoy or inconvenience the public. (Exh. 5, p. 3 at ¶5).

54. Cognizant of the fact that Harris had his cell phone with him during the march and his claim to have sent *one* tweet *after* being arrested, the District Attorney speculated that "defendant ***may*** have used … [his Twitter] account to make statements *while on the bridge* that were inconsistent with his anticipated trial defense." (Exh. 5, p. 4 at ¶9) (emphasis added).

55. The District Attorney does not say either that Harris *did* in fact tweet while he was on the Bridge or that he has ever tweeted regarding his 'state of mind' then. (Exh. 5 at ¶¶1-41). The object of the trial subpoena was to ascertain whether any such tweets existed.

56. Accordingly, the January 26, 2012 trial subpoena is the quintessential example of a fishing expedition.

57. Although "the event in question" was "limited to a single day," the District Attorney argued that the scope of the subpoena had to be "broader … to determine defendant's intentions on October 1, 2011, when the events were unfolding." (Exh. 5 at ¶33)

58. The scope of the subpoena was 108 times as broad and sought two types of information. (Exh. 3). It sought content information for a few weeks *prior to* October 1st to "encompass any statements … that this was a

planned act…." (Exh. 5 at ¶33). It sought content information for three months *after* the march to "capture any admissions after the day in question." *Id*. (emphasis added). And, it sought 3 ½ months of log in, location and session information "to connect" the account to the defendant.[3] (Exh. 3 at ¶10).

The District Attorney Serves A Second Subpoena On Twitter

59. On March 8, 2012, the District Attorney faxed another subpoena to Twitter for a second Harris account – @getsworse. (Exh. 9-A).

60. Nine days later, Harris filed a motion to quash and intervene directed to that subpoena. (Exh. 9). Like Harris' predecessor motion to quash, the instant motion challenged the subpoena on the grounds that

. it constituted an unwarranted invasion of the defendant's right of privacy;
. it constituted an infringement of the defendant's constitutional rights;
. it was overbroad and issued for an improper purpose; and
. it was not issued in compliance with CPL §640.10.

Twitter Advises The District Attorney's Office
It Considers the Subpoena Invalid

61. In the meantime, counsel for Twitter, John K. Roche, wrote to the District Attorney's Office, responding to the assertion that Twitter was in violation of the subpoena for failing to produce the requested documents. (Exh. 8). The assertion was incorrect, Mr. Roche advised, for all the reasons Twitter had recounted in an earlier email and because the subpoena had not

[3] In connection with his Motion to Quash, Harris acknowledged that the @destructuremal account is his. The District Attorney accordingly has no need for the "noncontent information."

been served in compliance with the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.

Respondent Issues His First Decision & Order:

62. On April 20, 2012, Respondent issued his first Decision and Order. (Exh. 10). He denied Harris' constitutional, statutory and common law challenges on the ground that Harris lacked standing to raise them, and predicated his ruling on the 'banking records rule' and the Supreme Court's decision in *United States v. Miller*, 425 U.S. 435 (1976).

63. Respondent found that Harris had a subjective expectation of privacy in his tweets and user information that was "understandable," but stated at the same time that the expectation lacked legal "merit." (Exh. 10 at p. 4).

64. In addition to ruling that Harris lacked standing in his own right to challenge the subpoena, Respondent denied Harris leave to intervene as a matter of discretion. (Exh. 10 at pg. 7-8).

65. Having thus eliminated Harris' challenges without having reached their merits, Respondent *sua sponte* undertook one substantive inquiry. He held that he was "compelled to evaluate the subpoena under federal laws governing internet communications" (Exh. 10 at p. 9); specifically, under the Stored Communications Act, 18 U.S.C. §§2701 et seq.[4]

[4] The Stored Communications Act was enacted as part of the Electronic Communications Privacy Act, 18 U.S.C. §§2510 et seq.

66. Respondent made three findings. He held that Twitter was an "electronic communication service" under the Act. (Exh. 10 at p. 9). He held that, using its subpoena, the government could "compel disclosure of the basic subscriber and session information listed in 18 U.S.C. § 2703(c)(2)," but not compel disclosure of Harris' tweets. (Exh. 10 at pages 9-10). Finally, Respondent accepted the District Attorney's conjecture that "while on the Brooklyn Bridge the defendant ***may*** have posted Tweets that were inconsistent with his anticipated trial defense." (Exh. 10 at pages 10-11)(emphasis added).

67. The latter afforded him the basis, Respondent said, to "compel Twitter to disclose @destructuremal account's Tweets, pursuant to 18 USC § 2703(d)." (Exh. 10 at p. 11).

68. So much of Respondent's April 20th Order as was entered pursuant to 18 USC § 2703(d) was entered *sua sponte*. The District Attorney did not make application for such a § 2703(d) order. He disputed its application.

69. In the final analysis, Respondent's April 20, 2012 Order is a hybrid one. It both enforces the January 26, 2012 subpoena and reinforces it with an order, requiring the disclosure of content information under 18 U.S.C. § 2703(d).

