CAL. NO. _____

To Be Argued By:
JOHN K. ROCHE
(Admitted *pro hac vice*)

New York Criminal Court Clerk's Index No. 2011NY080152

N. Y. S. C. I.

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

KARL J. SLEIGHT, ESQ.
HARRIS BEACH, PLLC
677 Broadway, Suite 1101
Albany, New York 12207
(518) 701-2716
ksleight@harrisbeach.com

JOHN K. ROCHE, ESQ.
(Admitted *pro hac vice*)
PERKINS COIE LLP
700 13th Street, N.W., Suite 600
Washington, D.C. 20005
(202) 434-1627
jroche@perkinscoie.com

Attorneys for Non-Party Movant-Appellant
Twitter, Inc.

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

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. otions to Quash were denied by an Order of the Honorable Matthew A. Sciarrino Jr

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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

28 and 65 days? Yes.

6. D

requested materials are

Yes.

PRELIMINARY STATEMENT

This case is one of first impression and involves increased use of information from social media companies in criminal

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

standing on any one, or all, of these bases.

subpoenas to Twitter.

For these reasons and those stated in further detail below, Twitter

s of April 20,

2012 and June 30, 2012 and issue an order that (1) finds that

standing under New York and/or Federal law to move to quash subpoenas for their

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,

Twitter freedom that

Set the Default to Open:

-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).

Twitt 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.

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

2703(d) Order (05/07/12), at 3 (*citing* ; *Matter of* *Codey*, 82 N.Y.2d 521, 525-26 (1993) e Uniform Act provides detailed and constitutionally valid procedures whereby a party to a criminal proceeding in one

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-

On June 30, 2012, the Criminal Court of the City of New York denied

See Order (Sciarrino, Jr., J) (06/30/12) (annexed to Notice of Appeal (07/17/12) [he th The trial court held

afford Defendant a proprietary interest in his Twitter records sufficient to confer standing upon him to move to quash

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

and independent grounds to move to quash subpoenas directed to Twitter. The

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).

erms 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 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).

itter records. For

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)

that a user who receives notice of a § 2703(b) subpoena for their

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)

U.S.C. § 2704(b) within four); *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).

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

or even mention § 2704(b)

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).

Acc

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.

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

predictability and precision in

judicial review ine drawing and unfounded speculation

out the search *See* 18 U.S.C. § 2703(g)(entitled,

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)

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

l

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,

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

Here, there are no inferences to be drawn from the data that the government se

able, the Court should still reverse the trial

requirements of the Federal and New York Constitutions.

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of-congress-twitter-archive.html)). Accordingly, disclosing communications to a

highest courts in the country and this state
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

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 s

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)

Second, as to the content (*i.e.*, Tweets) requested by the subpoenas, the

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

advance

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 MySp

computer crime unit of the State Police related that he had retrieved such

[9] *See* Government Memorandum in Opposition (05/25/12), Tweets, as here . . . are no longer visi he *Khatibi*, 8 A.D.3d at 486, 778 N.Y.S.2d at 512.

conversations from the hard drive of the com [10] Either

ailable 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

same time concluding that the government is unable to obtain copies of the Tweets on its own.

court

York law.

[10] *See also People v. Valdez*, 201 Cal. App. 4th 1429, 1434-37 (2011) (admitting ffice); *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) (unpu MySpace communications). In *Clevenstine* a legal compliance officer for

exchanged by users of accounts create 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,

HARRIS BEACH, PLLC
Karl J. Sleight
Attorneys for Non-Party
Movant-Appellant Twitter, Inc.
677 Broadway, Suite 1101
Albany, New York 12207
T: (518) 701-2716
F: (518) 425-0235
ksleight@harrisbeach.com

Of Counsel:
PERKINS COIE LLP
John K. Roche (admitted *pro hac vice*)
Attorneys for Non-Party
Movant-Appellant Twitter, Inc.
700 Thirteenth Street, N.W., Suite 600
Washington, DC 20005-3960
T: (202) 434-1627
F: (202) 654-9106
jroche@perkinscoie.com