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# New York State Supreme Court
# Appellate Division – First Department

Supreme Court Index No. 30207-13

IN RE 381 SEARCH WARRANTS
DIRECTED TO FACEBOOK, INC. AND
DATED JULY 23, 2013

**BRIEF OF *AMICI CURIAE* FOURSQUARE LABS, INC., KICKSTARTER, INC., MEETUP, INC., AND TUMBLR, INC. IN SUPPORT OF APPELLANT FACEBOOK, INC.**

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## INTEREST OF *AMICI CURIAE*

*Amici Curiae* Foursquare Labs, Inc., Kickstarter, Inc., Meetup, Inc., and Tumblr, Inc. (collectively, "New York Amici") are small and medium-sized online platforms located in New York City. Foursquare makes location-based applications that help users find their friends and discover interesting places and experiences nearby. As of May 2014, Foursquare had over 50 million users who have made over 6 billion "check-ins" and left over 55 million tips about places they have gone. Foursquare employs about 150 people in New York. Kickstarter is the world's leading platform for funding creative projects. Since Kickstarter launched in 2009, its platform has allowed 6.7 million backers to pledge over $1.2 billion in order to fund nearly 67,000 projects. Kickstarter has 88 employees working in its office in Brooklyn. Meetup is the world's largest network of local community groups, enabling people across the country and the world to find an existing Meetup group or start a new one. Meetup changes people's lives—and the cities and towns where they live—by connecting them around the things that matter in their lives. There are almost 18.3 million Meetup members and more than 168,000 Meetup groups. The company currently employs 125 people, the majority in downtown New York. Finally, Tumblr provides a platform for users to share their artwork, writing, photos, audio, and video with a worldwide audience.

Tumblr is home to over 197 million blogs and nearly 83 billion posts. Tumblr has 219 employees in New York.

In recent years, New York City has witnessed a tremendous growth in internet-based entrepreneurship.[1] Tech is now the city's second-largest job sector, and "New York City's share of the nation's private sector employment has reached its highest level in 20 years because of the growth of the tech/information sector."[2] Small and growing companies like New York Amici have been part of that development, and they therefore have a special interest in ensuring that the law in this State protects their rights and the rights of their users.

This appeal presents Facebook, Inc.'s challenge to bulk search warrants compelling it to disclose massive amounts of data associated with 381 of its users' accounts, coupled with a nondisclosure order indefinitely barring Facebook from informing those users of the search warrants. New York Amici regularly receive or anticipate receiving search warrants and other information requests from law enforcement agencies around the country. Some New York Amici are large

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[1] *See* Megan Rose Dickey and Jillian D'Onfro, "SA 100 2013: The Coolest People In New York Tech," BUSINESS INSIDER, Oct. 24, 2013, available at http://www.businessinsider.com/silicon-alley-100-2013-2013-10?op=1 (last visited August 7, 2014).

[2] Dr. Michael Mandel, "Building a Digital City: The Growth and Impact of New York City's Tech/Information Sector" at 2, Sept. 23, 2013, available at http://www.mikebloomberg.com/files/buildingadigitalcity.pdf (last visited August 7, 2014).

enough to have developed law enforcement guidelines, which they publish in an effort to make their response to government information requests transparent and efficient.[3] Although New York Amici comply with lawful information requests, their users expect that the privacy of their information will be protected and New York Amici are strongly committed to doing so by raising, where appropriate, objections to defective legal process. New York Amici also generally provide notice to users of information requests, which allows users to make their own decision (which might differ from New York Amici's independent legal decision) whether to object. Moreover, some smaller companies may lack the resources to fully litigate each search warrant or court order, which underscores the importance of providing users with notice and an independent opportunity to object. In short, from the perspective of small and mid-size online platforms like New York Amici, companies must be allowed to inform users of governmental information requests, and to challenge unlawful or improper search warrants on behalf of users—complete with the right to appeal adverse decisions.

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[3] *See, e.g.*, "Law Enforcement Data Requests," Foursquare Labs, Inc., available at https://support.foursquare.com/hc/en-us/articles/201066200-Law-Enforcement-Data-Request-Guidelines (last visited August 7, 2014); "Tumblr Law Enforcement Guidelines," available at http://www.tumblr.com/docs/en/law_enforcement (last visited August 7, 2014). Tumblr receives enough requests that it is able to publish a bi-annual "transparency report" that summarizes the nature, source, and outcome of various governmental requests for information. *See* Tumblr Transparency Reports, 2013 & January–June 2014, available at https://www.tumblr.com/transparency (last visited August 7, 2014).

