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

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

MEMORANDUM OF LAW
IN SUPPORT OF ARTICLE 78 PETITION

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

Emily M. Bass, Esq.
551 Fifth Avenue, 28th Floor,
New York, N.Y. 10176
(646) 810-3117

Attorneys for Petitioner

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PRELIMINARY STATEMENT

In *United States v. Jones*, 565 U.S. 945 (2012), the Government had probable cause to believe that the defendant was engaged in narcotics trafficking and, specifically, a conspiracy to distribute cocaine. The crimes with which he was ultimately charged carried a potential life sentence. During the course of its investigation, the government attached a GPS to the bottom of the car Jones drove and carefully tracked his movements for 28 days. From the data it obtained, the Government was able to connect Jones to a "stash house that contained $850,000 in cash, 97 kilograms of cocaine and 1 kilogram of cocaine base." 565 U.S. at 948. The Supreme Court found that the Government had conducted an "unreasonable search" in violation of the Fourth Amendment.

In this case, the Petitioner ("Harris") stands accused of a single charge of disorderly conduct as a result of his participation in a peaceful Occupy Wall Street march. The charge carries, at most, a $250 fine or 15 days in jail. Three months after arresting Harris for impeding traffic, the Government subpoenaed Twitter, the social media site, for 108 days worth of electronic communications and data associated with Harris' account. Respondent not only upheld the District Attorney's subpoena, but reinforced it with Court Orders under 18 U.S.C. §2703(d). The *Harris* Orders differ from the warrant obtained in *Jones* in two fundamental respects: The *Harris*

Orders require that information be produced for a period that is nearly 4 times as long as the period covered by the *Jones* warrant. Equally significantly, they require the disclosure of ***the content of communications*** for this period, as well as locational data. In other words, rather than simply enable the District Attorney to track Harris' whereabouts for 3 ½ months, Respondent's Orders give the District Attorney access to Harris' "diary."

Respondent held that Harris lacked "standing" to challenge the disclosure of any of this information.

Harris is entitled to a judgment under Article 78, vacating these Orders and enjoining Respondent from giving the District Attorney discovery to which he is not statutorily entitled. Alternatively and at a minimum, Harris is entitled to a judgment vacating the Orders and compelling Respondent to reach and to rule on the merits of each of Harris' challenges.

FACTUAL BACKGROUND AND STATEMENT OF THE PROCEEDINGS

A detailed Statement of the Proceedings is set forth in the Verified Petition. For the Court's convenience, an abbreviated statement follows:

Petitioner participated in a protest march in support of the Occupy Wall Street Movement in New York City on October 1, 2011. Seven hundred marchers were arrested. Petitioner Harris was one of them.[1]

[1] Counsel for Petitioner Harris wish to thank Moira Meltzer-Cohen for her incisive research and other assistance in the preparation of these papers.

He was charged with a single count of Disorderly Conduct in violation of Penal Law 240.20[5]. Specifically, he was accused of having "obstructed vehicular … traffic" on the roadway of the Brooklyn Bridge with the "intent to cause public inconvenience, annoyance and alarm."

The District Attorney expects Harris to defend against this charge on the ground he lacked the requisite intent. More specifically, the District Attorney expects Harris to claim that the protesters thought they were entitled to be where they were on the Bridge because they had been "led or escorted" there by the police.

Because the District Attorney can only prevail on the charge if he carries his burden on "intent," he took steps on January 26, 2012 he hoped would assist him in meeting this anticipated defense. He issued a trial subpoena to Twitter, Inc. for "any and all" user information and tweets associated with or posted to Harris' account (@destructuremal) over a 108 day period.

The District Attorney's rationale was twofold. He demanded the tweets or "content information" on the theory that Harris "***may*** have used … [his Twitter] account to make statements *while on the bridge* that were inconsistent with his anticipated trial defense." (Exh. 5, p. 4 at ¶9)[2]

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

(emphasis added). He demanded the "noncontent" or "user information" in order to "connect" Harris to the account.

Cognizant that the protesters were only on the Bridge for, at most, three hours, however, the District Attorney expanded the period covered by the trial subpoena in order to increase his chances of striking evidentiary gold. Accordingly, rather than simply demand the tweets that Harris posted over a 3 hour period, the District Attorney demanded tweets posted over a period 800 times as long. He demanded content information for a few weeks *prior to* October 1st to "encompass any statements … that this was a planned act…". (Exh. 5 at ¶33). He demanded tweets for a three month period *after* the march to "capture any admissions after the day in question." *Id*. (emphasis added). And, as indicated above, he demanded log in, location and session information for 108 days "to connect" defendant to his account. (Exh. 3 at ¶10).

On March 8 and May 30, 2012, the District Attorney issued two further subpoenas for information from and regarding Harris' Twitter accounts. The March 8th subpoena was for a second Harris account. The subject of the May 30th trial subpoena was, once again, the @destructuremal account.

Harris made a series of motions to quash the subpoenas on the grounds that:

. they constituted unwarranted invasions of his privacy;
. they infringed his constitutional rights;
. they issued for improper purposes; and

. were not issued in compliance with either the Criminal Procedure Law or Stored Communications Act.

Insofar as his constitutional rights were concerned, he alleged violations of his rights of speech, privacy and association under the New York and United States Constitutions.

On April 20, 2012, Respondent issued a Decision & Order rejecting Harris' motions. Respondent did not reach the merits of Harris' challenges; he ruled that Harris lacked standing to assert them. The principal basis Respondent cited for so ruling was the "third party doctrine" or "banking records rule."

Notwithstanding Harris' alleged lack of standing, Respondent held he was compelled to go on to ensure the subpoena was "legal." That meant one thing, from his perspective: the subpoena had to comply with the Stored Communications Act ("SCA"), 18 U.S.C. §§2701 et seq.

Respondent analyzed the subpoena from two perspectives. He found that it was sufficient under the SCA to support the District Attorney's demand for "noncontent information," but *not* his demand for tweets. (Exh. 10 at p. 10).

Accordingly, in addition to "so ordering" the subpoena, Respondent buttressed the subpoena with an order under 18 USC §2703(d), requiring Twitter to turn over 3 ½ months of tweets. Respondent entered this order *sua sponte*. The District Attorney did not request it. He disputed the SCA's application.

Respondent entered the §2703(d) Order notwithstanding the fact that the District Attorney *had not averred and could not aver* that there was an "ongoing criminal investigation." Such an investigation was an absolute predicate under the statute. Absent such an investigation, no §2703(d) Order could be entered.

Respondent also entered the Order notwithstanding the fact that it afforded the District Attorney discovery he was prohibited by state law, and the Criminal Court was not a "court of competent jurisdiction" within the meaning of the federal statute.