70. In its closing sentences, the April 20th Decision & Order takes an unusual turn: Respondent directs Twitter to provide the materials it is being

ordered to turn over to the Court for its own "*in camera inspection*." (Exh. 10 at p. 12)(emphasis added). Respondent says that, after reviewing the materials, he will provide "[t]he relevant portions thereof … to the office of the District Attorney, who will provide copies to the defense counsel as part of discovery." Id.

Harris Moves For Reargument

71. On April 30, 2012, Harris made a motion reargue in which he raised four points. He pointed out that the Court had applied an incorrect principle (the 'banking records rule') to determine Harris' standing, and that it had overlooked both the service issue and the issue of the second subpoena. He also pointed out that the Court had incorrectly assumed the existence of an "ongoing criminal investigation" in aid of which it could enter a 2703(d) order. (Exh. 11 at p. 6).

72. There was no criminal investigation still in progress.

73. The District Attorney's Office responded to Harris' motion, arguing that reargument should not be granted and that, if it was, *United States v. Jones*, 132 S.Ct. 945 (2012) and *People v. Weaver*, 12 N.Y.3d 433 (2009), were not relevant to the issues before the Court. (Exh. 12 at p. 3, ¶ 8).

74. On May 4, 2012, Respondent granted reargument, but reaffirmed his earlier holdings. (Exh. 13).

Twitter Moves to Quash Respondent's 4/20/12 Order

75. On May 7, 2012, Twitter made a motion to quash. Since it had not yet been properly served with any subpoena, its motion in the first instance was only addressed to Respondent's Order.

76. Several weeks later, the District Attorney's Office responded with a Memorandum of Law. In it, it made a significant admission.

77. Previously, the District Attorney's Office had repeatedly maintained that Harris' tweets were "public communications." Now, for the first time, it acknowledged that they were no longer publically available on Twitter's platform. (Exh. 14 at p. 13, n. 4).

78. On May 30, 2012, Twitter filed its Reply Memorandum. In it, it confirmed that, while the tweets in question had *once* been "readily accessible to the public," they no longer were.

79. On May 31st, three organizations filed a joint *amicus* in support of Twitter's motion to quash. The *amici curiae* included the American Civil Liberties Union, the Electronic Frontier Foundation and Public Citizen, Inc. They argued in their memorandum that because the District Attorney's subpoenas and Respondent's Order implicated Harris' First Amendment rights, both he and Twitter had standing to challenge them, regardless of the 'third party doctrine.' They also joined Harris and Twitter in arguing that *Jones* and *Weaver* had so altered the Fourth Amendment landscape that it

was now clear that Harris had a reasonable expectation of privacy in the information the subpoena and Order covered.

The District Attorney Serves A Third Subpoena
For Harris' Twitter Information

80. On May 30, 2012, the District Attorney's Office served yet a third subpoena upon Twitter for information regarding Harris. Like the first subpoena, this one was also directed to obtaining information regarding the @destructuremal account.

81. There were three main differences between the January 26th and May 30th subpoenas: First, while the January 26th subpoena had sought tweets and user information for a 3 ½ month period, the May 30th subpoena sought it for a month and a half. In other words, it reduced the period by over half. (*Cf*. Exh. 16-1 with Exh. 16-3).

82. Second, this time, it specified the user or subscriber information it wanted by reference to the specific categories of information described in 18 U.S.C. §2703(c)(2), and it sought to limit the substantive communications it sought to "public tweets." (Exh. 16-3).

83. Third, this time, by letter, the District Attorney gave Harris notice of the subpoena "[p]ursuant to 18 U.S.C. §2703(b)(1)(B)." (Exh. 14-A at p. 2; Exh. 16-4). By so doing, the District Attorney acknowledged both that the SCA applied to his subpoenas and that Harris had legal standing to move to quash them.

Harris Moves To Quash The Latest Subpoena

84. On June 8, 2012, Harris moved to quash the latest subpoena. (Exh. 14). As he had previously, he challenged the subpoena on the grounds that it was overbroad, issued for an improper purpose, and invaded his privacy and First and Fourth Amendment rights under the New York and United States Constitutions. He relied upon and incorporated his earlier arguments and memoranda and the arguments and memoranda submitted by Twitter and the *Amici*.

Twitter Files A Motion To Quash Addressed To The Three Subpoenas And Order

85. In the meantime, on May 31, 2012, the District Attorney's Office personally served a member of Twitter's Board of Directors in New York County with copies of Respondent's April 20, 2012 order and the January 26th and March 8th trial subpoenas for Harris' accounts and information.

86. In response to that service, on June 11, 2012, Twitter moved to quash both the Order and all three extant subpoenas.

Respondent Issues His Third Decision & Order Regarding The Subpoenas

87. On June 30, 2012, Respondent issued his Decision and Order in response to Twitter's motions. He reaffirmed his prior holdings.

88. Respondent again likened the subpoenaed materials to third-party bank records and held that Harris lacked a proprietary interest in them. (Exh. 17 at pages 3-4, p. 4 n.5).