## PRELIMINARY STATEMENT

The District Attorney of New York County obtained bulk search warrants under the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701–2712, directing Facebook to search and produce massive amounts of data contained in 381 user accounts. *See* Appellant's Br. at 22 n.6. In an order denying Facebook's motion to quash the search warrants, the Supreme Court (Melissa C. Jackson, J.) put Facebook—and by implication any recipient of an SCA search warrant—between a rock and a hard place. The Trial Court held that Facebook could *neither* disclose the existence of the search warrants to the users whose accounts were targeted *nor* itself raise a Fourth Amendment challenge to the warrants here—warrants that Facebook rightly insists are facially unconstitutional for lack of sufficient particularity. This holding puts internet-based companies, especially small and mid-size companies like New York Amici, in a double bind. To act as custodians of their users' private information, such companies must have the choice to either object to unlawful government intrusions or notify users of such intrusions. The Trial Court's order denying both options must be reversed.

New York Amici agree with Facebook's arguments challenging the Trial Court's troubling order. New York Amici focus on three issues of particular importance to small and mid-size online platforms based in this State.

*First*, the impact of the Trial Court's gag order falls especially hard on such companies. Companies like New York Amici make legal determinations about which search warrants and other information requests to challenge, and it is important that users also receive notice so that they may make their own independent determinations. Moreover, smaller, early-stage start-up companies may lack the resources to fully litigate the propriety of search warrants obtained under the SCA, making notice and an opportunity to object a critical protection for users. Prior restraints like the Trial Court's gag order are said to have a "freezing" effect on speech. Here, that freeze also threatens the willingness of users to participate in online platforms—fora for speech of all kinds—that small and mid-size companies offer, for fear that their private information will be obtained improperly and without their knowledge. For these reasons, online platforms must, as a general matter, be able to provide their users with notice and an opportunity to challenge any search warrants seeking their private information. Similarly, the SCA should be read to prohibit the imposition of a gag order unless a court has made particularized findings that the order is justified in the case before it.

*Second*, when they decide to do so, online platforms must be permitted to raise the Fourth Amendment rights of their users. As Facebook demonstrates, the law grants such companies third-party standing in these cases. Here, however, the Trial Court uncritically applied the limitations of Fourth Amendment "standing"—

familiar from a criminal defendant's motion to suppress evidence at trial—to Facebook's challenge to search warrants in a civil proceeding distinct from a potential future criminal trial. But the prohibition on a criminal defendant invoking the exclusionary rule unless his own Fourth Amendment rights have been violated rests on considerations particular to that rule—for example, the risk that "the criminal [will] 'go free because the constable has blundered.'" *Herring v. United States*, 555 U.S. 135, 148 (2009) (quoting *People v. Defore*, 242 N.Y. 13, 21 (1926) (Cardozo, J.). No such risk exists here. And many—in this case, it seems, most—of the users whose accounts are targeted may not be able to raise Fourth Amendment claims in their own right because they will not be indicted. Indeed, if the Government had its way, they would never even know about the intrusion. In these circumstances, it is appropriate for Facebook and similarly situated companies to invoke ordinary principles of third-party standing.

Moreover, online platforms like Facebook and New York Amici can assert their own Fourth Amendment rights because they own or rent the digital storage space where the information sought by a search warrant is stored. The Fourth Amendment applies to invasions of commercial premises. *Mancusi v. DeForte*, 392 U.S. 364, 367 (1968); *see also United States v. Leary*, 846 F. 2d 592, 596 (10th Cir. 1988) (corporation "has standing with respect to searches of corporate premises and seizure of corporate records."). And when the government invades a

property interest in a protected place, the holder of the property interest has suffered a violation of his Fourth Amendment rights without any need for additional inquiry into a reasonable expectation of privacy. *See United States v. Jones*, 132 S. Ct. 945 (2012) (placement of a GPS device on undercarriage of a car violated Fourth Amendment). The search and seizure at issue here is the digital equivalent of such an invasion. Many internet-based companies (including New York Amici) store their users' information either on servers they own or in storage space they rent from a "cloud computing" service. Such digital storage media are like filing cabinets or warehouse storage. Companies forced to divulge the contents of their digital storage incur a distinct Fourth Amendment injury, which they can raise in their own right.

*Finally*, the right to challenge search warrants in New York courts must include the right to appeal adverse judgments. And, as a matter of law, it does: Search warrants issued under the SCA are close cousins to subpoenas, which are immediately appealable even when issued in relation to a criminal investigation. Thus, "look[ing] to the true nature of the proceeding and to the relief sought," appeal is justified here. *Matter of Abrams*, 62 N.Y. 2d 183, 191 (1984). Moreover, from a practical perspective, the proceedings below are effectively concluded. Yet the Government insists that Facebook cannot immediately appeal. If not now, when? After a criminal prosecution—in which Facebook will not be a

party—is complete? The Government does not say, but its position implies that Facebook, and other similarly situated online platforms, would have no opportunity to appeal at all. That result is untenable. It is not only appropriate for this Court to allow immediate appellate review of motions to quash SCA search warrants; given the privacy and speech interests at stake, it is incumbent upon this Court to do so.