After "so ordering" the subpoena and entering the §2703(d) Order, Respondent's Order took an unusual turn. It ordered that the subpoenaed materials "be provided to this court for *in camera* inspection." (Exh. 10 at p. 11). Respondent assured the parties he would review the subpoenaed materials, and then provide "relevant portions thereof" to the District Attorney. (*Id*.) The latter, in turn, was then instructed to "provide copies to the defense counsel as part of discovery …". (*Id*.)

In response to a motion to reargue by Petitioner, on May 4, 2012, Respondent reaffirmed this Decision & Order in full.

On May 7, 2012, Twitter moved to vacate Respondent 4/20/12 Decision and Order.

On June 30, 2012, Respondent decided motions that Twitter filed on May 7 and June 11, 2012. Twitter's first motion sought to vacate

Respondent's 4/20/12 Decision & Order. Its second motion sought to quash three trial subpoenas and vacate the Order. Both the Order and subpoenas had been personally served on a member of Twitter's Board of Directors on May 31, 2012.

In his June 30th Decision, Respondent held that both Harris and Twitter lacked standing – Harris, under the "bank records cases," and Twitter, because it allegedly would suffer no undue burden by having to comply with the subpoena. (Exh. 17 at p. 4).

Respondent then repeated his Stored Communications Act analysis and entered a new Order, affording the District Attorney discovery of "all non-content information and content information from September 15, 2011 to December 30, 2011." (Exh. 17 at p. 11). This time, while e still enforcing the trial subpoena, Respondent did not "so order" it. Rather, he ordered the production of both content and non-content information under 18 U.S.C. §2703(d). (Exh. 17 at p. 8).

Once again, Respondent entered the §2703(d) Order even though there was no "ongoing criminal investigation" and no averment that there was one. Once again, the discovery the §2703(d) Order afforded the District Attorney was discovery to which he was not legally entitled under state law. And, once again, Respondent's Court was not competent to enter the §2703(d) Order within the meaning of state or federal law.

As in his earlier Order, in his June 30, 2012 Order, Respondent provided for "*in camera* inspection." (Exh. 17 at p. 11). This was done, he explained, to "safeguard" Harris' "privacy rights." (Exh. 17 at p. 2).

The Information And Materials Sought By The Subpoenas Implicate Harris Rights Under The First Amendment And Article I, Sec. 8 Of The New York Constitution

As we noted in the Verified Petition, both the January 26th trial subpoena and Respondent's June 30th Order seek two types of information. Significantly, however, they seek *different* types. The January 26th trial subpoena seeks "any and all tweets" and "any and all user information" for Harris' account over a 3 ½ month period. The June 30th Order, on the other hand, requires the disclosure of "all noncontent information and content information" for that same account and period. (Exh. 17 at p. 11).

As Respondent has defined the term (Exh. 17 at p. 2), "content information" clearly includes more than simply Harris' "public tweets." [3] It also includes his tweets that were *once* public *but no longer are*, and his "direct messages." "Direct messages" (hereinafter "DMs") are messages between Twitter users that are only visible to the sender and recipient and, thus, were never publicly available. They are like private email.[4] Logically,

[3] In the third trial subpoena the District Attorney issued to Twitter, he sought to cabin his previous demands. Thus, instead of asking for "any and all tweets," the District Attorney asked for "any and all public tweets." (Exh. 16-3). And, instead of asking for "any and all user information," he asked exclusively for section 2703(c)(2) information. Rather than follow suit, however, and reduce the scope of the production being ordered, Respondent did the opposite. He ordered that Twitter locate and produce even more information and materials than were originally called for by the January 26th subpoena.

[4] Paradoxically, Respondent orders that all "content information" be disclosed pursuant to his June 30th Order under §2703(d), notwithstanding the fact that he acknowledges that (i)

the term would also include tweets posted during the period covered by the Order by the people Harris followed.

By the same token, all "noncontent information" includes more than simply the information specified in §2703(c)(2).[5] At a minimum, it includes:

- the name of the subscriber to Twitter and his or her address;
- the length of time the subscriber has used Twitter services (including start date) and the types of service used;
- his or her local and long distance telephone connection records,
- records of his or her Twitter sessions, including the duration of each session and the times it began and ended,
- logs of account usage,
- the type of device the subscriber used in each instance, e.g., smartphone, netbook, laptop or computer
- the subscriber's browser type,
- an identification of mailer header information (minus the subject line)
- lists of outgoing e-mail addresses associated with communications sent from an account
- the telephone or instrument number associated with each subscriber, or other subscriber number or identity, including any temporarily assigned network address,
- his or her means and source of payment for the service;

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there is a difference between a publicly available tweet and "a private email, a private direct message, a private chat, or any of the other readily available ways to have a private conversation via the internet that now exist," (Exh. 17 at p. 6, and (ii) "[t]hose private dialogues would require a warrant based on probable cause in order to access the relevant information." (Exh. 17 at p. 6).

[5] See footnote 3.

- "log data," and
- a listing of the subscriber's followers and the persons the subscriber follows.

(Exh. 5, p. 10 at ¶23 n.7; and Exh. 17 at p. 3). Twitter defines "log data" to include:

> information such as your IP address, browser type, the referring domain, pages visited, your mobile carrier, device and application IDS, and search terms. Other actions, such as interactions with our website, applications and advertisements, may also be included in Log Data….

(Exh. 4, p. 6 at ¶3 ("Log Data")). Only the very first item (subscriber's name) and last item (lists of followers) included in "noncontent information" are clearly public. The remaining items of information are private and personal to the Twitter user or subscriber.

As Respondent clearly recognized in his June 30th Decision, IP addresses, like GPS data, can be used to mark a Twitter user's location. (Exh. 17 at p. 3, where Respondent states that the "noncontent" information Twitter is being required to turn over includes "physical locations"). See also, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 409 (2d Cir. 2004) (noting that an IP address identifies the location of the device being used); *Sony Music Entertainment Inc. v. Does 1-40*, 326 F.Supp. 556, 567

(S.D.N.Y. 2004). They can either be used to pinpoint his current location[6] or track his movements over time.

Every time someone signs on to Twitter to check up on breaking or trending news, to read tweets by others or to send their own tweets, they generate log data that is archived by Twitter. Moreover, every time someone uses their mobile phone to make or receive a call or a text message, they generate further data regarding their location. They create a new entry in their location log with every call, message and digital move.

While it used to be that GPS positioning was considered far more reliable than cell site data in determining someone's location, with the advance of technology, that is no longer the case. See *In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, No. 10-2188-SKG, 2011 WL 3423370, at *5 (D. Md. Aug. 3, 2011) ("Due to advances in technology and the proliferation of cellular infrastructure, cell-site location data can place a particular cellular telephone within a range approaching the accuracy of GPS.")[7]

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[6] Paul A Zandbergen, *Accuracy of iPhone Locations: A Comparison of Assisted GPS, WiFi and Cellular Positioning*, 13 Transactions GIS 5, 11 (2009) ("Horizontal error . . . var[ies] greatly across urban-rural gradients, with a median error in the order of 50 to several hundred meters in urban areas and in the order or [sic] several hundred meters to several kilometers in rural areas"). *See also* Kevin McLaughlin, Note, *The Fourth Amendment and Cell Phone Location Tracking: Where Are We?*, 29 HASTINGS COMM. & ENT. 421, 426-27 (Spring 2007); Recent Development, *Who Knows Where You've Been? Privacy Concerns Regarding the Use of Cellular Phones as Personal Locators*, 18 HARV J.L. & TECH 307, 308-10 (Fall 2004).

