CAL. NO. _____

To Be Argued By:
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New York Criminal Court Clerk's Index No. 2011NY080152

New York Supreme Court

APPELLATE TERM—FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

MALCOLM HARRIS,

Defendant,

TWITTER, INC.,

Non-Party Movant-Appellant.

BRIEF FOR NON-PARTY MOVANT-APPELLANT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM—FIRST DEPARTMENT

The People of the State of New York,

Plaintiffs-Appellees,

—against—

Malcolm Harris,

Defendant,

Twitter, Inc.,

Non-Party Movant-Appellant.

STATEMENT PURSUANT TO CPLR 5531

New York County
Criminal Court

Index No.: 2011NY080152

STATEMENT PURSUANT TO CPLR 5531

1. The index number of the case is 2011NY080152.

2. The full names of the original parties are The People of the State of New York (Respondent), Malcolm Harris (Defendant), and Twitter, Inc. (Non-party Movant-Appellant).

3. The action was commenced in New York City Criminal Court, New York County.

4. With respect to Twitter, this action was commenced on January 26, 2012 when Twitter received a subpoena via facsimile for records related to Defendant Malcolm Harris' Twitter account, @destructuremal. On March 8, 2012, Twitter received another subpoena via facsimile, seeking records related to a different

Twitter account of Defendant, @getsworse. On March 16, 2012, Defendant Harris filed a Motion to Quash the subpoenas in the Criminal Court of the City of New York. On April 20, 2012, Defendant's Motions to Quash were denied by an Order of the Honorable Matthew A. Sciarrino Jr. On May 7, 2012, Twitter filed a Motion to Quash the subpoenas received on January 26, 2012 and March 8, 2012, as well as the Order dated April 20, 2012 pursuant to 18 U.S.C. § 2703(d). On May 30, 2012, the New York County District Attorney's Office personally served subpoenas identical to those at issue in Twitter's pending Motion to Quash on a member of Twitter's Board of Directors in New York City. On June 11, 2012, Twitter filed an identical Motion to Quash the subpoenas issued on May 30, 2012. On June 30, 2012, the Criminal Court of the City of New York denied Twitter's Motions to Quash. This appeal then ensued.

5. The object of this action is for a judgment reversing the trial court's Order dated June 30, 2012 and quashing the subpoenas for Defendant Harris' Twitter records in their entirety. Furthermore, Twitter seeks an order from this Court holding that Twitter user Harris has standing under New York and Federal law to move to quash subpoenas for his Twitter records.

6. This appeal is from two orders of the Honorable Matthew A. Sciarrino, Jr., dated April 20, 2012 and June 30, 2012.

7. This appeal is on the original record as provided by section 640.3 of Title 22 of the New York Codes, Rules and Regulations (NYCRR) and the rules of Supreme Court, Appellate Division First Judicial Department.

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QUESTIONS PRESENTED

1. Did the trial court err in ruling that Defendant lacks any proprietary interest in his Twitter records, and therefore lacks standing under New York law to move to quash a third-party subpoena for those records, when Twitter's Terms of Service have established for years that its users have a proprietary interest in their Twitter records? Yes.

2. Did the trial court err in ruling that Defendant lacks standing under the federal Stored Communications Act, 18 U.S.C. § 2701, *et seq*. ("SCA") to move to quash a subpoena for his Twitter records when the court failed to address § 2704(b) of the SCA which expressly provides Defendant with standing? Yes.

3. Did the trial court err in failing to consider the numerous cases establishing that Defendant has standing to quash a third-party subpoena that implicates his Constitutional rights? Yes.

4. Did the trial court err in ruling that Defendant's Tweets are not protected by either the Fourth Amendment to the U.S. Constitution or art. I, § 12 of the New York Constitution when the government concedes that Defendant's Tweets are not publicly available? Yes.

5. Did the trial court err in ruling that over 3 months of Defendant's Tweets are unprotected by either the Fourth Amendment to the U.S. Constitution or art. I, § 12

of the New York Constitution when the U.S. Supreme Court and New York Court of Appeals have respectively held that the government must obtain a search warrant in order to gather data about a suspect's public movements for periods of 28 and 65 days? Yes.

6. Did the trial court err in ruling that the subpoenas for Defendant's Twitter records are "sufficiently circumscribed" insofar as the requested materials are "relevant" and "not otherwise procurable reasonably in advance of trial by the exercise of due diligence"? Yes.