## ARGUMENT

### I. SEARCH WARRANTS SEEKING USER INFORMATION CANNOT REMAIN INDEFINITELY SEALED

The bulk search warrants the trial court issued to Facebook include a blanket gag order, "pursuant to 18 U.S.C. §270[5](b), . . . not to notify or otherwise disclose the existence or execution of [each] warrant/order to any associated user/account holder." A11–12.[4] There is no time limit on this gag order, which the Trial Court reaffirmed in denying Facebook's motion to quash. As Facebook explains, such an indefinite bar on disclosure is impermissible under both the SCA and the First Amendment. *See* Appellant's Br. at 39–43. New York Amici join those arguments, and add that gag orders of the kind issued by the Trial Court here effect a particular hardship on small and mid-size online platforms like New York

[4] References to "A" followed by a page number refer to the Appendix of Appellant Facebook. References to "Govt MTD" and "Serino Aff" refer to the Motion to Dismiss this appeal filed by Respondent and the Affirmation of Bryan Serino submitted in support thereof, respectively.

Amici. Moreover, to avoid constitutional invalidity, the SCA should be construed to require particularized findings before a court can impose a gag order beyond the point when the evidence sought has been preserved.

### A. The Trial Court's Gag Order Is Improper And Imposes A Particular Hardship On Small and Mid-Size Companies

Indefinite gag orders like the one the Trial Court issued "implicate [a search warrant recipient's] rights under the First Amendment because [they are] both a content-based restriction of speech and a prior restraint on speech." *In re App. of the United States of America*, No. 14-480, 2014 WL 1775601, at *2 (D.D.C. Mar. 31, 2014) (citing *In re Sealing*, 562 F. Supp. 2d 876 (S.D. Tex. 2008)). As other *amici* explain, the Trial Court's gag order cannot even pass muster under the strict scrutiny standard applicable to content-based speech restrictions, to say nothing of the even higher hurdle that prior restraints must surmount. *See* Brief of *Amici Curiae* Dropbox, Inc., et al., at 20–22; *see also In re Sealing*, 562 F. Supp. 2d at 882 ("In order to justify . . . a prior restraint, the government must demonstrate that (1) the activity restrained poses a clear and present danger or a serious and imminent threat to a compelling government interest; (2) less restrictive means to

protect that interest are unavailable; and (3) the restraint is narrowly-tailored to achieve its legitimate goal.").[5]

From the perspective of small and mid-size online platforms like New York Amici, however, prior restraints like the trial court's indefinite gag order are especially pernicious. Courts typically give a wide berth to First Amendment rights in order to prevent the chilling of protected speech, but where an ordinary restriction on speech chills, "prior restraint freezes." *In re Sealing*, 562 F. Supp. 2d 876, 882 n.11 (S.D.Tex. 2008) (quoting Alexander M. Bickel, THE MORALITY OF CONSENT 61 (Yale University Press, 1975)); *see also United States v. Brown*, 250 F. 3d 907, 915 (5th Cir. 2001) (Prior restraints "are constitutionally disfavored in

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[5] Since Facebook filed its appeal brief, the Government has sought and obtained unsealing orders permitting Facebook to notify all users that their accounts had been searched. *See* Serino Aff ¶¶ 4–5, 7–8, 10. This issue is not moot, however. For one thing, "jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one capable of repetition, yet evading review." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976) (internal quotation marks omitted); *see also Urban Justice Center v. Silver*, 66 A.D. 3d 567, 568 (1st Dept. 2009) (holding that exception to the mootness doctrine applied where "the issues raised by the appeal are likely to recur"). In *Nebraska Press Association*, the Supreme Court reviewed an order restricting media organizations from broadcasting or publishing accounts of a criminal trial, even though that order had expired by its terms. *See* 427 U.S. at 546. The Court observed in that case that Nebraska law "authorizes state prosecutors to seek restrictive orders in appropriate cases. The dispute between the State and the [media organizations] who cover events throughout the State is thus 'capable of repetition.'" *Id.* at 546–47. The same rationale applies here, since state and federal governments are likely to seek indefinite nondisclosure orders in the future. Indeed, one of New York Amici, Tumblr, received 177 requests from state and federal authorities from January through June 2014. *See* Tumblr Transparency Report January–June 2014 (*supra* n.3) at 6. Some 37% of those information requests were accompanied by a non-disclosure order. Thus, the dispute over the propriety of such gag orders is not only "capable of repetition," it is almost guaranteed to recur.

this nation nearly to the point of extinction."). And the freezing impact on companies like New York Amici is deep.