[7] *See also* Li B, Tan YK, Dempster AG, *Using Two Global Positioning System Satellites to Improve Wireless Fidelity Positioning Accuracy in Urban Canyons*, 5 IET Comm. 163 (2011).

Indeed, in urban areas such as New York City, cell site data is now more reliable than GPS. See, e.g., Paul A Zandbergen, *Accuracy of iPhone Locations: A Comparison of Assisted GPS, WiFi and Cellular Positioning*, 13 Transactions GIS 5, 11 (2009). Cell site data can be used in such urban areas to narrow a person's location down to within 50 meters. 13 Transactions GIS at 11 (2009).

The implications for First Amendment rights are obvious, especially where, as here, law enforcement obtains both "noncontent" ***and*** "content" information. By weaving together the two types of information, law enforcement can create a detailed profile of a Twitter user's thoughts, statements, movements, associations and activities over a prolonged period. In this case, anyone reviewing the information and material Twitter has been ordered to turn over will know each time – between September 15 and December 30, 2011 - Harris logged into his Twitter account, where he was when he logged in, how long he remained there and both what he did and who he communicated with while he was logged in.

If he tweeted or sent direct messages during any of his Twitter sessions, the person reviewing the information will know the content of what he tweeted or communicated, the device he used (smartphone, laptop or computer) and whether he tweeted or sent direct messages from home, work or a café. He will also know how long it took Harris to compose each message and to whom his tweets or messages were sent. If Harris spent

time reading rather than writing or tweeting, the person reviewing the information will know that too. He will know how long Harris spent reading other people's tweets or messages, where he was when he read them, what he read and from whom the communications came. Significantly, he will know all these things even if the tweets and messages Harris sent or read have absolutely nothing to do with the OWS protest march or the Brooklyn Bridge.

The link between round-the-clock technological surveillance and associational rights was first acknowledged by the New York Court of Appeals in *People v. Weaver*, 12 N.Y.3d 433, 441-442 (2009). There, writing for the majority, Chief Justice Lippman expressed the view that the type of intensive surveillance made possible by the new technologies was not "compatible with any reasonable notion of personal privacy or ordered liberty …". "One need only consider," he said, "what the police may learn, practically effortlessly, from planting a single device:"

> The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods possibly limited only by the need to change the transmitting unit's batteries. Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. ***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***.

12 N.Y.3d 433, 441-442 (emphasis added). While the Court was speaking in *Weaver* of the impact of GPS technology, it was well aware that the integration of such technology into "cell phones" placed associational rights in even greater jeopardy. *People v. Weaver*, 12 N.Y.3d at 442. ("And, with GPS becoming an increasingly routine feature in … cell phones, it will be possible to tell from the technology with ever increasing precision who we are and are not with … [and] when we are and are not with them").

As is so often the case, technological advances have outstripped the law. The collection of GPS data by law enforcement is no longer the preeminent danger to associational freedoms and speech rights. The greatest threat is now posed by apps and mobile phones that are our ever-present companions.

ARGUMENT

I. HARRIS IS ENTITLED TO AN ARTICLE 78 JUDGMENT IN THE NATURE OF PROHIBITION

A. Respondent Exceeded His Authority When He Enforced The January 26, 2012 Subpoena

Prohibition lies to enjoin a judge from acting either without jurisdiction or in excess of his powers in an action over which he has jurisdiction. N.Y. C.P.L.R. §7803(2).

In enforcing the District Attorney's January 26, 2012 subpoena, Respondent exceeded his powers in at least two respects. He permitted the District Attorney to misuse a "trial subpoena" for discovery purposes. (Pet at ¶¶'s 113-115). And, he afforded the District Attorney discovery to which he was not, in any event, entitled under state law. (Pet at ¶¶'s 116-128).

A trial subpoena cannot properly be used to ascertain whether evidence exists. See *Matter of Terry D.*, 81 N.Y.2d 1042, 1044 (1993); *People v. Gissendanner*, 48 N.Y.2d 543, 551 (1979); *Matter of Constantine v Leto*, 157 A.D.2d 376 (3d Dept 1990), aff'd, 77 N.Y.2d 975 (1991); *People v. Simone*, 92 Misc.2d 306, 309-310 (Sup. Ct., Bronx County 1977), aff'd, 71 A.D.2d 554 (1st Dept 1979). Rather, it is a court process that directs an individual to appear together with specified evidence in his possession so that by reference to that evidence he may give testimony relevant to the matter under inquiry. *Constantine v. Leto*, 157 A.D.2d 376, 378 (3d Dept 1990), *aff'd on the App. Div. decision*, 77 N.Y.2d 975 (1991). The evidence

it seeks must thus be evidence of which the party issuing the subpoena is already aware, and that he can identify with reasonable particularity.

Similarly, a trial subpoena cannot be used to expand the discovery available under existing law. *Matter of Terry D.*, 81 N.Y.2d at 1044. In New York, the parameters of what can be discovered in a criminal action are set by statute. See generally, *People v. Colavito*, 87 N.Y.2d 423. 427 (1996); *People v. DaGata*, 86 N.Y.2d 40, 44 (1995*); Matter of Miller v. Schwartz*, 72 N.Y.2d 869, 870 (1988). "As a general rule, discovery which is unavailable pursuant to statute may not be ordered." *Matter of Sacket v. Bartlett,* 241 A.D.2d 97, 101 (3rd Dept 1998), *leave den'd*, 92 N.Y.2d 806 (1998); *People v. Arthur*, 175 Misc.2d 742, 757 (Sup. Ct., New York County 1997). The matters a prosecutor can automatically discover are enumerated in C.P.L. §240.30 and 340.30. The matters he can seek by court order are set forth in C.P.L. §240.40.

Consistent with these principles, courts have routinely quashed subpoenas that seek discovery outside statutory parameters. See, e.g., *Matter of Brown v. Appelman*, 241 A.D.2d 279 (2d Dept 1998); *Matter of Kaplan v. Tomei*, 224 A.D.2d 530 (2d Dept 1996); *People v Hendrix*, 12 Misc.2d 447, 451 (Sup. Ct., Queens County 2006)(third-party subpoenas quashed on ground they afforded discovery that was outside the court's power to grant); *People v Norman*, 76 Misc.2d 644, 649 (Sup. Ct., New York County 1973)("A subpoena duces tecum should not be used to circumvent

limitations on discovery by either the prosecutor or the defendant and a subpoena for the production of material exempt from discovery should not be issued by the court").