89. Respondent also held that Harris had forever forfeited any right to claim a privacy interest. According to Respondent, "[i]t is the act of tweeting or disseminating communications" in the first place that "controls" and not the current status of communications. (Exh. 17 at p. 7). Thus, having once posted the tweets in question publically, in Respondent's view, Harris had forever "gifted [them] to the world." (Exh. 17 at p. 11).

90. In Respondent's view, unlike in the real and digital worlds, "privacy" is an all-or-nothing proposition.

91. In addition to holding that Harris lacked standing, Respondent reduced Twitter's stake in the matter to a question of "undue burden."

92. Respondent held that Twitter was not subjected to an undue burden "as it does not take much to search and provide the data to the court." (Exh. 17 at p. 4).

93. So long as the third party is in possession of the materials," Respondent said, the court may issue an order for them "when the materials are relevant and evidentiary ." (Exh. 17 at p. 4).

94. On the question of relevance and materiality, Respondent reaffirmed his earlier conclusion: the government had offered "specific and articulate facts showing that there are reasonable grounds to believe that … ***the records or other information sought, are relevant and material[ ] to an ongoing criminal investigation."*** (Exh. 17 at p. 7)(emphasis in the original).

95. Once again, Respondent's determination of relevance and materiality was solely predicated on one thing: the D.A.'s speculation that Harris *may* have tweeted regarding his "state of mind" while he was on the Bridge, either then or at some other point during a 3 ½ month period. (Exh. 17 at pages 7-8).

96. Respondent then repeated his exercise of ensuring that his Order was in compliance with the Stored Communications Act. (Exh. 17 at pages 2-3, 7-8).

97. Although in one respect, his current analysis was identical to the analysis in which he engaged in his April 20 Opinion, in two other respects, the analyses diverged.

98. Respondent again found that the Stored Communications Act ("SCA") (18 USC §2701 *et seq)* distinguished between electronic communication services and remote computing services, and "content information" and "non-content information," Exh. 17 at p. 3, and again issued an order under 18 U.S.C. §2703(d).

99. However**,** the §2703(d) Order Respondent issued on April 20th and the §2703(d) Order he issued on June 30th differ in two respects.

100. First, whereas the April 20th §2703(d) Order only covered content information, the June 30th §2703(d) Order now covered both content information and noncontent information.

101. Second, Respondent now acknowledged that the SCA requires law enforcement to obtain a warrant upon probable cause to obtain content information that has either been in storage for less than 180 days or that is less than 180 days old. (Exh. 17 at p. 8).

102. On April 20, 2012, nearly all of the tweets the District Attorney's Office sought were *less* than 180 days old and, therefore, required a warrant.

103. Yet, the §2703(d) Order Respondent entered on April 20th ordered the tweets be turned over simply based on an allegation that they were "relevant and material" to a non-existent criminal investigation. The Order did not require the District Attorney to obtain a warrant for the tweets or require or find probable cause.

104. The situation on June 30th stood in stark contrast: By now, 107 out of the 108 days' worth of tweets being sought did not require a warrant under the terms of the SCA because they were over 180 days old. Only the tweets associated with December 30, 2011 had not yet reached the 180-day mark.

105. Accordingly, Respondent issued a new §2703(d) Order on June 30, 2012 reflecting the changed situation. He ordered Twitter to "disclose all non-content information and content information from September 15, 2011 to December 30, 2011" (Opn at 11); but to obtain a search warrant for any

information it wanted pertaining to December 31, 2011. (Exh. 17 at pages 8, 10).

106. "[T]o avoid any issue of alleged nonimpartiality," Respondent said, "that warrant should be made to another judge of this court." (Exh. 17 at pages 10-11).

107. Just as he had in his earlier April Order, Respondent then ordered Twitter to provide the materials being turned over pursuant to his orders "to this court for *in camera* inspection." (Exh. 17 at p. 11).

108. The purpose of the *in camera* review, Respondent said, was "to safeguard … [Mr. Harris'] privacy rights." (Exh. 17 at p. 2).

109. This Article 78 proceeding has been brought within four months of April 20, 2012. It is therefore timely as to all Orders.

FIRST CAUSE OF ACTION
(Claim # 1 In The Nature of Prohibition,
To Enjoin Respondent From
Enforcing The Trial Subpoenas)

110. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 109 as if fully set forth herein.

111. In enforcing the January 26, 2012 subpoena on April 20, May 4 and June 30, Respondent acted in excess of his authority and in violation of Harris' rights of speech and association.

112. Respondent acted in excess of his authority in each of two respects.

113. He permitted a trial subpoena to be used for a proscribed purpose, and afforded the District Attorney discovery to which he was not legally entitled and that Respondent could not grant.

114. A trial subpoena may not be used for the purpose of discovery or to ascertain the existence of evidence.

115. Its sole purpose is to compel the production for use at trial of specific evidence, whose existence is already known.

116. In any event, discovery in criminal proceedings in New York is regulated by statute.

117. In an action proceeding in superior court, the prosecutor is entitled to the discovery specified in C.P.L. §§240.30 and 240.40(2)(a)(i)-(vii).