PRELIMINARY STATEMENT

This case is one of first impression and involves law enforcement's increased use of information from social media companies in criminal prosecutions. In orders issued on April 20 and June 30, 2012, the Criminal Court of the City of New York ruled that (1) only Twitter, not its users, have standing to move to quash subpoenas directed to Twitter for a user's records; (2) a user's "Tweets" are not protected by either the Fourth Amendment to the U.S. Constitution or art. I, § 12 of the New York Constitution; and (3) the subpoenas at issue are "sufficiently circumscribed" under New York law. Twitter appeals from each of these rulings.

Twitter respectfully submits that its users have standing on three separate and independent grounds to move to quash subpoenas directed to Twitter for their records. First, Twitter's users have standing under New York law because Twitter's Terms of Service have long established that users have a proprietary interest in their records. Twitter users own their Tweets and should have the right to fight invalid government requests. Second, Twitter's users have standing under § 2704(b) of the federal SCA, which provides that a user who receives notice of a subpoena for their account records "may file a motion to quash such subpoena . . . in the appropriate . . . State court." 18 U.S.C. § 2704(b). Finally, Twitter's users

have standing based on a long line of precedent establishing that individuals whose constitutional rights are implicated by a government subpoena to a third party can challenge the request. Accordingly, the Court should find that Twitter's users have standing on any one, or all, of these bases.

Defendant's Tweets are also protected by the Fourth Amendment to the U.S. Constitution and art. I, § 12 of the New York Constitution because the government admits that it cannot publicly access them, thus establishing that Defendant maintains a reasonable expectation of privacy in these communications. *U.S. v. Warshak*, 631 F.3d 266 (6th Cir. 2010). Alternatively, even if Defendant's Tweets are publicly available, the U.S. Supreme Court and the New York Court of Appeals have ruled that public information which would allow law enforcement to draw mere inferences about a citizen's thoughts and associations are entitled to Constitutional protection, thus establishing that a citizen's substantive communications are certainly entitled to the same protection. *U.S. v. Jones*, 132 S.Ct. 945 (2012); *People v. Weaver*, 12 N.Y.3d 433 (2009).

Finally, the subpoenas are not "sufficiently circumscribed" under New York law for two reasons. First, the non-content records (*e.g.*, name, address) demanded by the subpoenas are irrelevant because they merely establish that which no one disputes, *i.e.*, that the Twitter accounts at issue belong to Defendant. Second, if

Defendant's Tweets are in fact publicly available as the trial court ruled, then the requested materials clearly are "otherwise procurable reasonably in advance of trial by the exercise of due diligence", thus obviating the need for the government's subpoenas to Twitter.

For these reasons and those stated in further detail below, Twitter respectfully requests that the Court reverse the trial court's Orders of April 20, 2012 and June 30, 2012 and issue an order that (1) finds that Twitter's users have standing under New York and/or Federal law to move to quash subpoenas for their Twitter records, and (2) quashes the subpoenas for Defendant's Twitter records in their entirety.

STATEMENT OF FACTS

I. Twitter's Role and its Response to Legal Process

Twitter is a real-time information network based in San Francisco, California that has been described by one federal district court as

> a social networking and micro-blogging service that invites its users to answer the question: "What are you doing?" Twitter's users can send and read electronic messages known as "[T]weets." A [T]weet is a short text post (up to 140 characters) delivered through Internet or phone-based text systems to the author's subscribers. Users can send and receive [T]weets in several ways, including via the Twitter website.

U.S. v. Shelnutt, No. 4:09-CR-14 (CDL), 2009 WL 3681827, at *1 n.1 (M.D. Ga. Nov. 2, 2009). In addition to providing a casual means of communication for millions of people, Twitter also provides a voice for liberty across the globe. For example, Twitter's role in facilitating the movement for freedom in the Middle East is well-documented. *See, e.g.*, Farzaneh Milani, *Saudi Arabia's Freedom Riders*, N.Y. TIMES, June 13, 2011 (describing Saudi women's use of Twitter "to organize a mass mobile protest defying the kingdom's ban on women driving") (*available at* 2011 WLNR 11760586). The U.S. State Department has also "sought [Twitter's] assistance . . . to empower Iranians to communicate with each other about a disputed election," and Chinese citizens have "worked to overcome the 'Great Firewall of China,' a state-run barrier to any information that could

foment discord against the Communist dictatorship" by setting up "a 'Berlin Twitter Wall' to share memories and to discuss other barriers to freedom that should be removed." Gary Thompson & Paul Wilkinson, *Set the Default to Open: Plessy's Meaning in the Twenty-First Century and How Technology Puts the Individual Back at the Center of Life, Liberty, and Government,* 14 Tex. Rev. L. & Pol. 48, 70 (2009).