More significantly, higher courts have found that prohibition lies where a judge grants a discovery application for which there is no statutory basis. *See, e.g., Matter of Brown v. Blumenfeld,* 296 A.D.2d 405, 406 (2d Dept 2002); *Matter of Pittari v. Pirro*, 258 A.D.2d 202, 207 (2d Dept 1999); *Matter of Sacket v. Bartlett,* 241 A.D.2d 97, 101 (3rd Dept 1998); *Pirro v. LaCava*, 240 A.D.2d 909 (2d Dept 1996), leave den'd, 89 N.Y.2d 813 (1997); *Matter* of *of Hynes v. Cirigliano*, 180 A.D.2d 659 (2d Dept 1992). *See also Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 570-572 (1988) (prohibition granted where lower court dismissed criminal case on ground not authorized by statute).

Because Respondent's actions clearly exceeded his powers in a manner that implicates Harris' First Amendment rights, Harris is entitled to a judgment under Article 78, vacating Respondent's April, May and June Orders. Harris is further entitled to an Article 78 judgment, enjoining Respondent from affording the District Attorney the information and materials covered by the subpoena, to any extent and in any form.

B. Respondent Exceeded His Authority When He Entered Orders Under 18 U.S.C. 2703(d)

Respondent cannot evade the limitations on his powers under *Matter of Terry D, supra*, and C.P.L. §240.40 by resort to 18 U.S.C. §2703(d)

because a State governmental authority cannot obtain a court order under §2703(d) that is "prohibited by the law of such State." 18 U.S.C. §2703(d). Put another way, section 2703(d) expressly adopts the limits imposed by state law on a court's power to issue orders. An order that cannot be issued under state law cannot be issued under section 2703(d) either.

In addition, §2703(d) contains its *own* limitations on the issuance of orders under it. Two in particular are pertinent. First, by its express terms, an order under §2703(d)

> "shall issue only if the governmental entity offers specific and articulable facts showing that there are ***reasonable grounds to believe*** that the contents of a wire or electronic communication, or the records or other information sought, ***are relevant and material to an ongoing criminal investigation***."

18 U.S.C. §2703(d)(emphasis added). Second, the court issuing the §2703(d) order must be a "court of competent jurisdiction." *Id*. That term is defined as including "a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants." 18 U.S.C. §2711(3)(B).

In addition to transgressing the State's limits on his powers, Respondent also transgressed these limits. Thus, he issued an order under §2703(d) even though there was ***no*** "ongoing criminal investigation" and, thus, no "reasonable grounds to believe" that the communications and information being sought were "relevant and material" to such an investigation.

Moreover, insofar as these particular §2703(d) Orders are concerned, the court in which Respondent sat was not a "court of competent jurisdiction." This is necessarily so because, under New York's Criminal Procedure Law, a local criminal court is only given the power to issue search warrants "under circumstances prescribed in this article." C.P.L. §690.05(1). Those circumstances include a geographic restriction. A local criminal court is only authorized to issue a search warrant that "may be … executed … in the state," C.P.L. §690.20(1), and it must have "geographical jurisdiction over the location to be searched when the search is to be made for personal property of a kind or character described in section 690.10 ….". C.P.L. §§690.35(2)(a), 690.10(4).

Here, the location to be searched is in California, and the prosecution alleges the property to be searched for is of the kind described in C.P.L. §690.10(4). Under these circumstances, Respondent's court is not authorized by the law of New York to issue to issue a search warrant and, thus, is not a "court of competent jurisdiction" for purposes of 18 U.S.C. §2703(d).

Because Respondent's actions in nonetheless issuing orders under §2703(d) implicate Petitioner's First Amendment rights, Petitioner is entitled to a judgment under Article 78, vacating them and enjoining Respondent from affording the District Attorney the discovery he seeks in any form.

C. Respondent Threatens To Exceed His Authority And Further Violate Harris' Rights By Undertaking An *In Camera* Inspection.

The point is self-evident: By his Orders, Respondent not only afforded the District Attorney discovery to which he was not entitled under the CPL, he authorized the District Attorney to engage in a fishing expedition. The "fish" he was authorized to trawl for and catch included information and materials – tweets, DMs, log and location data – that implicate Harris' privacy rights and rights of speech and association.

By promising to conduct an *in camera* review, Respondent does not thereby avoid any constitutional infirmity. Rather, he thereby joins the fishing party and, perhaps, makes himself the principal means by which the constitutional violations are effected.

Because Respondent's promise to root around among any materials Twitter produces implicates Harris' First and Fourth Amendment rights, Petitioner is entitled to a judgment under Article 78, vacating Respondent's Orders and enjoining Respondent from requiring that such materials be produced for his *in camera* review.

II. HARRIS IS ENTITLED TO AN INJUNCTION AGAINST APPLICATION OF THE THIRD PARTY DOCTRINE OR A DECLARATION AS TO ITS INAPPLICABILITY

In his April 10th and June 30th Decisions, Respondent concluded that Harris lacked standing to mount any challenges to the trial subpoenas because of the 'third party doctrine.' That doctrine derives from *United States v. Miller*, 425 U.S. 435 (1976).

In *Miller*, the defendant moved to suppress copies of bank records that two banks had produced in compliance with a subpoena *duces tecum*. He claimed that because the subpoena was defective, the production of the records was in violation of the Fourth Amendment. The Supreme Court disagreed. It analyzed the question from two vantage points. It asked first whether the defendant had any proprietary or property interest in the records, 425 U.S. at 437, 440, and, second, whether he had any "legitimate expectation of privacy concerning their contents." 425 U.S. at 442.

It held that he had no property interest because the records were not his "private papers," but rather the "business records of the banks," 425 U.S. at 440, and no legitimate privacy expectation because "the documents … contain only information voluntarily conveyed to the banks … in the ordinary course of business." 425 U.S. at 442. By thus consciously revealing his affairs to another person, the Court stated, "[t]he depositor takes the risk … that the information will be conveyed by that person to the Government." 425 U.S. at 443. Finding that there were no Fourth

Amendment interests of the depositor implicated, the Court held the case was governed "by the general rule that the issuance of a subpoena to a third party to obtain ***the records of that party*** does not violate the rights of a defendant …". 425 U.S. at 444 (emphasis added). *Accord*, *People v. Doe*, 96 A.D.2d 1018 (1st Dept 1983)("[b]ank records … belong to the bank;" "[t]he customer has no proprietary or possessory interests in them").

It is clear on the face of the Supreme Court's decision in *Miller* that it did not intend the rule it announced to apply to all information in the hands of third parties. Rather, it clearly contemplated the rule would ***not*** apply in each of two circumstances: (1) where the target of the subpoena had a legally "protectable" interest in the information or materials; and/or (3) where the information or materials implicated his First Amendment interests. 425 U.S. at 444 n. 6.