118. Under C.P.L. §§240.30, the prosecutor is entitled to: (i) documents concerning a physical or mental examination made by or at the request or direction of the defendant and (ii) “any photograph, drawing, tape or other electronic recording which the defendant intends to introduce at trial.”

119. Under C.P.L. §240.40(2)(a)(i)-(vii), the Prosecutor is additionally entitled to seek a Court order requiring a defendant to provide non-testimonial evidence.

120. Under the authority of §240.40(2)(a)(i)-(vii), the court in such an action can require a defendant to

(i) Appear in a line-up;
(ii) Speak for identification by witness or potential witness;
(iii) Be fingerprinted;
(iv) Pose for photographs not involving reenactment of an event;
(v) Permit the taking of samples of blood, hair or other materials from his body …;
(vi) Provide specimens of his handwriting;
(vii) Submit to a reasonable … medical inspection of his body.

121. None of the information or materials covered by the January 26, 2012 trial subpoena come within the categories of discoverable materials specified in §§240.30 or 240.40(2)(a)(i)-(vii).

122. The subpoenaed materials would thus not be automatically discoverable by the District Attorney under C.P.L. §240.30 nor discoverable by Court order under the Criminal Procedure Law *under any circumstances*.

123. Under the circumstances that obtain in the action against Harris, the subpoenaed materials are not discoverable for a second reason: the District Attorney is not proceeding in a superior court, but in a local criminal court instead.

124. Where the District Attorney is proceeding in a local criminal court, he is not even entitled to the range of discovery provided for in C.P.L. §240.30 and 240.40(2)(a)(i)-(vii).

125. Under C.P.L. §340.30, the only discovery to which the prosecutor is entitled in a criminal action commenced in local criminal court is notice by a defendant under C.P.L. §250 that he intends to offer one of three trial defenses.

126. C.P.L. §250 has no application here.

127. Accordingly, none of the statutes in the State afforded Respondent the power to grant the prosecutor any discovery in the criminal action against Harris, let alone the discovery the District Attorney sought.

128. Since Respondent cannot use the procedural mechanism of a trial subpoena or subpoena *duces tecum* to expand discovery that is otherwise available to the prosecutor, Respondent's actions in enforcing the January 26, 2012 trial subpoena on April 20, May 4 and June 30, 2012 were in excess of his authorized powers.

129. Insofar as Respondent's Order of April 20, May 4 and June 30th enforced the District Attorney's subpoenas, they were not supported by a compelling governmental interest

130. They sanctioned an unlawful fishing expedition and violated Harris' rights of speech, association and privacy.

131. By reason of the foregoing, Respondent acted in excess of his authorized powers.

132. Harris has no adequate remedy at law.

133. If a judgment of prohibition is not entered, Harris will suffer constitutional violations that cannot be remedied on appeal.

134. The harm to Harris would be substantial and, because associational rights are involved, would implicate the public interest.

135. By reason of the foregoing, Harris is entitled to a determination under Article 78 that Respondent's Orders of April 20, May 4 and June 30, 2012 are invalid, unlawful and unenforceable.

136. Harris is further entitled to a judgment under Article 78, enjoining Respondent from affording the District Attorney the discovery he seeks to any extent and in any form.

SECOND CAUSE OF ACTION
(Claim # 2 In The Nature of Prohibition
To Enjoin Respondent From
Enforcing His §2703(d) Orders)

137. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 136 as if fully set forth herein.

138. On April 20 and June 30, 2012, in addition to enforcing the January 26, 2012 trial subpoena, Respondent *sua sponte* entered orders under 18 U.S.C. §2703(d) that, in whole or in part, paralleled the subpoena and also directed the production of communications and noncontent information.

139. The §2703(d) Order Respondent entered on April 20th required the production of 3 ½ months of Harris' tweets.

140. The §2703(d) Order Respondent entered on June 30th required the production of both "content" and "noncontent information" for the period "September 15, 2011 to December 30, 2011." With the exception of one day, the January 26th subpoena and June 30th §2703(d) Order covered the same period.

141. Respondent acted in excess of his powers in entering each of these Orders.

142. He exceeded his powers in at least three respects.

143. First, the Criminal Court of the City of New York was not competent to issue the Orders under 18 U.S.C. §2703.

144. To qualify as a "court of competent jurisdiction" within the meaning of 18 U.S.C §§2703 and 2711, Respondent's Court would have to have been authorized by New York law to issue search warrants *under the circumstances of this case*.

145. It is not so authorized. It is authorized to issue search warrants in other circumstances, but not where (i) the object of the search is personal property of the kind described in C.P.L. §690.10 and (ii) the location to be searched is not in the state.

146. Here, the District Attorney described the object of the search as §690.10(4) property and the location to be searched as situated in California.

147. Second, Respondent entered orders under §2703(d) notwithstanding the fact that, before a §2703(d) order can issue, the requesting governmental entity must show there are "reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, ***are relevant and material to an ongoing criminal investigation***."

148. The District Attorney's Office did not and could not make such a showing here for two reasons.

149. It did not itself seek a §2703(d) Order. Respondent entered the Order *sua sponte*.

150. More significantly, there was no "ongoing criminal investigation," so the communications and information sought could not be "relevant and material" to one.