Twitter's established policy upon receipt of legal demands is to give notice to the account holder prior to producing the requested information, unless prohibited by law, so that the user has a reasonable opportunity to decide whether to file a motion to quash. Twitter's policy is well known to the New York County District Attorney's Office and was acknowledged by the government upon service of the subpoenas at issue. *See, e.g.,* Letter from Lee Langston to Twitter, Inc. (05/30/12).

II. The Subpoenas and Orders Related to Defendant's Twitter Accounts

On October 1, 2011, Defendant is alleged to have participated in an Occupy Wall Street protest march on the roadway of the Brooklyn Bridge for which he was

subsequently charged with Disorderly Conduct (P.L. § 240.20[5]).[1] *See* Order (Sciarrino, Jr., J) (04/20/12) [hereinafter "April 20th Order"], at 1.

On January 26, 2012, the New York County District Attorney's Office faxed Twitter a subpoena for records related to Defendant's Twitter account, @destructuremal. The records requested by the January 26th subpoena included "[a]ny and all user information, including email address, as well as any and all [T]weets posted for the period of 9/15/2011-12/31/2011[.]" *See* Subpoena (01/26/12) (Exhibit 1 to Affirmation of Jeffrey D. Vanacore [06/11/12]).

On March 8, 2012, the District Attorney's Office faxed Twitter another subpoena for records related to Defendant's Twitter account, @getsworse.[2] The records requested by the March 8th subpoena included "[a]ll public [T]weets posted for the period of 9/15/2011-10/31/2011 and 2/1/2012-2/15/2012" in addition to "[t]he following subscriber information: name; address; records of session times and durations; length of service (including creation date); types of service utilized; telephone or instrument number or any other subscriber number or

[1] To the best of Twitter's knowledge, Defendant's trial is currently scheduled for December 12, 2012.

[2] @getsworse is the same account as @destructuremal. Users can change their usernames at will, but the account remains the same. *See* Twitter Help Center, *How to Change Your Username* (*available at* https://support.twitter.com/articles/14609-how-to-change-your-username#).

identity, including any temporarily assigned network address." *See* Subpoena (03/08/12) (Exhibit 2 to Affirmation of Jeffrey D. Vanacore [06/11/12]).

Defendant subsequently moved to quash these subpoenas after Twitter provided him with notice pursuant to its policy.

On April 20, 2012, the Criminal Court of the City of New York denied Defendant's Motions to Quash by an Order issued under 18 U.S.C. § 2703(d). The trial court held that (1) Defendant lacked standing to quash the subpoenas by drawing an analogy to cases dealing with the production of bank records, (2) the subpoenas were properly issued under § 2703(b) of the SCA, and (3) the Court could compel Twitter to produce Defendant's Tweets by court order under § 2703(d) of the SCA. *See* April 20th Order, at 11–12.

On May 7, 2012, Twitter exercised its right under 18 U.S.C. § 2703(d) to move to quash the trial court's Order. In addition to asserting that Defendant had standing to file his own motion to quash and that the order compelled Twitter to violate state and federal law, Twitter also argued that the subpoenas had not been properly served under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings ("Uniform Act"), which applies to requests for documents as well as demands for live testimony. *See* Affirmation of Jeffrey D. Vanacore in Support of Non-Party Twitter, Inc.'s Motion to Quash §

2703(d) Order (05/07/12), at 3 (*citing* McKinney's CPL § 640.10; *Matter of Codey*, 82 N.Y.2d 521, 525-26 (1993) ("The Uniform Act provides detailed and constitutionally valid procedures whereby a party to a criminal proceeding in one State can either obtain the presence of a witness residing in another State or can compel the production of evidence located in another State.").

In response to Twitter's Uniform Act objection, on May 30, 2012 the District Attorney's Office personally served a member of Twitter's Board of Directors in New York City with subpoenas that are identical to those served by fax on January 26th and March 8th, in addition to yet another subpoena for "@destructuremal". The records requested by the additional May 30th @destructuremal subpoena included "[a]ll public [T]weets posted for the period of 9/15/2011-10/31/2011" as well as "[t]he following subscriber information: name; address; records of session times and durations; length of service (including creation date); types of service utilized; telephone or instrument number or any other subscriber number or identity, including any temporarily assigned network address." *See* Subpoena (05.30.12) (Exhibit 3 to Affirmation of Jeffrey D. Vanacore [06/11/12]).