The case before it, the *Miller* Court insisted, did not have any ramifications under the First Amendment. It did not present the "situation in which the Government, through 'unreviewed executive discretion,' has made a wideranging inquiry that unnecessarily 'touch[es] upon intimate areas of an individual's personal affairs." 425 U.S. at 444 n. 6. It did not present the situation in which there was an "improper inquiry into protected associational activities." *Id*. And, the defendant did not "contend that the subpoenas infringed upon his First Amendment rights." *Id*.

This case stands in stark contrast. Harris not only has protectable interests in the content and noncontent information being sought, the case squarely implicates his First Amendment interests. The banking records rule is therefore not applicable.

A. Harris Had Protectable Interests In The Information Sought By The Subpoenas

1. Harris Had A Protectable Interest In Location And Call-Identifying Information

As Twitter's privacy policy forthrightly acknowledges, the "log data" it collects it collects "automatically." Some of the information it collects is automatically generated by the use of Twitter's services. (Exh. 14-D at p. 28, noting that "Our servers automatically record information ("Log Data") created by your use of the services"). Other information is automatically generated by a Twitter user's use of their mobile phone or other electronic device.

In either event, the information that Twitter collects is not information that has been consciously created for Twitter and conveyed to it by its users. It is information of whose existence users are very likely unaware and over the creation of which they have no control. It is information electronic devices are programmed to generate and transmit whether or not those who own the devices consent.[8]

[8] The industry has programmed devices in this fashion in order to comply with the CALEA, 18 U.S.C. §§ 1001-1010. That Act requires telecommunications carriers to configure their systems so as to enable law enforcement to "intercept" calls and obtain "call-identifying information." U.S. Telecommunications Ass'n v. F.C.C., 227 F.3d 450, 453 (D.C.Cir. 2000).

Because ordinary citizens have neither knowledge nor control over the nature and extent of the personal data that is generated, they can hardly be said to have consciously assumed the risk that it will be disclosed to the government. *See, e.g., In re U.S. for Historical Cell Site Data*, 747 F.Supp.2d 827, 840-845 (S.D.Tex. 2010). Equally significantly, because Harris did not consciously and affirmatively send Twitter location, log or session data, he retains a protectable privacy interest in the "noncontent information" ordered turned over by Respondent.

Although it does so strictly in the context of mobile phone service, the Communications Assistance for Law Enforcement Act or "CALEA," 18 U.S.C. §§ 1001-1010, implicitly recognizes the legitimacy of this argument. It does so (1) by recognizing that mobile phone service customers have a legitimate privacy interest in "customer proprietary network information" or "CPNI," 47 U.S.C. §222(c),[9] (2) by requiring carriers not disclose the information, except in very limited circumstances, *id.*, and (3) by providing that customers "shall not be considered to have approved the use or disclosure of or access to … call location information" except in connection with emergency services, notwithstanding that, technically, they may have provided the carriers the information. 47 U.S.C. §222(f)(1) and (d)(4).

There is no reasonable basis upon which it can be decided that Twitter users have any less protectable a privacy or proprietary interest in log and

[9] The term "customer proprietary network information" is defined in 47 U.S.C. §222(h)(1)(A). It is roughly equivalent to much of the "noncontent information" ordered disclosed by Respondent.

location data than mobile phone customers have in CPNI. In any event, when a Twitter user accesses Twitter via his mobile phone, presumably CPNI, location data and "noncontent information" overlap. In that circumstance, it is inconceivable that the same information that is customer proprietary network information in the hands of telecommunications carriers becomes third party proprietary information in the hands of a service provider or social media site. Information that belongs to the customer in the carrier's hands must likewise belong to him in the hands of a service provider or social media site.

2. Harris Had Protectable Interests In The Contents Of His Communications

a. He Had A Proprietary Interest

In his April 20, 2012 Decision, Respondent repeatedly states that Harris has no proprietary interest in the tweets he posted to Twitter between September 15, 2011 and December 31, 2011. (Exh. 10 at p. 4)("defendant has no proprietary interests in the @destructuremal account's user information and Tweets"). Respondent bases his claim on Twitter's terms of service (Exh. 17 at p. 3) and the "non-exclusive, royalty-free license" in his DMs and tweets that Harris gave Twitter. (Exh. 10 at p. 4).

Respondent's theory is that, by posting the communications he authored, Harris "gifted … [them] to the world." (Exh. 17 at p. 6). Thereafter, they "were not his." (Exh. 10 at p. 4). He had no proprietary

interest in them. (Exh. 17 at pp. 3, 6). They "were, by definition public." (Exh. 10 at p. 6).

Respondent is unequivocally wrong. As the person who authored his DMs and tweets, Harris is, by law, the person in whom copyright initially vested. 17 U.S.C. §201(a). As the owner of copyright in those works, he held the exclusive rights enumerated in 17 U.S.C. §106. He could publicly display, reproduce, distribute or adapt any of his works *or* choose not to. He could exploit his works in certain ways and for certain periods of time, but not others. And, he could choose whether to exercise all of these rights by himself or whether to authorize others to exercise certain of them. If he chose the latter course, he could further choose who to authorize to exercise which rights, for how long and on what conditions.

Harris did not divest himself of these rights or of preeminent control over his DMs and tweets by giving Twitter *a* ***non-exclusive*** license. This is true for two reasons.[10] First, because giving someone a non-exclusive license does not effect a "transfer" of copyright or any of the exclusive rights under it. 17 U.S.C. §101 (definition of "transfer of copyright"). Second, because only someone who holds an ***exclusive*** right in a work "is entitled … to all of the protection and remedies accorded to the copyright owner by this title." 17 U.S.C. §201(d)(2).

[10] It is also confirmed by 17 U.S.C. §512(c), which clearly recognizes the continuing responsibility of users for user-generated content. If posting transferred ownership or all proprietary interest, the regime set up by §512 would make no sense.

If the copyright in a DM or tweet is infringed, it is only the person who holds the copyright or one or more exclusive rights who has standing to institute an action for infringement.[11] 17 U.S.C. §501(b). Accordingly, Harris would have standing. Twitter would not.[12]

Harris would also be the only one with standing to complain of a violation of 17 U.S.C. §201(e). Section 201(e) provides:

> When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

17 U.S.C. §201(e).

Of course, the question *here* is not whether the State or state law enforcement officials have infringed or are threatening to infringe Harris' copyrights or to violate §201(e). The *only* question is whether Harris retains a sufficient proprietary interest in his works to complain of constitutional, common law, ECPA and CPL violations. Since Harris' proprietary interests

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[11] A State, state official, employee or instrumentality of a State is liable for infringement in the same manner and to the same extent as a private person. 17 U.S.C. §§501(a) and 511(a).