151. Absent an "ongoing criminal investigation," Respondent lacked the statutory authority to enter a §2703(d) Order.

152. Third, 18 U.S.C. §2703(d) provides that "[i]n the case of a State governmental authority, … a court order [under §2703(d)] shall not issue if prohibited by the law of such State."

153. State law in this instance prohibits the §2703(d) Orders that were entered since it prohibits the discovery the two orders authorize. That discovery is the same discovery that is unavailable under state law.

154. For each of these three independently sufficient reasons, Respondent exceeded his authority in entering orders under 18 U.S.C. §2703(d).

155. Insofar as Respondent's Orders of April 20 and June 30, 2012 are based on 18 U.S.C. §2703(d), they were and are not supported by a compelling governmental interest

156. Rather, they sanction an unlawful fishing expedition and violate Harris' rights of speech, association and privacy.

157. Harris has no adequate remedy at law.

158. If a judgment of prohibition is not entered, Harris will suffer constitutional violations that cannot be remedied on appeal.

159. The harm to Harris would be substantial and, because associational rights are involved, would implicate the public interest.

160. By reason of the foregoing, Harris is entitled to a determination under Article 78 that Respondent's §2703(d) Orders of April 20, May 4 and June 30, 2012 are invalid, unlawful and unenforceable.

161. Harris is further entitled to a judgment under Article 78, enjoining Respondent from affording the District Attorney the discovery he seeks to any extent and in any form.

THIRD CAUSE OF ACTION
(Claim # 3 In The Nature of Prohibition,
To Enjoin Respondent From
Reviewing the Subpoenaed Materials
In Camera)

162. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 161 as if fully set forth herein.

163. By entering his Decisions & Orders of April 20, May 4 and June 30, Respondent has enabled the prosecutor, under the guise of a trial subpoena, to engage in a fishing expedition and, potentially, obtain discovery to which he is not lawfully entitled.

164. By ordering Twitter to deliver the subpoenaed materials and materials covered by the Orders for *in camera* review, Respondent undertakes to *himself* conduct a further phase of the fishing expedition.

165. He thereby not only joins the fishing party, he makes himself its principal member.

166. Such an *in camera* review, every bit as much as the initial acquisition of Harris' information, would violate Harris' rights of speech, privacy and association.

167. Accordingly, in promising to undertake such a review, Respondent threatens to exceed his powers and infringe Harris' constitutional rights in yet a further and unique way.

168. Should Respondent in fact conduct such a review, rather than diminish or protect against, he will compound the constitutional injuries effected by his April, May and June Orders.

169. Harris has no adequate remedy at law against such constitutional injuries if a judgment in the nature of prohibition is not entered.

170. The harm to Harris would be substantial and, because associational rights are involved, would implicate the public interest.

171. The constitutional violations that would attend such a review cannot be remedied on appeal.

172. By reason of the foregoing, Harris is entitled to a determination under Article 78 that the provision for *in came*ra inspection in his April 20 and June 30, 2012 Orders is invalid, unlawful and unenforceable.

FOURTH CAUSE OF ACTION
(A Hybrid Claim Under Article 78,
In the Nature Of Prohibition And/or
Mandamus)

173. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 172 as if fully set forth herein.

174. Respondent relied upon the "third party doctrine" to find that Harris lacks standing to challenge the subpoenas and Order that are the subject of this Petition.

175. By its terms, the third party doctrine is ***in***applicable in each of two circumstances.

176. First, it is inapplicable where the movant has a legally cognizable or protectable interest in the papers or effects to be subjected to a search. This interest can either be a proprietary interest or an expectation of privacy.

177. Second, it is inapplicable where the movant's First Amendment rights are implicated.

178. Each of these circumstances obtains in this case.

179. Harris has protectable interests in the information and materials covered by the January 26th subpoena and April, May and June Orders.

180. Equally significantly, the January 26th subpoena and April, May and June Orders implicate Harris' rights of speech and association.

181. Accordingly, in applying the third party doctrine to determine whether Harris had standing to move to quash the subpoenas or Orders, Respondent exceeded his powers and violated Harris' First and Fourth Amendment rights under the United States and New York Constitutions.

182. Respondent thereby also failed to perform a duty enjoined upon him by law.

183. Harris had a clear legal right to have the issue of his standing to challenge the subpoenas and Order determined based upon *his own* rights and not the rights and interests of a third party.

184. Respondent failed to perform his duty to give effect to that clear right.

185. Harris has no adequate remedy at law.

186. Accordingly, Harris is entitled to a judgment under Article 78, vacating Respondent's rulings under the third party doctrine, and ordering Respondent to recognize Harris' clear standing in his own right, all as detailed below.

FIFTH CAUSE OF ACTION
(Claim # 1 In The Nature of Mandamus
Compelling Respondent To Reach & Rule On
Harris' Challenge Under The Fourth Amendment
& NY Const Art. I, § 12)

187. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 109 and 174 through 186 as if fully set forth herein.

188. The test for standing to claim a violation of the Fourth Amendment or NY Const Art I, §12 is well established. It has two elements.

