TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF INTEREST OF *AMICI CURIAE* 2

FACTUAL BACKGROUND 3

ARGUMENT 5

I. TWITTER USERS HAVE STANDING TO MOVE TO QUASH SUBPOENAS THAT IMPLICATE THEIR CONSTITUTIONAL RIGHTS. 5

A. Twitter Users Have Standing To Challenge Third-Party Disclosure Requests. 5

B. Harris Has Standing Because His First Amendment Rights Are Implicated By The Twitter Subpoena. 11

II. THE TWITTER SUBPOENA AND THE RESULTING COURT ORDER VIOLATE HARRIS'S CONSTITUTIONAL RIGHTS. 18

A. The Twitter Subpoena and the Court's § 2703(d) Order Violate The First Amendment And Article I, Section 8 Of The New York Constitution. 18

B. The Twitter Subpoena And The Court's § 2703(d) Order Violate The Fourth Amendment And Article I, Section 12 Of The New York Constitution. 22

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Amazon.com L.L.C. v. Lay, 758 F. Supp. 2d 1154 (W.D. Wash. 2010) 8, 15, 20, 21

Anonymous Online Speakers v. United States District Court, 661 F.3d 1168 (9th Cir. 2011)..... 9

Arista Records, LLC v. Doe 3, 604 F.3d 110 (2d Cir. 2010) 9

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)..... 17

Boyd v. United States, 116 U.S. 616 (1886), *overruled on other grounds by Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967)..... 17

Bradosky v Volkswagen of Am., Inc., No. M8-85 (SWK), 1988 WL 5433 (S.D.N.Y. Jan. 15, 1988) 22

Brock v. Local 375, Plumbers Int'l Union of Am., 860 F.2d 346 (9th Cir. 1988) 7

City of Chicago v. Morales, 527 U.S. 41 (1999) 24

Cohen v. Google, Inc., 887 N.Y.S.2d 424 [Sup Ct, New York County 2009] 9

Comty.-Serv. Broad. of Mid-Am., Inc. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978) 13

Dendrite Int'l, Inc. v. Doe, 775 A.2d 756 (N.J. App. 2001) 9

Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), *vacated and reversed on other grounds*, *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006)..... 8, 9, 28

Doe v. Cahill, 884 A.2d 451 (Del. 2005)..... 9

Doe v. SEC, No. C 11-80209 CRB, 2011 WL 5600513 (N.D. Cal. Nov. 17, 2011) 8

Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975) 6, 10

Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963) 11, 18, 20

Grandbouche v. United States (In re First Nat'l Bank), 701 F.2d 115 (10th Cir. 1983)..... 7, 9

Gravel v. United States, 408 U.S. 606 (1972) 6

Greenbaum v. Google, Inc., 845 N.Y.S.2d 695 [Sup Ct, New York County 2007]..... 9, 10

In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't, 620 F.3d 304 (3d Cir. 2010) 26, 27

N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) 15

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 24

People v Di Raffaele, 55 N.Y2d 234 [Ct App 1984] 27

People v. Collier, 85 Misc. 2d 529 [Sup Ct, New York County 1975] 12, 15, 18, 20

People v. Hall, 86 A.D.3d 450 [1st Dept 2011] 24

People v. Laws, 623 N.Y.S.2d 216 [1st Dept. 1995] 6

People v. Weaver, 12 N.Y.3d 433 [2009] ..... passim

Perlman v. United States, 247 U.S. 7 (1918) 7

Pilchesky v. Gatelli, 12 A.3d 430 (Pa. Super. 2011) 9

Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark. 1968) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968) 6

Pub. Relations Soc'y of Am., Inc. v. Rd. Runner High Speed Online, 799 N.Y.S.2d 847 [Sup Ct, New York County 2005] 9