[12] Twitter would only have standing if the copyright in its compilation or collective work were *also* infringed. In that event, both Harris and Twitter would be able to sue. In the case where only the copyright in the individual tweets is infringed, only Harris would have standing as a matter of right. Twitter could either join with Harris in bringing suit or ask the court for permission to intervene.

have not been diminished by Twitter's non-exclusive license, the answer is an unequivocal "Yes."

b. He Had A Privacy Interest

In addition to a proprietary interest, Harris also had and has a legitimate privacy interest in his communications. After all, his "direct messages" were never made public, and his tweets between September 15 and December 30, 2011 are no longer so.

It does not matter that the tweets that are being sought and that have been ordered to be disclosed were *once* public. In Justice Marshall's words, "[p]rivacy is not a discrete commodity, possessed absolutely or not at all."[13] It is *not* the same thing as secrecy. Rather, like copyright, it is divisible. We can choose to share different aspects of our personality or different thoughts and beliefs with different circles of friends, family and acquaintances. We can even choose to share the same thoughts and beliefs to differing degrees with different persons.

> Perhaps, Professor Taslitz best described why privacy matters to us: Identity is complex … Each of us wears many masks wherein each mask reflects a different aspect of who we really are. We do not want our entire natures to be judged by any one mask, nor do we want partial revelations of our activities to define us in a particular situation as other than who we want to be. In short, we want to choose the masks that we show to others; any such loss of choice is painful, amounting almost to a physical violation of the self. When we are secretly watched, or when information that we choose to reveal to one audience is instead exposed to another, we lose that sense of choice.

[13] *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting).

Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 Law & Contemp. Probs. 125, 131 (2002).

Our privacy interest in certain information is not extinguished, therefore, simply because we share it at one point in time or with one group of people. Rather, we retain a legitimate interest in determining whether, "when, how, and to what extent … [to share that same] information" with others. 21 Alan F. Westin, *Privacy and Freedom* 7 (1967).[14]

Applying this concept, it becomes ineluctably clear that Harris had a legitimate privacy interest in both his DMs and his tweets.

B. The Information And Materials Implicated Harris' First Amendment Rights

We have already demonstrated in considerable detail that the information and materials the subpoenas sought and Respondent's June 30th Order requires be turned over seriously implicate Petitioner's rights of speech and association. See Memo of Law, *ante* at pp. 8-14.

In sum: Harris has a proprietary interest in the information and materials sought by the subpoenas and Orders. He also has a privacy interest in those same information and materials. By the same token, both

[14] See also 23 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890)(where Brandeis defines privacy as the individual's "right of determining … to what extent his thoughts, sentiments, and emotions shall be communicated to others"). It is this concept of privacy that the social media sites are built upon, not the all-or-nothing paradigm.

the content and noncontent information sought implicate his First Amendment Rights.

For each of these three independently sufficient reasons, the third party doctrine does not apply to this case.

III. HARRIS IS ENTITLED TO AN ARTICLE 78 JUDGMENT IN THE NATURE OF MANDAMUS

Recognizing that the third party doctrine is not applicable to Harris' case is not the same thing as answering the question: Does Harris have standing to challenge the subpoenas and Orders?

Thankfully, that question is not hard to answer. It can be answered by the straightforward application of well-established and clearly defined "tests" for standing. Each test varies with and is determined by the substantive law.

While the tests vary somewhat, the answer does not: Harris unquestionably had standing to move to quash the subpoenas under each of the laws he invoked.

Because, in each instance, Harris' standing was clear, he is entitled to judgment compelling Respondent to reach and rule on the substance of each of his legal challenges.

A. Respondent Should Be Compelled To Reach & Rule On The Substance Of Harris' Challenges Under The Fourth Amendment And Art. I, Sec. 12.

Since at least 1979, the Supreme Court has been uniform in holding that whether someone has standing under the Fourth Amendment depends upon whether he "can claim a 'justifiable,' a 'reasonable' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). This inquiry – which is

derived from Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967), has been understood as embracing two discrete questions:

> The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," 389 U.S., at 361 – whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private." *Id.*, at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as `reasonable,'" *id.*, at 361 — whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Id.*, at 353.

442. U.S. at 740.

Harris clearly met both branches of the standing inquiry. Respondent acknowledged Harris satisfied both branches, and the United States Supreme Court recently confirmed the reasonableness of recognizing a privacy interest in locational data. The reasonableness of recognizing an expectation of privacy in the contents of communications was long ago recognized in *Katz v. United States*, 389 U.S. 347 (1967) and *Alderman* v. *United States*, 394 U. S. 165, 176 (1969).

1. Fifth Cause of Action

Respondent explicitly acknowledged that Harris had a subjective expectation of privacy in his Twitter account. (Exh. 10 at p. 4)(even calling that expectation, "understandable"). And, Respondent implicitly acknowledged society is prepared to accept that expectation as "reasonable." (Exh. 10 at pp. 5 and 3)(where Respondent acknowledges it is "widely believed" among 140 million Twitter users that a disclosure

of information regarding their account will only be made *with their approval*).

As if the judgment of 140 million Twitter users weren't enough, Respondent adds his own vote of confidence in the reasonability of such an expectation to the public groundswell. Thus, even after pronouncing the Twitter users' belief in the sanctity of their accounts legally unsustainable, Respondent goes on to assure everyone that any information and materials regarding Harris' account will be examined *in camera*. (Exh. 10 at p. 11; Exh. 17 at p. 11). Respondent explains he is taking this precaution to safeguard Harris' "privacy rights." (Exh. 17 at p. 2). Respondent thereby reflexively and forcefully confirms society's view that Harris' privacy expectations are reasonable.

2. Sixth Cause of Action

To prove a violation of the Fourth Amendment, a party must prove: (i) that he has a reasonable expectation of privacy in the area or item examined;[15] (ii) that the government subjected it to a "search," and (iii) that the "search" was "unreasonable."

While the Justices in *United States v. Jones*, 565 U.S. 945 (2012), disagreed on the second factor, they agreed on the first. That is, while they disagreed as to the nature of the "search" that was conducted,[16]

[15] As previously indicated, this element of proof has two components – a subjective component and an objective component.

[16] The majority defined the search as being comprised of the physical attachment of the GPS to the underside of the car *and* the subsequent monitoring of the vehicle's movements.

they agreed on the extent of the privacy interests being infringed. Put another way, they agreed that Jones had a reasonable expectation of privacy in the overall movements of the car being monitored.

The concurrences state this explicitly. *See Jones* , 565 U.S. at 964 (Alito's concurrence)(wherein Justice Alito notes that "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period"); 565 U.S. at 956 (Sotomayor's concurrence)(wherein Justice Sotomayor further notes that "[a] car's movements … are it's owner's movements" and that "[o]wners of GPS-equipped cars and smartphones do not contemplate that these devices will be used to enable covert surveillance of their movements").