189. The person moving to quash must prove (i) he has a subjective expectation of privacy in the area or materials being searched, and (ii) the expectation is one society is prepared to recognize as 'reasonable.'

190. Although perhaps involuntarily, Respondent confirms that Harris has satisfied each part of this test.

191. Thus, Respondent expressly acknowledges that Harris' had a subjective expectation of privacy, even calling his expectation "understandable." (Exh. 10 at p. 4).

192. Next, Respondent confirms *by his own actions* that society – in the person of the Court - is prepared to recognize that expectation as reasonable.

193. While granting the District Attorney's request to force Twitter to turn over 107 days of subpoenaed materials, both on April 20, 2012 and again on June 30, 2012, Respondent ordered Twitter to provide those materials "for *in camera* inspection." (Exh. 10 at p. 11; Exh. 17 at p. 11).

194. It is inconceivable that Respondent would take that action and provide for *in camera* review were Harris' expectations unreasonable.

195. Finally, Respondent reports that among Twitter users – who he says number 140 million (Exh. 10 at p. 3), it is "widely believed … that any disclosure of a user's information would first be requested from the user and require approval by the user …". (Exh. 10 at p. 5).

196. It follows that Harris has both a subjective and objectively reasonable expectation of privacy in the materials sought and, thus, clear standing under the Fourth Amendment and New York Constitution.

197. For his part, Respondent had a duty enjoined upon him by law to give effect to those clear rights and to reach and rule on the substance of Harris' challenges.

198. Respondent failed to perform this duty. He refused to recognize Harris' standing, and he avoided the merits of Harris' challenges.

199. Harris has no adequate remedy at law.

200. Accordingly, Petitioner is entitled to a judgment under Article 78, reversing and remanding Respondent's Decisions & Orders and compelling him to reach and rule on the merits of Harris' privacy-based challenges.

SIXTH CAUSE OF ACTION
(Claim # 2 In The Nature of Mandamus
Compelling Respondent To Reach & Rule On
Harris' Challenge Under The Fourth Amendment
& NY Const Art. I, § 12)

201. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 109 and 174 through 200 as if fully set forth herein.

202. The test for standing to claim a violation of the Fourth Amendment or NY Const Art I, §12 is well established. It has two elements.

203. The person moving to quash must prove (i) he has a subjective expectation of privacy in the area or materials being searched, and (ii) the expectation is one society is prepared to recognize as 'reasonable.'

204. Harris has satisfied each element.

205. First, Respondent acknowledges that Harris' had a subjective expectation of privacy in the materials, even calling that expectation "understandable." (Exh. 10 at p. 4).

206. Second, even if Respondent himself is not found to have confirmed the reasonability of this privacy expectation, both the New York Court of Appeals and United States Supreme Court have now done so.

207. The New York Court of Appeals recognized the objective reasonability of such an expectation in *People v. Weaver*, 12 N.Y.3d 433 (2009).

208. The United States Supreme Court did so in *United States v. Jones*, 565 U.S. 945 (2012).

209. Accordingly, Harris clearly has standing under both the Fourth Amendment and N.Y. Const. Article I, §12 to move to quash the subpoenas and Orders.

210. In turn, Respondent had a duty enjoined upon him by law to give effect to those clear rights and to reach and rule on the heart of Harris' challenges.

211. Respondent failed to perform each aspect of this duty. He refused to recognize Harris' standing, and avoided the merits of Harris' challenges.

212. Harris has no adequate remedy at law.

213. Accordingly, Petitioner is entitled to a judgment under Article 78, reversing and remanding Respondent's Decisions & Orders and compelling him to reach and rule on the merits of Harris' privacy-based challenges.

SEVENTH CAUSE OF ACTION
(Claim # 3 In The Nature of Mandamus
Compelling Respondent To Reach & Rule On
Harris' Challenge Under The First and Fourteenth Amendments
& NY Const Art. I, § 8)

214. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 109 and 174 through 213 as if fully set forth herein.

215. In his Decisions & Orders, Respondent recognizes that Harris' activities have all the hallmarks of political expression.

216. Thus, he recognizes that Harris was a "protester," participating in a "protest march" in support of the "Occupy Wall Street" Movement when he was arrested on October 1, 2011 (Exh. 10 at p. 1).

217. He recognizes that "social media has become one of the most prominent methods of exercising free speech." (Exh. 17 at p. 10).

218. Indeed, he acknowledges that "it is probably safe to assume that Samuel Adams, Benjamin Franklin, Alexander Hamilton and Thomas Jefferson would have loved to tweet their opinions as much as they loved to write for the newspapers of their day …". (Exh. 17 at p. 10).

219. Because Harris' DMs were never public and the 107 days of tweets are no longer so, requiring Twitter to unearth them and turn them over to the government implicates Harris' speech rights.

220. Indeed, such an order is tantamount to an official decree that certain speech or writings must be published, or republished or rebroadcast.

221. The same is true of the requirement that Twitter turn over 107 days of location and log data and other noncontent information. Such information implicates Harris' rights of association.