Rakas v. United States, 439 U.S. 128 (1979) 6

Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004) 13, 24

Shelton v. Tucker, 364 U.S. 479 (1960) 20

Silverman v. United States, 365 U.S. 505 (1961) 25

Singleton v. Wulff, 428 U.S. 106 (1976) 11

Smith v. Maryland, 442 U.S. 735 (1979) 27

Solers, Inc. v. Doe, 977 A.2d 941 (D.C. 2009) 9

PolTexaed States, 364 U.S. 65.C. 270 820

olBurseyd States

United States v. Jones, 132 S. Ct. 945 (2012) ..... passim

United States v. Miller, 425 U.S. 435 (1976) 9, 26, 27

United States v. Perrine, 518 F.3d 1196 (10th Cir. 2008) 27

United States v. Rumely, 345 U.S. 41 (1953) 12

United States v. Warshak, 631 F.3d 266 (6th Cir. 2011) 16, 27

Velsicol Chem. Corp. v. Parsons, 561 F.2d 671 (7th Cir. 1977) 7

Warth v. Seldin, 422 U.S. 490 (1975) 5

Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 28

Statutes

18 U.S.C. § 2511 22

18 U.S.C. § 2703 ..... passim

INTRODUCTION

This Court's April 20, 2012 Order requires Twitter to provide the New York County District Attorney's Office with a broad swath of information about a Twitter user's communications, locations, and movements over a three-and-a-half month period. That information includes the content of the user's "tweets," the date, time, and Internet Protocol address that corresponds to each time the user, Malcolm Harris, logged in to his Twitter account, and the amount of time each log-in lasted, regardless of whether he posted any tweets during those times or whether any of his tweets are related to the D.A.'s pending disorderly conduct prosecution of Harris. The Order, which permits the D.A. to obtain all of this information without obtaining a warrant, violates Harris's First and Fourth Amendment rights, as well as his corresponding rights under the New York Constitution.

encouraged public participation in civic affairs, and has brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs and public debates. *See generally* http://www.citizen.org/litigation/briefs/internet.htm. In particular, over the past twelve years, Public Citizen has represented Doe defendants or Internet forum hosts or appeared as *amicus curiae* in cases in which subpoenas have sought to identify hundreds of authors of anonymous Internet messages.

FACTUAL BACKGROUND

This matter arises out of the New York County District Attorney's (the "D.A.") prosecution of Malcolm Harris, one of the hundreds of individuals accused of committing disorderly conduct by being on the Brooklyn Bridge during an Occupy Wall Street-related protest. In connection with that case, on January 26, 2012, the D.A. issued a broadly worded trial subpoena to Twitter (the "Twitter Subpoena") seeking "[a]ny and all user information, including e-mail address, as well as any and all tweets posted for the period of 9/15/2011-12/31/2011," for the account associated with @destructuremal—*i.e.*, Harris's account.[1] That request covers not only the subscriber information that Harris submitted when he registered for Twitter, including his personal email address, but also the content of his tweets, the date, time, and the Internet Protocol ("IP") address[2] that corresponds to each time he used Twitter over the three-and-a-half month period, and the duration of each of Harris's Twitter sessions, regardless of whether he posted any tweets during those log-in sessions and regardless of whether any of his tweets were related to the issues involved in the pending prosecution. The plain terms of the Subpoena—"[a]ny and all user information"—also appear to encompass information concerning

[1] A copy of the Twitter Subpoena is attached hereto as Exhibit A.
[2] An IP address is a unique numerical address that identifies individual computers or other devices as they interact over the Internet. IP addresses can be used to determine where a computer and its user are located when it is connected to the Internet.

Harris's use of Twitter's "Direct Message" feature, which is the functional equivalent of a private email message service between Twitter users and their friends. Some of the information, like IP addresses and information concerning Direct Messages, was never publicly available; other information, like the content of the tweets, was once (but is no longer) publicly available via Twitter.

The D.A. did not notify Harris of the issuance of the Twitter Subpoena. In fact, without any authority, the D.A. "direct[ed]" Twitter not to inform Harris of the existence of the trial subpoena. *See* Ex. A. Harris learned of the subpoena only because Twitter notified him of it, pursuant to Twitter's policy of informing its customers of such subpoenas unless it is legally restricted from doing so.

Harris filed a motion to quash the Twitter Subpoena on February 6, 2012. The D.A. filed a brief in opposition, and took the position that Harris did not have standing to challenge the Twitter Subpoena. In its brief, the D.A. alleged that it needed the requested information to refute Harris's anticipated trial defense that the police either led or escorted him onto the non-pedestrian part of the Brooklyn Bridge. More specifically, the D.A. asserted that the requested information would establish that Harris is the owner of the @destructuremal Twitter account and that he posted tweets from that account contradicting his anticipated defense on the day of the incident.

On April 20, 2012, the Court denied Harris's motion, holding that he had no standing to challenge the Twitter Subpoena. The Court also proceeded to consider the validity of the Subpoena, concluding that it complied with the Stored Communications Act (the "SCA"), and *sua sponte* issuing an order pursuant to 18 U.S.C. § 2703(d) requiring Twitter to provide the

information requested in the Twitter Subpoena within twenty days of receiving notice of the Order.

Harris filed a motion to reargue on April 30, 2012, to which the D.A. filed a response. On May 7, 2012, prior to its compliance deadline, Twitter separately filed its own motion to quash the new § 2703(d) order issued by the Court.