Although not quite so explicitly, by necessary implication the majority states the same thing. Thus, Justice Scalia posits a Fourth Amendment violation in the *Jones* case that consists of two parts:

> The installation of the GPS + the obtaining of information regarding the car's movements

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(*Jones*, 565 U.S. at 949)("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search"). Justice Alito's concurrence defined the search as solely being "the *use* of a GPS for the purpose of long-term tracking." (565 U.S. at 961). Justice Sotomayor embraced both definitions. She agreed that the only principle needed to decide the case before them was that a search occurs "[w]hen the Government physically invades personal property to gather information." (565 U.S. at 955). However, she also agreed with Alito's concurrence that "longer term GPS monitoring in investigations of most offenses" would constitute a search. (565 U.S. at 955).

It is the conjuncture of these two injuries, Justice Scalia repeatedly emphasizes, that violated Jones' constitutional rights. 565 U.S. at 949, 950 n.3, 951. The GPS installation, alone, would not have sufficed. 565 U.S. at 952 n.5.

It necessarily follows that the activities that violated Jones' "reasonable expectation of privacy" included the monitoring, as well as the installation of the device. *Katz,* 389 U.S. at 360 (Harlan's concurrence)(a Fourth Amendment violation occurs when government officers violate a person's reasonable expectation of privacy)*, Bond v. United States*, 529 U. S. 334 (2000); *California* v. *Ciraolo*, 476 U. S. 207 (1986); *Smith* v. *Maryland*, 442 U. S. 735 (1979). It further follows that Jones had a reasonable expectation of privacy in the aggregated movements of the car he drove.

Whether the *Jones* majority will ever find that *non-intrusive* electronic monitoring constitutes an unreasonable search in violation of the Fourth Amendment is not clear. What is clear is that a person who has been subjected to such monitoring has standing to litigate the Fourth Amendment issues. All nine Justices would appear to be agreed on this point.

Harris' standing is therefore clear under both the Fourth Amendment and Article I, §12. As a consequence, he is entitled to an Article 78 judgment, compelling Respondent to reach and rule on his Fourth Amendment and Article I, section 12 challenges.

B. Respondent Should Be Compelled To Reach & Rule On The Substance Of Harris' Challenges Under The First Amendment And Art. I, Sec. 8.

Any person whose rights of speech or association are implicated by a subpoena directed to a third party has standing to challenge it under the First Amendment, before the subpoenaed information and materials are turned over. *See, e.g., Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975); *Gravel v. United States*, 408 U.S. 606, 608-609 (1972); *Pollard v. Roberts*, 283 F.Supp. 238, 258-259 (E.D. Ark. 1968)(three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968); *Perlman v. United States*, 247 U.S. 7, 12-13 (1918); 111 F.3d 1066, 1073 (3d Cir. 1997); *Brock v. Local 375, Plumbers Int'l Union of America*, 860 F.2d 346, 349 (9th Cir. 1988); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1234 (11th Cir. 1988); *Grandouche v. United States* (*In re First Nat'l Bank*), 701 F.2d 115, 117-119 (10th Cir. 1983); *Local 1814, Int'l Longshoremens' Ass'n., AFL-CIO, v. Waterfront Commission of New York Harbo*r, 667 F.2d 267, 271 (2d Cir. 1981); *Velsicol Chemical Corp. v. Parsons*, 561 F.2d 671, 674 (7th Cir. 1977).

As we have already demonstrated, Harris' freedoms of speech, beliefs and association were clearly implicated by the District Attorney's subpoenas and Respondent's Orders. (*See* Mem. at pp. 8-14, *ante*). Harris' standing is therefore clear under both the First Amendment and Article I, §8. As a consequence, he is entitled to an Article 78 judgment, compelling

Respondent to reach and rule on his First Amendment and Article I, section 8 challenges.

C. Respondent Should Be Compelled To Reach & Rule On The Substance Of Harris' Challenges Under The Electronic Communications Privacy Act.

As the United States Court has recently had occasion to reiterate, under the Supremacy Clause:

> … federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law 'together form one system of jurisprudence, which constitutes the law of the land for the State…'

Haywood v. Drown, 556 U.S. 729, 734 (2009). It is therefore appropriate to apply the substantive law of the State to determine whether Harris had standing under the federal statute to challenge the subpoenas and Orders.

Under state law, the issue of whether a party has standing to claim the benefit or protection of a statute is determined by whether the interests he is seeking to protect are arguably within the zone of interests protected by the statute. *See, e.g., Matter of District Attorney*, 58 N.Y.2d 436, 442 (1983)("the contemporary rule is that a party has standing to enforce a statutory right if its abuse will cause him injury and it may fall within the 'zone of interest' protected by the legislation"); *Dairylea v. Walkley*, 38 N.Y.2d 6, 9 (1975); *In re State v. Christenson*, 77 A.D.2d 174, 185 (2d Dept 2010)(defendant, not Town Justice, would have had standing to challenge

delegation of power to prosecute).[17] This test is commonly referred to as the "zone of interests" test. It is clearly met where either (i) the party invoking the statute is within the class of persons the statute was intended to benefit, or (ii) where that class of persons must be relied upon to challenge disregard of the law.

Since the test was formulated in order to enable standing to be decided "without … dealing with the merits" of a particular action, 38 N.Y.2d at 9, the determination is made based on the party's averments and either the language of the statute or its legislative history.[18] "Only where there is a clear legislative intent negating review … or lack of injury in fact … will standing be denied." *Matter of District Attorney*, 58 N.Y.2d at 442 (quoting from *Dairylea*, 38 N.Y.2d at 11).

It cannot be denied in this instance. Harris clearly had standing under the Stored Communications Act, 18 U.S.C. §§2701 et seq. He was within the class of persons clearly intended to be benefitted by the Act – i.e., users of an "ECS" whose communications are now in electronic storage. See, e.g., 18 U.S.C. §§2701(a), 2701(c)(2), 2702(a)(1), 2702(a)(3); 2703(a), 2703(c), 2703(d), 2707(f), and 2707(a).[19] He would suffer an injury in

[17] The test would be the same in any event since the "zone of interests" test is also the federal test for statutory standing. *See generally*, *Association of Data Processing Service Organizations, Inc*. v. *Camp*, 397 U.S. 150, 153-157 (1970).

[18] Legislative history should only be referred to, of course, where the language of the statute is ambiguous.

[19] The New York Court of Appeals came to a similar conclusion in a related context. Thus, it held that the principle of grand jury secrecy protects both those who give confidential testimony or make confidential communications and those whom such communications concern. *Matter of District Attorney of Suffolk County*, 58 N.Y.2d 436, 443 (1983)(the time-

fact were his DMs, tweets, log and location data disclosed. (See, e.g., Pet. at ¶¶ 30-45; Mem. at pp. 8-14, *ante*). He is a member of the class that can be relied upon on to challenge disregard of the law. (Pet. at ¶¶ 249- 253). And, Congress cannot be said to have clearly negated judicial review.