On June 11, 2012, Twitter filed a Motion to Quash the subpoenas that were re-served on May 30th. *See* Affirmation of Jeffrey D. Vanacore in Support of Non-Party Twitter, Inc.'s Motion to Quash § 2703(d) Order (06/11/12).

On June 30, 2012, the Criminal Court of the City of New York denied Twitter's Motions to Quash. *See* Order (Sciarrino, Jr., J) (06/30/12) (annexed to Notice of Appeal (07/17/12) [hereinafter "June 30th Order"]. The trial court held that (1) Twitter's Terms of Service in effect during the relevant time period did not afford Defendant a proprietary interest in his Twitter records sufficient to confer standing upon him to move to quash the subpoenas, (2) neither the Fourth Amendment to the U.S. Constitution nor art. I, § 12 of the New York Constitution required the government to obtain a search warrant for Defendant's Tweets because the subpoenas do not involve any physical intrusion and Defendant does not have a reasonable expectation of privacy in public Tweets, and (3) the scope of the subpoenas was "sufficiently circumscribed" under New York law. *See id.*

On July 18, 2012, Twitter filed its Notice of Appeal from the trial court's June 30th Order. *See* Notice of Appeal (07/17/12).

ARGUMENT

POINT I

The Trial Court Erred in Finding that Twitter's Users Do Not Have Standing Under New York or Federal Law to Move to Quash Subpoenas Directed to Twitter

As discussed further below, Twitter's users have standing on three separate and independent grounds to move to quash subpoenas directed to Twitter. The Court should therefore find that Twitter's users have standing on any one, or all, of these bases.

I. Twitter's Users Have Standing Under New York Law

Under New York law, in order to have standing to file a motion to quash a subpoena directed to a third-party the movant need only demonstrate a proprietary interest in the subject matter of the subpoena. *People v. Doe*, 96 A.D. 2d 1018, 1019 (N.Y. A.D. 1 Dept., 2004); *In re Out-of-State subpoenas issued by New York Counsel for State of California Franchise Tax Bd.*, 33 Misc.3d 500, 507, 929 N.Y.S.2d 361, 368 (N.Y. Sup. 2011); *People v. Owens*, 188 Misc.2d 200, 203, 727 N.Y.S.2d 266, 268 (N.Y. Sup. 2001).

Twitter's Terms of Service have made clear since at least 2009[3] that its users own**,** and thus maintain a proprietary interest in, the content they post on Twitter:

> You retain your rights to any Content you submit, post or display on or through the Services.

See Terms of Service (*available at* http://twitter.com/tos). As the U.S. District Court for the Southern District of New York has recognized, Twitter's users do not lose their proprietary interest in their content simply by posting it on Twitter. *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 304 (S.D.N.Y. 2011) (photojournalist could bring a copyright infringement claim against media companies for content he posted on Twitter).

Accordingly, the operative language from Twitter's Terms of Service was unquestionably in effect during "the dates in question,"[4] thus establishing that

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[3] All prior versions of Twitter's Terms of Service are publicly available on Twitter's Web site, and the quoted language has been included in Twitter's Terms of Service since September 10, 2009. *See* Version 2 of Twitter's Terms of Service, effective September 10, 2009 (*available at* http://twitter.com/tos/previous/version_2). The Court can take judicial notice of Twitter's prior Terms of Service available on its Web site. *People v. Larsen*, 29 Misc.3d 423, 425, 906 N.Y.S.2d 709, 711 (N.Y. Crim. Ct. 2010)(taking judicial notice of a press release on a company's Web site).

[4] The trial court agreed with Twitter that its Terms of Service define the extent of a user's proprietary interest in their Twitter records, and thus framed the issue as "whether Twitter users have standing to challenge third-party disclosure requests under the terms of service that existed during the dates in question." *See* June 30th Order, at 3 (emphasis added). However, the trial court went on to assert without

Twitter's users indeed maintain a proprietary interest in their Twitter records. For these reasons, the Court should reverse the trial court's holding that Defendant lacks standing under New York law to move to quash the subpoenas to Twitter.