ARGUMENT

I. TWITTER USERS HAVE STANDING TO MOVE TO QUASH SUBPOENAS THAT IMPLICATE THEIR CONSTITUTIONAL RIGHTS.

The Court's April 20 Order held that Harris does not have standing to challenge the Twitter Subpoena on the ground that it was issued to Twitter, not to Harris, for information in Twitter's possession, not in Harris's possession, and that Harris's constitutional rights are therefore not threatened by the subpoena. Order at 4-6. That conclusion is at odds with decisions from the United States Supreme Court and numerous courts around the country. Because Harris's First Amendment rights are implicated by the Twitter Subpoena, he has standing to challenge it.

A. Twitter Users Have Standing To Challenge Third-Party Disclosure Requests.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). That question "in no way depends on the *merits* of the plaintiff's contention that particular conduct is illegal." *Id*. at 500 (emphasis added). Because Harris's First Amendment rights are implicated by the Twitter Subpoena, he has standing to challenge its validity, even if

rights)[4]; *Perlman v. United States*, 247 U.S. 7, 12-13 (1918) (permitting individual to raise constitutional objections to disclosure of documents in the possession of a third party, and to appeal denial of motion immediately).

Courts around the country, including courts in New York, have followed the Supreme Court's clear guidance and held that individuals whose constitutional rights are implicated by subpoenas to third parties have standing to challenge them, even if the individuals do not presently have a possessory interest in the information sought.[5]

In reaching its prior conclusion, this Court relied heavily on Twitter's Terms of Service and its Privacy Policy. Those terms of service and the privacy policy, like the similar ones of many other Internet companies, do not alter the First Amendment standing analysis. Indeed, in *In re Grand Jury Subpoena No. 11116275*, Misc. No. 11-527 (RCC), 2012 WL 691599 (D.D.C. Feb. 23, 2012), a federal court recently permitted a Twitter user to bring a motion challenging a

seeking the user's subscriber information because the user had voluntarily provided that information to Google. *Doe v. SEC*, No. C 11-80209 CRB, 2011 WL 5600513, at *3 (N.D. Cal. Nov. 17, 2011). Amazon.com customers have similarly been permitted to challenge government demands to Amazon for their account information. *Amazon.com L.L.C. v. Lay*, 758 F. Supp. 2d 1154 (W.D. Wash. 2010).[6]

That Harris has already disclosed some of the subpoenaed information to Twitter similarly does not eliminate his right to challenge the Twitter Subpoena. *See, e.g.*, *In re Grand Jury Subpoena Dated Dec. 17, 1996*, 148 F.3d at 490 (rejecting a virtually identical argument that the movants lacked standing because they did not have "a possessory interest in the documents requested"); *Doe v. SEC*, 2011 WL 5600513, at *3 (same); *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 508-09 (S.D.N.Y. 2004), *vacated and reversed on other grounds*, *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006) (same). Were it otherwise, Internet users would never be able to defend their constitutional right to engage in anonymous speech on the Internet, because users must provide their information to others—e.g., to Internet Service Providers—to access the Internet. As Judge Marrero, a federal district court judge in the Southern District of New York, explained in a similar situation:

> [T]he implications of the Government's position are profound. Anonymous internet speakers could be unmasked merely by an administrative, civil, or trial subpoena, or by any state or local disclosure regulation directed at their ISP, and the Government would not have to provide any heightened justification for revealing the speaker. The same would be true for attempts to compile membership lists by seeking the computerized records of an organization which uses a third-party electronic communications provider. Considering, as is undisputed here, the importance of the internet as a forum for speech and association, the Court rejects the invitation to permit the rights of internet anonymity and association to be placed at such grave risk.

[6] As Twitter's motion makes clear, Twitter users also retain a property interest in their tweets pursuant to Twitter's terms of service, which is an independent basis for sustaining Harris's standing to challenge the Subpoena. Twitter Memorandum at 4.

One of the principal rationales behind *Eastland* and all of these other cases is that even if subpoenas are directed to third parties, individuals whose rights are at stake must still be given an opportunity to challenge them because third parties do not have the necessary incentives to do so. *Eastland*, 421 U.S. at 501 n.14; *id.* at 514 (Marshall, J., concurring) (stating that the target must be given a forum to "assert its constitutional objections to the subpoena, since a neutral third party could not be expected to resist the subpoena by placing itself in contempt"); *see also In re Shapiro v Chase Manhattan Bank, N.A.*, 84 Misc. 2d 938, 943 [Sup Ct, New York County 1975] ("Banks cannot be expected to resist a subpoena by placing themselves in contempt, and compliance by the third-party bank clearly would frustrate any judicial determination of the issue.").