Of the three classes of persons benefitted by the Act, only users and subscribers satisfy all these criteria with respect to challenges mounted under the statutory provisions cited above. Neither an ECS or a government agency can satisfy these criteria because

- they are not benefitted by 18 U.S.C. §§2701(a), 2701(c)(2), 2702(a)(1), 2702(a)(3); 2703(a), 2703(c), and 2703(d); those provisions place restrictions on them,[20]
- they would not suffer an injury-in-fact were those provisions to be violated; and
- they cannot be relied upon to challenge their own disregard of those laws.

Indeed, as we have already indicated, it is not simply that an ECS does not meet the criteria for standing. (Pet. at ¶¶ 249-252). It is required by §2703(g) to serve as the government's agent and, thus, cannot be expected to challenge the government on its users' behalf. The only class of persons

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honored Grand Jury secrecy principle applies equally to protect "either one who gives evidence or to one concerning whom evidence is given").

[20] For example, 18 U.S.C. §2702(a)(1) forbids an electronic communications service, except in very limited circumstances, from "knowingly divulg[ing]" the *contents* of any communications it holds in storage. Section 2702(a)(3) forbids it from "knowingly divulg[ing]" *non*content information.

that can be relied upon to challenge disregard of the cited provisions is the class of users and subscribers to which Harris belongs.

In sum, Harris had and has a clear legal right under the Stored Communications Act to assert the challenges he has. As a consequence, he is entitled to an Article 78 judgment, compelling Respondent to reach the substance of his challenges and to rule on their merits.

D. Respondent Should Be Compelled To Reach & Rule On The Substance Of Harris' Challenges Under The Criminal Procedure Law.

The same test for standing applies, and the same results should obtain. See, e.g., *Matter of District Attorney of Suffolk County*, 58 N.Y.2d 436 (1983)(applying the "zone of interest" test). Harris clearly had standing to challenge the subpoenas and Orders as violative of the provisions and limits of Criminal Procedure Law §§240.30, 240.40, 340.30 and 610 and 640.10.

He is an intended beneficiary of the limits embodied in and reflected by those provisions, and has asserted interests the limits were intended to serve. (Pet. at ¶¶ 110-136; Mem. at pp. 14–17, *ante*). He will suffer an injury-in-fact if the terms and limits of those provisions are violated. (Mem. at pp. 8–14, *ante*). Only defendants can be relied upon to challenge the disregard of these provisions. See, e.g., CPL §§240.30, 240.40, 340.30, and 610.10(3).

Clearly the government cannot be relied upon to challenge its own actions, and Twitter is a stranger to the provisions. It has no stake of its own in their enforcement and should not be compelled to stand in for and vindicate each of its users' rights. [21]

Finally, the Legislature cannot be said to have clearly negated judicial review.

Because Harris had a clear right to move to quash under the Criminal Procedure Law, he is entitled to an Article 78 judgment, compelling Respondent to reach and rule on his challenges under the Criminal Procedure Law.

E. Respondent Should Be Compelled To Reach & Rule On The Substance Of Harris' Challenges At Common Law.

Historically, standing has been seen as ensuring that the person before the court has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult … questions." *Baker v. Carr*, 369 U.S. 186, 204 (1982). *See also Schlesinger v. Reservists To Stop The War*, 418 U.S. 208, 220 (1974)(explaining why concrete injury or injury-in-fact is the *sine qua non* of standing).

Here, Respondent turned the principle of standing on its head. He denied standing to the one party that had a personal stake in the outcome of

[21] The only one of these provisions Twitter would have its own stake in enforcing would be CPL §640.10.

core issues before the Court, and accorded it to someone *without that stake* who, therefore, *could not* present those issues. Respondent thereby assured there was no one with standing to present them and significant governmental acts were insulated from scrutiny.

Petitioner therefore had standing to litigate his common law challenges based upon two separate principles. He unquestionably had standing based upon the principle that "where to deny standing to … [the party before it] would be to insulate governmental action from scrutiny," a court will recognize that party's standing. See *Society of Plastics v. Suffolk*, 77 N.Y.2d 761, 779 (1991)(alt. holding on the facts); *Matter of Har Enterprises v. Town of Brookhaven*, 74 N.Y.2d 524, 529 (1989); *Bradford School v. Ambach*, 56 N.Y.2d 158, 164-165 (1982)(where a "failure to accord … standing would … in effect … erect an impenetrable barrier to any judicial scrutiny," standing should be recognized); *Boryszewski v. Brydges*, 37 N.Y.2d 361 (1975)(since the judicial process is the classical means for effective scrutiny of governmental action, "[i]t is unacceptable … by any process of … quarantine to exclude the very persons most likely to invoke its powers").

Harris also clearly had standing based on the traditional test for standing recognized at common law. Under that test, a motion to quash a judicial subpoena *duces tecum* is to be "made by the adversely affected and interested person and not by strangers to the litigation." *People v.*

Grosunor, 108 Misc.2d 932, 935 (Criminal Court of the City of New York, Bronx County 1981). A defendant is clearly covered by this rule:

> The right of the defendant and the witnesses subpoenaed to challenge the compulsion of the process served prior to the production of the records demanded cannot seriously be questioned. * * * In situations where witnesses served with subpoenas are not parties, nevertheless, upon a claim of privilege, the defendant being the party principally concerned by the adverse effect of the subpoenas served upon the witnesses and being the `party whose rights are invaded by such process may apply to the court whose duty it is to enforce it, or to set it aside if it is invalid'".

Beach v. Oil Transfer Corp., 23 Misc.2d 47, 48 (Sup. Ct, Kings County 1960).

Here, Harris' common law rights, as well as his rights under a variety of constitutional and statutory provisions, were invaded by the subpoenas. Accordingly, his right at common law to apply to the court to quash the Court's process was unquestionable. Because Harris had a clear right to move to quash, he is entitled to an Article 78 judgment, compelling Respondent to reach and rule on his common law challenges to the subpoenas and Orders.

CONCLUSION

Based upon each of the above independently sufficient arguments, Petitioner Harris' petition should be granted in full. He should be granted one or another of two judgments under Article 78.

Either, he should be granted a judgment, vacating Respondent's Decisions & Orders and enjoining Respondent from in any way and to any extent affording the District Attorney access to the information and materials

he sought pursuant to the trial subpoenas. Alternatively, Petitioner should be granted a judgment, vacating Respondent's Decisions & Orders and requiring Respondent to reach and rule on the merits of each of the challenges Harris has leveled at the subpoenas and Orders.

Submitted By,

Martin R. Stolar, Esq.
351 Broadway, 4th Floor
New York, N.Y. 10013
(212) 219-1919
Mrslaw37@hotmail.com

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Emily M. Bass, Esq.
551 Fifth Avenue, 28th Floor,
New York, N.Y. 10176
(646) 810-3117
emilybassesq@gmail.com

Attorneys for Petitioner Harris