II. Twitter's Users Also Have Standing Under the SCA

The SCA governs the ability of governmental entities, like the New York County District Attorney's Office, to compel service providers like Twitter to produce content (*e.g.*, Tweets) and non-content customer records (*e.g.*, name and address). *See generally* 18 U.S.C. § 2703 (entitled, "Required disclosure of customer communications or records").

A subpoena or court order is only sufficient to compel the production of non-content records. *Id.* § 2703(c)(2)(defining the six types of non-content records available on a subpoena); *id.* § 2703(d)(requiring disclosure of non-content "records or other information" on a court order). In order to obtain the contents of communications, a governmental entity must obtain a search warrant. *Id.* § 2703(a). However, under § 2703(b) of the SCA, if the governmental entity

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any factual support in the record that the language quoted above from Twitter's Terms of Service did not go into effect until May 17, 2012, over three months after the last of Defendant's Tweets were posted and nearly one month after the trial court's April 20th Order. *Id.* Therefore, based on this unsupported assumption, the trial court concluded that "the terms of service that existed during the dates in question" did not provide Defendant with any proprietary interest in his Twitter records. *Id.*

provides prior notice of the subpoena or court order to the subscriber or customer, the text of the SCA permits the governmental entity to compel the disclosure of content that has been in electronic storage for more than 180 days. *Id.* §§ 2703(a), (b)(1)(B).[5]

The SCA also expressly provides in § 2704(b)—entitled "Customer challenges"—that a user who receives notice of a § 2703(b) subpoena for their account records "may file a motion to quash such subpoena . . . in the appropriate . . . State court." *See* 18 U.S.C. § 2704(b); *see also In re Toft*, 453 B.R. 186, 197 n.12 (Bkrtcy. S.D.N.Y. 2011)("A subscriber may challenge disclosure under 18 U.S.C. § 2704(b) within fourteen days of receiving notice."); *Doe v. S.E.C.*, No. 3:11–mc–80184 CRB (NJV), 2011 WL 4593181, at *2 (N.D. Cal. Oct. 4, 2011)(same).[6]

Here, the April 20th Order specifically finds that the subpoenas were issued under § 2703(b). *See* April 20th Order, at 10. Moreover, when the government re-served the subpoenas in New York City on May 30, 2012, the cover letter accompanying those subpoenas expressly acknowledged that they were served

[5] As discussed further below, these provisions of the SCA have been declared unconstitutional to the extent they permit disclosure of content on anything less than a search warrant. *U.S. v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010).

[6] Service providers may also move to quash a court order issued under § 2703(d). *See* 18 U.S.C. § 2703(d).

"pursuant to 18 U.S.C. § 2703(b)(1)(B)." *See*, Letter from Lee Langston to Twitter, Inc. (05/30/12). Hence, it follows that § 2704(b) gives Defendant federal standing to file a motion to quash the subpoenas. Twitter raised this issue repeatedly in each of its filings, yet the Court's June 30th Order does not address or even mention § 2704(b). For these reasons, the Court should reverse the trial court's implicit holding—by its failure to address § 2704(b)—that Defendant lacks standing under the SCA to move to quash the subpoenas to Twitter.

III. Twitter's Users Also Have Standing to Assert Their Constitutional Rights

Defendant has also asserted that his Constitutional rights under the First and Fourth Amendments are implicated by the subpoenas to Twitter. The United States Supreme Court and courts across the country have held that individuals whose constitutional rights are implicated by a government subpoena to a third party have standing to challenge the request to attempt to protect their constitutional rights before disclosure of the requested information. *See, e.g.*, *Eastland v. U.S. Servicemen's Fund,* 421 U.S. 491, 501 n.14 (1975)(holding that lower court properly entertained the plaintiffs' challenge of a congressional subpoena issued to their third-party bank); *In re Grand Jury Subpoena No. 11116275*, Misc. No. 11-527 (RCC), 2012 WL 691599, at *7 (D.D.C. Feb. 23, 2012)(permitting Twitter user to bring motion challenging grand jury subpoena for

his subscriber information); *Doe v. SEC*, No. C 11-80209 CRB, 2011 WL 5600513, at *3 (N.D. Cal. Nov. 17, 2011)(permitting Gmail user to bring motion challenging subpoena for subscriber information).

Accordingly, even if the Court determines that Twitter's users have no proprietary interest in their Twitter records and somehow lack the standing conferred upon them by the federal SCA, the Court should still rule that Defendant has standing to move to quash the subpoenas to Twitter in order to protect his constitutional rights.