Although Twitter has now filed its own motion in this case, that does not mean that it will do so in other cases. Indeed, its brief makes clear that one of the reasons why Twitter weighed in here is because of the potential consequences for Twitter of the Court's holding that the thousands of Twitter users in New York do not have standing to challenge any governmental requests for information about them. Twitter Memorandum at 5. The reality is that Twitter, like other Internet companies, will not—and cannot—challenge every government request directed at one of its millions of users, who pay Twitter no money and have no relationship with Twitter other than that they use its services. *Cf. Greenbaum*, 845 N.Y.S.2d at 698 (permitting intervention by user to challenge subpoena to Google because, *inter alia*, "Google leaves it to those people to come in and protect their own interests." (citation and internal quotation marks omitted)).[8]

[8] It is well-established that Twitter has standing to raise the constitutional rights of its users, like Harris, if it chooses to do so. *See, e.g., In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 257-58 (D.D.C. 2003), *reversed on other grounds*, *RIAA v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (holding that Verizon had standing to

Because Twitter and similar entities do not have the incentives to challenge these government requests—in large part because their own rights are not primarily at stake—Internet users, the individuals whose constitutional rights are at stake, are precisely the people who should have standing to try to defend those rights in court. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976) (holding that individuals whose personal rights are at stake "usually will be the best proponents of their own rights"); *In re Grand Jury*, 111 F.3d 1066, 1072 (3d Cir. 1997) ("Because it is Doe 1 and Doe 2 whose privacy has been violated and would again be violated by compliance with the [grand jury] subpoena . . . it is the intervenors and not the witness herself who are best suited to assert the Title III claim.").[9] The same holds here: although the information requested may be in Twitter's possession, the First Amendment interests at stake belong primarily to Harris, and Harris's rights are best raised by Harris, not by Twitter.[10] Given the First Amendment interests at stake here, *see* Part I.B, in addition to the Fourth Amendment interests, *see* Part II.B, Harris has standing to challenge the Twitter Subpoena.

B. Harris Has Standing Because His First Amendment Rights Are Implicated By The Twitter Subpoena.

Government demands for information concerning an individual's expressive activities implicate the First Amendment and its New York equivalent, Article I, Section 8. *See, e.g.*, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 558 (1963) ("It is particularly important that the exercise of

the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." (citation and internal quotation marks omitted)); *United States v. Rumely*, 345 U.S. 41, 46 (1953) (holding that a subpoena to a bookseller implicated the First Amendment). Because the Twitter Subpoena would reveal sensitive details about Harris and his communications, he has standing to raise a First Amendment challenge to it.

The Twitter Subpoena seeks "[a]ny and all user information" about Harris's use of Twitter over a three-and-a-half month period, including the political views and personal opinions that Harris expressed in his tweets. This type of prolonged, wholesale surveillance into speech

against them—a particularly harmful result for Internet speech, especially for speech occurring on websites like Twitter.[11]

The government surveillance at issue here is especially concerning because, in addition to the content of Harris's tweets, the Twitter Subpoena also covers the IP addresses associated with Harris's use of Twitter, and the date and time for each log-in session. IP addresses correlate to specific geographic locations. *See, e.g.*, *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 409 (2d Cir. 2004) (explaining that the IP address identifies the location of the device being used); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 567 (S.D.N.Y. 2004) (detailing that IP addresses can be matched with publicly available databases to "indicate the 'likely' locations of the residences or other venues where defendants used their Internet-connected computers"). The aggregation of this information will, thus, provide the D.A. with a comprehensive and detailed map of where Harris was when he was expressing certain thoughts or simply reading others' tweets, over a three-and-a-half month period, regardless of whether there is any connection between those tweets and the pending prosecution.

The combination of Harris's location plus the content of his messages makes the Twitter Subpoena particularly invasive from a First Amendment perspective, because knowing Harris's location when he was expressing certain thoughts will provide meaning to some of his tweets. For example, a message like "I like the government here" both derives meaning from and conveys meaning about the speaker's location; it would mean one thing if tweeted from Peoria and quite another if tweeted from Pyongyang. Likewise, tweeting "Everybody must get stoned"

[11] That the content of Harris's tweets was public at some point does not undermine Harris's First Amendment interest in precluding the government from needlessly inquiring into his speech activities. Courts have recognized that forced disclosure of content that was once publicly available may still chill speech. *See Comty.-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1122 (D.C. Cir. 1978) (holding that a requirement that government-funded

might mean one thing if tweeted from Woodstock on the night of a Bob Dylan concert, but something far different if tweeted from Tehran on a day in which numerous citizens are stoned to death for committing moral offenses. Similarly, "Take the bridge" might mean one thing if tweeted from lower Manhattan on October 1, 2011, and a far different thing if tweeted from near the Golden Gate Bridge on September 11, 2011. Indeed, that is precisely why the D.A. wants to obtain the content of Harris's tweets; *where* people are when they say certain things matters. Connecting Harris's specific locations to his specific messages will, thus, provide the D.A. with nuanced insight into Harris's daily life and his expressive activities.