222. By combining the two requirements, so as to require Twitter to turn over DMs and tweets, location and log data, and lists of followers, Respondent has endangered core First Amendment values.

223. The District Attorney asserted two governmental interests in support of the subpoenas. The demand for content information was

intended to help in establishing Harris' "state of mind" on October 1st and refuting his anticipated trial defense. The demand for non-content information was intended to "connect" Harris with the @destructuremal account.

224. Neither of these interests is a compelling one.

225. The first interest is not compelling because the only offense with which Harris is charged is a single violation that does not even qualify as a misdemeanor.

226. The second interest is not compelling because Harris has already acknowledged that the @destructuremal account is his.

227. Respondent's Decisions & Orders are also not narrowly tailored to serve the interests invoked as their justification.

228. Thus, in order to establish Harris' "state of mind" over the course of a peaceful 3-hour march, Respondent's Decisions & Orders require Twitter to turn over 2,568 hours of information, reflective of Harris' thinking on an unlimited range of topics.

229. Furthermore, in order to establish the fact that the @destructuremal account belonged to Harris – a fact Harris has already acknowledged - Respondent's Decisions & Orders require Twitter to turn over another 2,568 hours of information concerning Harris' real-world movements, movements on the Net, reading habits, writing habits, Twitter habits, and followers.

230. Even where the government's objectives are justifiable, they may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association.

231. Because Harris was in immediate danger of sustaining a direct injury as a result of the District Attorney's subpoenas and is now in immediate danger of sustaining such injuries as a result of Respondent's Decisions & Orders, Harris clearly had and has standing, under the First and Fourteenth Amendments and Article I, §8 of the New York Constitution to move to quash the District Attorney's trial subpoenas and vacate Respondent's Orders.

232. By the same token, Respondent has and had a duty enjoined upon him by law to give effect to Harris' right to institute such challenges, by reaching and ruling on their merits.

233. Respondent failed to perform either part of this duty. He failed to acknowledge Harris' right or standing to move on First Amendment and Article I, §8 grounds, and he failed to reach the substance and rule on the merits of Harris' challenges.

234. Harris has no adequate remedy at law.

235. Accordingly, Petitioner is entitled to a judgment under Article 78, vacating Respondent's Decisions & Orders and compelling Respondent to reach and rule on Harris' challenges under the First and Fourteenth Amendments and New York Constitution.

EIGHTH CAUSE OF ACTION
(Claim # 4 In The Nature of Mandamus
Compelling Respondent To Reach & Rule On
Harris' Challenges Under The ECPA)

236. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 109 and 174 through 235 as if fully set forth herein.

237. Whether a party has standing to move to quash under, or claim the benefit of, a statute is determined by whether the interest sought to be protected by the movant or complainant is arguably within the zone of interests to be protected or regulated by the statute. This is commonly referred to as the "zone of interests" test.

238. The zone of interests test is an inquiry into whether the movant or party is within the class of persons sought to be benefited by the statute or provision.

239. There can be no question that Harris satisfies this test and, therefore, had standing to move to quash the District Attorney's subpoenas under the Electronic Communications Privacy Act, 18 U.S.C. §§2510 et seq. (hereinafter "ECPA"), and the portion of the Act referred to as the Stored Communications Act, 18 U.S.C. §§2701 et seq. (hereinafter "SCA").

240. It is equally plain Harris has standing to challenge Respondent's Decisions and Orders under the Act.

241. The Electronic Communications Privacy Act was passed in 1986 with the intent of extending the restrictions that were applicable to

telephone “wiretaps” to electronic communications between computers or devices.

242. The Act has two titles. Title I protects the privacy of wire, oral and electronic communications while they are in transit. It protects against improper “interception.”

243. Title II - also referred to as the Stored Communications Act - protects the privacy of communications held in electronic storage. It protects against improper access to such communications and improper turn-over or disclosure.

244. Respondent found that the Stored Communications Act (“SCA” or “Act”) applied to the information regarding Harris and his Twitter account sought by the subpoenas, but that Harris did not have standing to move to quash the subpoenas under the Act.

245. The whole raison d’etre for the passage of these titles was to protect the privacy of electronic communications and those who engage in them, not those who act as facilitators, conduits, middlemen, or warehousemen.

246. While social media sites, Internet access providers and Internet Service Providers have an interest in maintaining the privacy and integrity of their servers and switches, the principal privacy interests at stake in information concerning their users and their users’ communications are their users’ own.

247. Twitter is like other Internet Service Providers or Internet Access Providers in that it does not monitor and is therefore unaware of the contents of its users' communications. It followed this policy with respect to Harris' communications.

248. As a Twitter subscriber and user, unwitting generator of "log data," subject of "user information" and author of tweets, Harris is clearly within the "zone of interests" protected by the ECPA and SCA.

249. There is yet another reason Harris had and has standing to move to quash under the SCA. This Act relieves the government of the need to have officers serve and execute search warrants. It requires electronic communications services ("ECSes") and "remote computing services" ("RCSes") to execute them on the government's behalf. 18 U.S.C. §2703(g).