POINT II

The Trial Court Erred in Finding that the Subpoenas Do Not Violate the Federal and New York Constitutions

I. Defendant Has a Reasonable Expectation of Privacy in Tweets That the Government Cannot Publicly Access

The Fourth Amendment to the U.S. Constitution and art. I, § 12 of the New York Constitution protect not only against trespassory intrusions by the government, but also violations of a citizen's reasonable expectation of privacy. *Kyllo v. United States*, 533 U.S. 27, 31–33 (2001); *People v. Weaver*, 12 N.Y. 3d 433, 445 (2009).

The highest court in the country to address the issue has determined that the SCA violates an individual's reasonable expectation of privacy under the Fourth Amendment to the extent it requires their service provider to produce the contents of their non-public communications in response to anything less than a search warrant. *U.S. v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) ("to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional.").

In this case, the trial court held that the reasoning of *Warshak* is inapplicable and Defendant's Tweets are unprotected by either the Fourth Amendment to the U.S. Constitution or art. I, § 12 of the New York Constitution because "[t]here is no reasonable expectation of privacy for [T]weets that the user has made public." *See* June 30th Order, at 7.

However, in so ruling the trial court once again ignored a key fact: the government concedes it is unable to publicly access Defendant's Tweets.[7] The fact that the government needs Twitter's assistance to get access to these communications coupled with the fact that the user is explicitly opposing this access, contradicts the notion that the user has no reasonable expectation of privacy in these Tweets.

The trial court's analysis does nothing to distinguish this case from *Warshak* or provide any meaningful distinction between an unavailable Tweet and the

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[7] *See* Government's Memorandum in Opposition (05/25/12), at 13 n.4 ("the Tweets, as here . . . are no longer visible on Twitter's platform."). The Court may take judicial notice of the government's brief. *Khatibi v. Weill*, 8 A.D.3d 485, 486, 778 N.Y.S.2d 511, 512 (N.Y.A.D. 2 Dept., 2004) (the "court may take judicial notice of undisputed court records and files."). Tweets may no longer be visible for any number of reasons, including that the user has deleted them. *See also* "Get to know Twitter: New User FAQ" ("we currently only allow you to see the 3200 most recent Tweets you have posted via your account.") (*available at* https://support.twitter.com/articles/13920-frequently-asked-questions#) (last visited on May 28, 2012).

emails at issue in *Warshak.* For example, if an email is entitled to Constitutional protection but an unavailable Tweet is not, what exactly is the dividing line that will allow citizens to understand when the Constitution protects their communications? It simply cannot be the case that a Tweet that is no longer available or is deleted mere seconds after it was posted is unprotected by the Federal or New York Constitutions, but an email sent to a group of people and never deleted can only be obtained with a search warrant. Arbitrary distinctions based on the number of people involved in a communication or the length of time it may have been publicly accessible do nothing to effectuate "the Fourth Amendment's goal to curb arbitrary exercises of police power [] and prevent 'a too permeating police surveillance.'" *Jones,* 132 S.Ct. at 956 (Sotomayor, J., concurring) (quoting *U.S. v. Di Re,* 332 U.S. 581, 595 (1948)).

Concerns about arbitrary distinctions are all the more pertinent under art. I, § 12 of the New York Constitution which has "on many occasions" been interpreted to provide greater protections than the Fourth Amendment. *People v. Weaver*, 12 N.Y. 3d 433, 445 (2009). Indeed, New York has adopted these "separate standards when doing so best promotes predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of [New York's] citizens." *Id.* (internal quotation marks omitted). This case, involving a political protester's communications that the government admits

it cannot access, is precisely the type of case where "predictability and precision in judicial review" is required, not arbitrary line drawing and unfounded speculation as to whether the communications may be publicly available.

Accordingly, because the government concedes it is unable to publicly access Defendant's Tweets, the trial court's rationale for ordering Twitter to disclose them on anything less than a search warrant lacks any foundation and should be reversed.

II. Publicly Available Information Is Also Protected Under the Federal and New York Constitutions

Even assuming arguendo that the trial court was correct in its conclusion that Defendant's Tweets are "publicly" available, its holding that the Tweets are unprotected by the Federal and New York Constitutions is still erroneous.

The New York Court of Appeals has recognized that individuals have a reasonable expectation of privacy even in their movements through public thoroughfares and that a warrant is required for the government to obtain that information because it can reveal intimate details about their lives. *People v. Weaver*, 12 N.Y. 3d 433, 441-45 (2009)(tracking of a vehicle's location through public streets for 65 days requires a warrant under the New York constitution).