Knowing how long Harris was logged on to Twitter when he tweeted certain thoughts, or when he was simply reading others' tweets—items also encompassed by the Twitter Subpoena—will similarly provide details about Harris's reading and speaking habits. In addition, the IP addresses will disclose exactly how Harris accessed Twitter to communicate—e.g., through a laptop, his mobile phone, or his home computer—providing yet more personal details about Harris's communications.

On their own, some of these details about Harris's communications might not be terribly invasive. Combined over such a long period of time, however, these discrete details and data points will enable the D.A. to piece together a comprehensive portrait of Harris's expressive activities and habits, directly implicating his First Amendment rights. *Cf. Jones*, 132 S. Ct. at 955 (Sotomayor, J. concurring) (stating that GPS monitoring "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations"); *People v. Weaver*, 12 N.Y.3d 433, 442 [2009] (holding that GPS monitoring reveals "a highly detailed profile, not simply of where we go, but by easy inference, of our associations . . . and of the pattern of our

professional and avocational pursuits").[12] Where individuals are when they say a certain thing or read certain material, when they say those things or read other things, how long they spend to say those things or to read other things, and what kind of tools they use for their communications, are private, intimate details about individuals' communications and communications habits. None of this information is the government's business, and the D.A. cannot simply obtain it without first satisfying constitutional scrutiny. *See, e.g.*, *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (holding that the forced disclosure of reading habits "is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment") (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); *Collier*, 85 Misc. 2d at 556 (explaining that even small infringements of constitutional rights cannot be permitted).

Moreover, although the D.A. has now disclaimed any intent to seek information concerning Harris's use of Twitter's "Direct Messaging" feature, which essentially functions like a private email account, the plain terms of the Twitter Subpoena—"[a]ny and all user information"—appear to encompass that information as well. Because the D.A. has not conceded that the wording of the Twitter Subpoena is improper in any manner and because it has not agreed never to ask for the full scope of the originally-demanded information, the Subpoena's validity turns on its plain language, not on what the D.A. now claims it intended the Subpoena to cover. *See, e.g.*, *Amazon.com, L.L.C. v. Lay*, 758 F. Supp. 2d 1154, 1169 & n.2 (W.D. Wash. 2010) (rejecting the government's argument that a document demand should be read to cover only what the government says it intended, instead of the plain language of the

communicating with each other via direct messages. The content of those direct messages is indisputably constitutionally protected, much like the content of emails and telephone calls. *See, e.g.*, *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2011) (holding that the content of emails cannot be obtained by the government unless constitutional scrutiny is first satisfied); *Katz v. United States*, 389 U.S. 347, 352-53 (1967) (same re telephone calls). In addition to revealing the content of those private communications, information concerning Harris's Direct Messages would also disclose the date, time, and IP address of every individual with whom Harris either sent or received a direct message, providing a detailed dossier on Harris's friends and associates, as well as on him. Information concerning Harris's use of Direct Messages, thus, directly implicates Harris's First Amendment interests.

If individuals knew that the government could combine what they have been saying for the past three-and-a-half months with where they were when they said those things, what time of day they read certain websites or communicated with their friends, how long they read certain websites and took to write messages, and whether communications were made via a mobile phone, laptop, or personal computer (and therefore whether the individuals were more likely to say certain things from work, from their home, or while [illegible]

information is spread over the Internet—especially through Twitter and similar services—

II. THE TWITTER SUBPOENA AND THE RESULTING COURT ORDER VIOLATE HARRIS'S CONSTITUTIONAL RIGHTS.

Turning to the merits, the Twitter Subpoena and the Court's April 20 Order violate Harris's First and Fourth Amendment rights, as well as his corresponding rights under the New York Constitution.

A. The Twitter Subpoena and the Court's § 2703(d) Order Violate The First Amendment And Article I, Section 8 Of The New York Constitution.