250. Insofar as an ECS or RCS performs that function, it becomes the government's agent and is entitled to be paid.

251. Having been prospectively assigned the role of serving as an agent for the prosecution, an ECS or RCS cannot also be required to serve as an agent for the defense. In other words, it cannot be required to serve both masters, representing the defendant's interests in challenging a search and the prosecution in carrying it out.

252. To confer SCA standing *exclusively* on ECSes and RCSes would not only unfairly place them in an intolerable position, it would also deprive their users of non-conflicted representation under the Act.

253. The integrity of the statutory scheme thus depends upon users and subscribers being able to press their own challenges.

254. It necessarily follows that Harris had and has standing to challenge the District Attorney's subpoenas and Respondent's Decisions & Orders under the Act.

255. By the same token, Respondent had and has a duty to give effect to Harris' standing under the statute, by reaching and ruling on the merits of Harris' challenges.

256. Respondent failed to perform either part of this duty. He failed to acknowledge Harris' standing under the statute, and he failed to reach and rule on the merits of Harris' SCA challenges.

257. Harris has no adequate remedy at law.

258. Accordingly, Petitioner is entitled to a judgment under Article 78, vacating Respondent's Decisions & Orders and compelling Respondent to reach and rule on Harris' challenges under the ECPA and/or SCA.

NINTH CAUSE OF ACTION
(Claim # 5 In The Nature of Mandamus
Compelling Respondent To Reach & Rule On
Harris' Challenges Under The CPL)

259. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 109 and 174 through 258 as if fully set forth herein.

260. Petitioner has alleged that the subpoenas the District Attorney sent Twitter were issued for an improper purpose, were overbroad - affording the prosecutor discovery to which he was not entitled under the C.P.L., and that they were not issued and not served in conformity with C.P.L. §§ 610 or 640.

261. Harris clearly had standing to move to quash the subpoenas on these grounds.

262. Harris comes within the "zone of interests" of the Criminal Procedure Law and, in particular, sections 240.30, 240.40, 340.30 and 610 and 640.10.

263. Respondent was enjoined by law to give effect to Harris' standing and to reach and rule on the substance of Harris' challenges.

264. Respondent failed to perform either part of this duty. He failed to give effect to Harris' standing, and he failed to reach and rule on the merits of Harris' challenges.

265. Harris has no adequate remedy at law.

266. Accordingly, Petitioner is entitled to a judgment under Article 78, vacating Respondent's Decisions & Orders and compelling Respondent to reach and rule on Harris' challenges under the Criminal Procedure Law.

TENTH CAUSE OF ACTION
(Claim # 6 In The Nature of Mandamus
Compelling Respondent To Reach & Rule On
Harris' Common Law Challenges)

267. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 109 and 174 through 266 as if fully set forth herein.

268. Petitioner has alleged that the trial subpoenas the District Attorney issued were violative of the well-established common law principle that trial subpoenas cannot be used for discovery purposes or to engage in a fishing expedition.

269. As a direct result of the District Attorney's issuing each of three trial subpoenas, Harris was placed in immediate danger of suffering a concrete injury-in-fact.

270. As a consequence, Harris had a clear right to move to quash the subpoenas on common law grounds.

271. Respondent had a duty to give effect to Harris' standing and to reach and rule on the substance of his common law challenges.

272. Respondent failed to perform either part of this duty. He neither gave effect to Harris' clear legal right nor reached and ruled on the merits of his common law challenge.

273. Harris has no adequate remedy at law.

274. Accordingly, Petitioner is entitled to a judgment under Article 78, vacating Respondent's Decisions & Orders and compelling Respondent to

reach and rule on the substance of Harris' common law challenge to the trial subpoenas.

WHEREFORE, Petitioner demands judgment for appropriate permanent and preliminary declaratory and injunctive relief as follows:

(a) declaring that Respondent's Decision and Orders, dated April 20, May 4 and June 30, 2012 are invalid, a nullity and of no force and effect, and enjoining Respondent from in any way and/or to any extent enforcing the District Attorney's trial subpoenas or affording him access to the materials and information he sought pursuant to them; and/or, alternatively,

(b) vacating the April, May and June Decisions & Orders,

(c) enjoining Respondent from applying the banking records rule to determine Harris' standing in this case;

(d) compelling Respondent to acknowledge Petitioner's standing to challenge the subpoenas and Orders under each of the following authorities:

> the First and Fourth Amendments to the United States Constitution, Article I, sections 8 and 12 of the New York Constitution, the Electronic Communications Privacy Act or Stored Communications Act, the Criminal Procedure Law and the common law;

(e) further compelling Respondent to reach and rule on the merits of Petitioner's challenges under each of those laws; and

(f) granting such other, further and/or different relief as the Court deems just and proper.

Dated: August 17, 2012
New York, New York

Martin R. Stolar, Esq.
351 Broadway, 4th Floor
New York, N.Y. 10013
(212) 219-1919
mrslaw37@hotmail.com

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Emily M. Bass, Esq.
551 Fifth Avenue, 28th Floor
New York, N.Y. 10076
(646) 810-3117
emilybassesq@gmail.com

Attorneys for Petitioner Harris