Likewise, the U.S. Supreme Court has ruled that monitoring a suspect's public movements for as little as 28 days constitutes a search within the meaning of the Fourth Amendment and requires a warrant. *U.S. v. Jones*, 132 S. Ct. 945, 949 (2012). At least five justices also agreed that tracking one's movements through public thoroughfares impinges on an individual's reasonable expectation of privacy. *Id.* at 955 (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring on behalf of himself and three other Justices).

Nevertheless, the trial court concluded that because this case does not involve any sort of "physical intrusion" and Defendant's Tweets are publicly available, it is inappropriate to look to these recent decisions extending Constitutional protections to publicly available information. *See* June 30th Order, at 5. The trial court's holding is erroneous for at least two reasons.

First, the only reason a physical intrusion does not occur when the government demands electronic communications from Twitter is because Congress recognized the enormous burden that service providers and law enforcement would suffer if officers were required to travel all over the country and physically enter a provider's premises in order to search for data themselves. Accordingly, 18 U.S.C. § 2703(g) specifically states that an officer's presence is not required in order to fulfill a demand for documents, essentially deputizing the service provider to carry

out the search on law enforcement's behalf. *See* 18 U.S.C. § 2703(g)(entitled, "Presence of officer not required"). The Court cannot assume that Congress' concession to the realities of the information age (by not requiring a physical intrusion every time law enforcement demands records from a service provider) was also intended to deprive millions of citizens of their Constitutional rights. *Jones v. U.S.*, 526 U.S. 227, 239 (1999)("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.")(internal quotation marks omitted).

Second, the trial court's conclusion elevates form over substance because a careful reading of *Jones* and *Weaver* demonstrates that the Federal and State Constitutions are not implicated because of the minor physical intrusion occasioned by placing a tiny, unnoticed device on the underside of a car, but rather, by the vast amount of otherwise public data collected by the device. *U.S. v. Jones*, 132 S.Ct. 945, 951 n.5 (2012) ("A trespass on 'houses' or 'effects,' or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information."); *id.* at 958 ("It is clear that the attachment of the GPS device was not itself a search; if the device had not functioned or if the officers had not used it, no information would have been obtained.") (Alito, J., concurring); *People v. Weaver*, 12 N.Y. 3d 433, 442 (2009) ("What the technology yields and records with breathtaking

quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits.").

Here, there are no inferences to be drawn from the data that the government seeks because they consist of Defendants' substantive communications, not merely his comings and goings through public thoroughfares. If the U.S. Supreme Court and the New York Court of Appeals believe that public information which would allow law enforcement to draw mere inferences about a citizen's "political, religious, amicable and amorous" associations are entitled to Constitutional protection, then certainly a citizen's substantive communications are entitled to the same protection before a private, third-party can be forcibly deputized to collect that information and hand it over to the government.[8]

[8] The trial court also noted that Twitter has agreed to donate Tweets to the Library of Congress. *See* June 30th Order, at 6. First, it should be noted that deleted Tweets will not be part of the archive. *See The Library and Twitter: An FAQ*, ("deleted tweets will not be part of the archive") (*available* at http://blogs.loc.gov/loc/2010/04/the-library-and-twitter-an-faq/). Moreover, as the court acknowledged, the Library of Congress' archive is not yet available, and if it ever is, will only be open to a limited set of researchers. *Id.* (citing Audrey Watters, *How the Library of Congress is Building the Twitter Archive*, O'Reilly Radar (June 2, 2011) ("access to the Twitter archive will be restricted to 'known researchers' who will need to go through the Library of Congress approval process to gain access to the data.") (*available at* http://radar.oreilly.com/2011/06/library-

Accordingly, even if the Court agrees with the trial court's conclusion that Defendant's Tweets are publicly available, the Court should still reverse the trial court's finding that Defendant's Tweets are unprotected by the warrant requirements of the Federal and New York Constitutions.

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of-congress-twitter-archive.html)). Accordingly, disclosing communications to a limited set of researchers hardly waives one's Constitutional rights given that the highest courts in the country and this state have decided that data regarding one's public movements exposed for anyone to see is entitled to Constitutional protection.