Because the Twitter Subpoena and the Court's § 2703(d) order implicate Harris's First Amendment rights, the D.A. must show both an "overriding and compelling" government interest in obtaining the requested information

anticipated trial defense." April 20 Order at 11. Because the D.A. cannot establish that it "actually needs the disputed information" to prove either of those points, the Twitter Subpoena cannot pass First Amendment scrutiny. *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. at 572.

First, as far as *amici* are aware, there is no dispute that the account in question is Harris's Twitter account, and that he published the tweets on that account in the past. Nor is there any dispute that Harris was in New York and on the Brooklyn Bridge when he was arrested there. Because Harris is not contesting these facts, the D.A. does not need to obtain any information from Twitter, let alone his IP addresses or the date, time, and duration of his many Twitter sessions, to prove these facts. At most, all that the D.A. needs—and all that the D.A. should be permitted to obtain, if anything—is information sufficient to show that on the day in question, Harris was the one posting tweets through that account. Detailed information concerning his use of Twitter and his locations and movements on the other 107 days covered by the Twitter Subpoena is not necessary for that purpose.

Second, to the extent the D.A. wants access to Harris's tweets from the day in question to establish contradictions with his anticipated trial version of what happened on that day, all the D.A. needs are those specific tweets. Again, the D.A. does not need any information about

eeSubpaeeds 1Amacount. Detailed

the Brooklyn Bridge." Affirmation In Support Of People's Response To Defendant's Motion To Reargue at 7. Regardless of whether that is so, Harris's "state of mind" on all of the other days—let alone his specific whereabouts, at various times of each day, and how long he spent using Twitter—is unrelated to his state of mind on the day in question. Because the D.A. cannot establish a substantial nexus between the information requested and the D.A.'s alleged need for the information, the Twitter Subpoena cannot withstand First Amendment scrutiny. *See, e.g.*, *Gibson*, 372 U.S. at 546; *Collier*, 85 Misc. 2d at 560; *United States v. Bursey*, 466 F.2d 1059, 1083 (9th Cir. 1972); *Amazon.com v. Lay*, 758 F. Supp. 2d at 1169 & n.2 (invalidating disclosure demand because the information requested was not necessary to accomplish North Carolina's stated goals).[14]

For many of the same reasons, the Twitter Subpoena is also unconstitutional because it is overbroad and impermissibly sweeps in a vast swath of information about Harris's expressive activities that the D.A. has no legitimate need to know. Where, as here, the government seeks information that is protected by the First Amendment, it "must use a scalpel, not an ax." *Bursey*, 466 F.2d at 1088; *see also Local 1814*, 667 F.2d at 273 (considering the validity of a third-party subpoena and holding that, "(E)ven though the governmental purpose (assuring teacher competence) be legitimate and substantial, that ole

The Twitter Subpoena fails to "use a scalpel" because it broadly seeks "[a]ny and all user information" over a long period of time, even though the D.A. cannot claim that all—or even most—of Harris's tweets have anything to do with the Brooklyn Bridge incident or Harris's state of mind at the time of the incident. For example, if Harris posted a Tweet two weeks before the incident about a new book he read or about the New York Yankees, or even if he did so on the day in question, there is no need for the government to obtain that tweet. Nor does the D.A. need information about where Harris was at that time and for how long he was logged on to Twitter. Indeed, the D.A. has not articulated any reason for needing Harris's IP addresses or log session information. Moreover, the plain terms of the Subpoena call for the production of "[a]ny and all" information concerning Harris's use of Twitter's Direct Messaging feature, which even the D.A. now acknowledges it does not need. Because the D.A. could have issued a much narrower subpoena to obtain the information it claims it needs, the Twitter Subpoena is unconstitutional. *See, e.g.*, *In re Grand Jury Subpoena*, 829 F.2d 1291, 1302 (4th Cir. 1987) (quashing a subpoena requiring videotape distributers to produce copies of videos, and holding that the government must act "in the least intrusive manner possible, which means, at a minimum, by identifying the requested material in a way that allows the recipient of the subpoena to know immediately whether an item is to be produced or not"); *Amazon.com v. Lay*, 758 F. Supp. 2d at 1169

circumstances, it is not a cure for the Twitter Subpoena's constitutional defects because even the review can implicate Harris's First Amendment interests. *See N.Y. Times Co. v. Jascalevich*, 439 U.S. 1331, 1335-36 (1978) (Marshall, J., in chambers) (holding that forced disclosure even for *in camera* review purposes can inhibit First Amendment rights); *Bradosky v Volkswagen of Am., Inc.*, No. M8-85 (SWK), 1988 WL 5433, at *3 (S.D.N.Y. Jan. 15, 1988) (stating that an in camera inspection "in and of itself impacts on the First Amendment rights" of the entity seeking to prevent disclosure). In any event, even if an *in camera* review were deemed appropriate, the Court should release information to the D.A. only if the D.A.'s request can pass constitutional muster, not just if the Court deems the information to be relevant to the case.

B. The Twitter Subpoena And The Court's § 2703(d) Order Violate The Fourth Amendment And Article I, Section 12 Of The New York Constitution.

The Twitter Subpoena also implicates Harris's fundamental rights under the Fourth Amendment and Article I, Section 12 of the New York Constitution to be free of government surveillance of his movements over a period of time. Although some of the information requested here was publicly available at one point, a significant portion, such as the IP addresses and information concerning Direct Messages, never was publicly available. In addition, some of the formerly public tweets are no longer publicly available via Twitter. The government cannot obtain this information—Twitter's database of historical speech activities and its users' corresponding locations and movements—without a warrant based on probable cause; a mere subpoena or a § 2703(d) order is not sufficient.[15]

[15] Independently of the Fourth Amendment, the SCA protects the contents of the tweets even if they may once have been publicly available via Twitter. As Twitter's memorandum in support of its motion to quash explains, *see* Memorandum at 7, under the express terms of the Stored Communications Act, the D.A. cannot obtain the contents of many of Harris's tweets from Twitter without first obtaining a search warrant. 18 U.S.C. § 2703(a); *see also id.* at 18 U.S.C. § 2703(b)(1)(B)(ii).

The New York Court of Appeals has recognized that individuals have a reasonable expectation of privacy in their movements over a prolonged period of time, even movements conducted in public places, and that a warrant is required for the government to obtain that information because it can reveal intimate details about people's lives. *See People v. Weaver*, 12 N.Y.3d 433, 441-42 [2009]. As the Court of Appeals explained in *Weaver*: "Cell technology has moved presumptively private phone conversation from the enclosure of *Katz*'s phone booth to the open sidewalk and the car, and the advent of portable computing devices has resituated transactions of all kinds to relatively public spaces. It is fair

the individual's constitutionally protected right to move freely without government surveillance. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 54 (1999) ("[I]t is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage'); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (stating that activities like wandering and strolling from place to place are "historically part of the amenities of life as we have known them"). That is because IP addresses, like GPS devices, can reveal one's geographic locations and movements from one place to another. *See, e.g.*, *Register.com*, 356 F.3d at 409; *Sony Music*, 326 F. Supp. 2d at 567. Thus, by using the IP addresses linked to each date and time that Harris logged into Twitter over a three-and-a-half month period, the government can determine his location at the very times that he was engaged in publishing his own messages or reading others' thoughts—regardless of whether the underlying speech was related to the subject matter of this prosecution, and regardless of whether he was using Twitter from a public or a private space, including Harris's home, where his expectation of privacy is greatest.[16]

That the D.A. sought three-and-a-half months of data distinguishes this case from *People v. Hall*, 86 A.D.3d 450, 452 [1st Dept 2011], in which the First Department did not find a privacy interest in three days of cell phone-based location information. Indeed, if tracking an individual's movements in a vehicle for twenty-eight days (*Jones*) or for sixty-five days (*Weaver*) violates a reasonable expectation of privacy, *see Jones*, 132 S. Ct. at 946; *Weaver*, 12 N.Y.3d 433, then tracking an individual's movements over 108 days surely violates such an

[16] The accuracy of IP address geolocation can depend on many factors, including how an ISP has set up its network of servers and whether an Internet user utilizes one of several tools that allow Internet users to obfuscate their IP addresses. Although IP address location data is less precise than GPS tracking records, it does not have to be equally precise to implicate privacy concerns. Indeed, Justice Alito's opinion makes clear that his conclusion did not depend on the particular type of tracking technology at issue in *Jones*, and that he was well aware that the government can also track location through numerous other means, existing and not yet imagined. *Jones*, 132 S. Ct. at 963 (identifying the proliferation of mobile devices as "[p]erhaps most significant" of the emerging location tracking technologies).

expectation as well. *Jones*, 132 S. Ct. at 964 (Alito, J., concurring) ("We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark.").