POINT III

The Trial Court Erred in Finding that the Subpoenas Are "Sufficiently Circumscribed" Under New York Law

The trial court correctly notes that the scope of a subpoena duces tecum is "sufficiently circumscribed" under New York law when the requested materials are, *inter alia*, (1) relevant, and (2) not otherwise procurable reasonably in advance of trial by the exercise of due diligence. *See* June 30th Order, at 9. However, without any analysis the court then goes on to find that the subpoenas to Twitter meet this standard. *Id.* This conclusion is also erroneous for at least two reasons.

First, the only reason for the government to demand non-content records (*e.g.*, name, address, and records of session times) related to Defendant's Twitter accounts is to establish that Defendant is in fact the user of those accounts. However, Defendant has filed multiple motions to quash in which he asserts he is the user of the accounts and therefore maintains a proprietary interest in the subpoenaed records. Accordingly, the non-content records demanded by the subpoenas are not relevant because they relate only to undisputed facts that simply are not at issue in this case. *People v. Primo*, 96 N.Y.2d 351, 355, 753 N.E.2d 164, 167 (2001)("evidence is relevant if it tends to prove the existence or non-existence of a material fact, *i.e.*, a fact directly at issue in the case.")(emphasis added).

Second, as to the content (*i.e.*, Tweets) requested by the subpoenas, the underlying premise throughout the trial court's orders is that Defendant's Tweets are publicly available. *See generally*, April 20th Order and June 30th Order. While the government interestingly disputes that conclusion,[9] if one assumes the trial court is correct and Defendant's Tweets are in fact publicly available, then it cannot also be the case that the Tweets are "not otherwise procurable reasonably in advance of trial by the exercise of due diligence." If Defendant's Tweets are publicly available the government can simply print or download them on its own without burdening Twitter and this Court with unnecessary subpoenas and related litigation. Indeed, courts in New York and elsewhere routinely admit electronic communications that are retrieved by law enforcement officers and others during the course of an investigation, so there is no reason why the government needs to obtain these supposedly public communications from Twitter. *People v. Clevenstine*, 68 A.D.3d 1448, 1450, 891 N.Y.S.2d 511, 514 (N.Y. A.D. 3 Dept., 2009) (admitting MySpace communications where "an investigator from the computer crime unit of the State Police related that he had retrieved such

[9] *See* Government's Memorandum in Opposition (05/25/12), at 13 n.4 ("the Tweets, as here . . . are no longer visible on Twitter's platform."). As noted, the Court may take judicial notice of the government's brief. *Khatibi*, 8 A.D.3d at 486, 778 N.Y.S.2d at 512.

conversations from the hard drive of the computer used by the victims").[10] Either Defendant's Tweets are publicly available—in which case the government could have obtained them months ago—or they are not, in which case the government should have obtained a search warrant for them. In any event, it is illogical to conclude that Defendant's Tweets are publicly available, while at the same time concluding that the government is unable to obtain copies of the Tweets on its own.

Accordingly, if the Court agrees with the trial court's conclusion that Defendant's Tweets are publicly available, the Court should then reverse the trial court's finding that the subpoenas are "sufficiently circumscribed" under New York law.

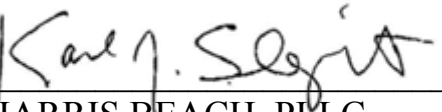
[10] *See also People v. Valdez*, 201 Cal. App. 4th 1429, 1434-37 (2011) (admitting printouts of MySpace page printed by investigator from the prosecutor's office); *State v. Mosley*, 164 Wash. App. 1046, 2011 WL 5831756, at *3 (Wash. App. Div. 1, 2011) (unpublished) (admitting photographs found on a MySpace page by a third-party witness); *State v. Bell*, No. CA2008-05-044, 2009 WL 1395857, at *5-6 (Ohio App. 12 Dist., May 18, 2009) (unpublished) (admitting victim's printouts of MySpace communications). In *Clevenstine* a legal compliance officer for MySpace also testified "that the messages on the computer disk had been exchanged by users of accounts created by defendant and the victims," but similar evidence from Twitter is unnecessary here because, as noted above, Defendant does not dispute that he is the user of the accounts. *Clevenstine*, 68 A.D.3d at 1450.

CONCLUSION

For the reasons stated, Twitter respectfully requests that the Court reverse the trial court's Orders of April 20, 2012 and June 30, 2012 and issue an order that (1) finds that Twitter's users have standing under New York and Federal law to move to quash subpoenas for their Twitter records, and (2) quashes the subpoenas for Defendant's Twitter records in their entirety.

Dated: August 27, 2012

Respectfully submitted,



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