That is especially the case given that Twitter users like Harris increasingly rely on laptops, iPads, or other mobile devices to access Twitter. They are likely to carry their devices with them at all times and to be logged on to Twitter for a significant portion of the day, enabling the government to reconstruct their movements to conduct virtually twenty-four hour surveillance of them as they traverse both public and private spaces, much like in *Jones* and *Weaver*.[17]

Technological advances have made possible government fishing expeditions into databases of information and communications that would have been impossible in the past. Although the government always could have attended a suspect's public speeches in the course of its investigations, it has never before had the capacity to review, in retrospect, the content and location of every public speech made by a criminal defendant for a three-plus month period. In this way, Twitter's database "is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world." *Weaver*, 12 N.Y.3d at 441; *see also United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007) ("technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive."). As the Court of Appeals stated in *Weaver*, in words that could have been written for this case: "Technological advances have produced many valuable tools for law enforcement

[17] Indeed, IP addresses can be cross-referenced with records from other companies to provide information reflecting an individual's activities at home, "the very core" of the Fourth Amendment's right to be free from unreasonable government searches. *Silverman v. United States*, 365 U.S. 505, 511 (1961). For example, the information the D.A. seeks here may reveal that Harris frequently logged into Twitter from a specific IP address. An information demand to the company that assigned that IP address—not an unlikely scenario given that the D.A. expressly demanded Harris's personal email address— may reveal that the number corresponds to a computer or network in Mr. Harris's home.

and, as the years go by, the technology available to aid in the detection of criminal conduct will only become more and more sophisticated. Without judicial oversight, the use of these powerful devices presents a significant and, to our minds, unacceptable risk of abuse." 12 N.Y.3d at 447.

That the Court has now approved the validity of the Twitter Subpoena and issued its own § 2703(d) order does not cure these constitutional deficiencies. The Court has still not determined that there is probable cause to permit the D.A. to obtain all of this intimate and detailed information about Harris's communications, locations, and movements over such a lengthy period of time; in issuing the § 2703(d) order, the Court merely concluded that the D.A. had established that the information requested was "relevant and material" to a criminal investigation.

Nor does the fact that the information requested is in the possession of a third party mean that there can be no constitutional violations here. Prolonged location tracking violates citizens' reasonable expectations of privacy; that is true even where, as here, the information is stored by a third party. *See, e.g.*, *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 317-18 (3d Cir. 2010) (*Third Circuit Opinion*) (distinguishing cell phone location information maintained by the cell phone company from bank records or phone dialing information); *In re U.S. for an Order Authorizing the Release of Historical Cell-Site*, 809 F.Supp.2d 113, 126 (E.D.N.Y. 2011) ("[T]he court concludes that an exception to the third-party-disclosure doctrine applies here because cell-phone users have a reasonable expectation of privacy in cumulative cell-site-location records, despite the fact that those records are collected and stored by a third party."). Unlike the bank records and telephone records cases cited by the Court,[18] Internet users do not voluntarily share their

[18] *United States v. Miller*, 425 U.S. 435 (1976) (holding that an individual has no Fourth Amendment interest in bank records created and maintained by the bank in the course of financial transactions); *Smith v. Maryland*, 442

location information with their ISPs or the other Internet services they utilize in a manner that is analogous to the dialing of a telephone or engaging in a financial transaction with a bank. In addition, whereas banking records and telephone dialing information are knowingly and voluntarily provided to a third party, IP address information is communicated by the Internet user automatically, passively, invisibly, and unknowingly. *See Third Circuit Opinion*, 620 F.3d at 317 (rejecting an identical argument in the context of a demand for cell phone location information, and noting that it is "unlikely that cell phone customers ar

42. Because “internet records of the type obtained via a [government demand] could differ substantially from transactional bank or phone records,” *Doe v. Ashcroft*, 334 F. Supp. 2d at 509, this case presents a far different scenario from the bank and telephone dialing record cases. *Id*. at 510 (“In stark contrast to this potential to compile elaborate dossiers on internet users, the information obtainable by a pen register is far more limited . . . The Court doubts that the result in *Smith* would have been the same if a pen register operated as a key to the most intimate details and passions of a person's private life.”).

techn
judici

Weaver, 12 N

and hold that

cover the det

provided und

For th

quash and ho

third parties f

and vacate th

Dated: May

EXHIBIT A

SUBPOENA (DUCES TECUM)

FOR A WITNESS TO ATTEND THE

CRIMINAL COURT OF THE CITY OF NEW YORK

In the Name of the People of the State of New York

[redacted]

795 Folsom Street
Suite 600
San Francisco, CA 94107

YOU ARE COMMANDED to appear before the CRIMINAL COURT of the County of New York,

[redacted]

PART JURY 7, at the Criminal Court Building, 346 Broadway, between Hogan Place and White Street, in the Borough of Manhattan, of the City of New York, on February 2, 2012 at 9:00 AM, as a witness in a criminal action prosecuted by the People of the State of New York against

Lee Langston
Assistant District Attorney
212 335-9206

MALCOLM HARRIS

[redacted]