Small and mid-size companies do not always litigate the validity of governmental requests for information. A company might decide not to object because it does not perceive a defect in the warrant or other legal process, though the targeted user may have a different assessment. And smaller entities, such as start-ups and other developing companies, may not always have the resources to litigate. It is therefore critical that online platforms have the option to inform their users of governmental intrusions, prior to production, so that those users can decide for themselves whether to assert their rights. Indeed, unless silenced by a gag order, New York Amici generally pursue a policy of providing notice to users of a governmental request for information.[6] Such notice is often the *only* way users find out about a request. *Cf.* Justin P. Murphy & Adrian Fontecilla, *Social Media Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues*, 19 RICH. J.L. & TECH 11, 16 (2013) (giving an example of a case in which "the defendant was only able to move to quash the subpoena because Twitter's policy is to notify users of requests for their information prior to disclosure") (quotation marks omitted).

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[6] *See, e.g.*, Tumblr Transparency Report, January–June 2014 (supra n.3) at 9.

Such transparency not only furthers New York Amici's interest in open communication with their users, it ensures that users are willing to use their online platforms in the first place. Indefinite gag orders, on the other hand, discourage users from participating in online services, risking serious harm to small and mid-size online platforms that must compete for users in the industry. This economic harm is also a significant First Amendment harm—New York Amici, like other small and mid-size online platforms, provide a platform for valuable social, political, and cultural speech; when government discourages such speech, it threatens interests the First Amendment protects. *Cf. Bd. of Cnty. Comm'rs. v. Umbehr*, 518 U.S. 668, 674 (1996) (noting that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental efforts that fall short of a direct prohibition against the exercise of First Amendment rights") (alteration and quotation marks omitted).

In short, in light of the serious interest companies like New York Amici have in transparent communication with users, the prior restraint the Trial Court imposed here cannot be reconciled with the First Amendment.

### B. The SCA Must Be Interpreted To Avoid Violating The First Amendment

Section 2705(b) of the SCA authorizes courts to "comman[d] a provider of electronic communications service . . . to whom a warrant . . . is directed . . . not to notify any other person of the existence of the warrant" if a court "determines that

there is reason to believe that notification of the existence of the warrant . . . will result in" one of five threats to a government investigation, such as "destruction of or tampering with evidence" or "flight from prosecution." 18 U.S.C. § 2705(b), (b)(2), (b)(3). The Trial Court invoked its authority under Section 2705(b) of the SCA to issue its order, noting that "the court is permitted to mandate nondisclosure when the court finds that disclosure would" result in the "'destruction of or tampering of [sic] evidence.'" A7 (quoting 18 U.S.C. § 2705(a)(2)). Yet the Court made no factual determinations, instead glibly asserting that "[e]videntiary leads resulting from the Facebook material could be destroyed, removed or deleted" and that "[i]ndividuals of interest, suspects, or witnesses could flee or be intimidated." *Id.* The Court's glibness is particularly misguided given that online platforms— New York Amici included— comply with lawful preservation requests received from law enforcement.[7]

If the Trial Court's ipse dixit proclamation sufficed under the SCA to issue a gag order without particularized findings that it was justified, the SCA would violate the First Amendment. Section 2705(b) of the SCA authorizes courts to

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[7] *See, e.g.*, "Law Enforcement Data Requests," Foursquare, (*supra*, n.3) ("Foursquare will take steps to preserve a snapshot of then-existing account data in connection with a criminal investigation for 90 days, pending service of formal legal process."); "Tumblr Law Enforcement Guidelines," (*supra*, n.3) ("Tumblr will preserve account records, to the extent they are available, for 90 days upon receipt of a valid preservation request issued in accordance with applicable law.").

impose content-based speech restrictions. It must therefore be "justified by a compelling government interest and [be] narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (describing scrutiny applicable to content-based restrictions). Compelling though the government's interest in preventing the threats listed in Section 2705(b) may be, its "legitimate interest in the integrity of its investigation does not automatically trump First Amendment rights." *In re Sealing*, 562 F. Supp. 2d at 883. Strict scrutiny requires, among other things, that the government "specifically identify an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (quotation marks omitted). And the Trial Court made no findings that the government had met that burden here. For example, assuming the evidence sought is in fact preserved, there is no risk that it will be tampered with or destroyed. Without particularized findings that one of the threats listed in the SCA exists, the statute's authorization to restrict speech would not be narrowly drawn to serve the government's interest. *See, e.g.*, *Butterworth v. Smith*, 494 U.S. 624 (1990) (statute barring disclosure of grand jury testimony was unconstitutional as applied after grand jury had retired, in part because the government's interests were not advanced by the prohibition).

The SCA need not, and therefore should not, be construed to permit courts to issue gag orders without such particularized findings. *See, e.g.*, *United States v. Caronia*, 703 F. 3d 149, 160 (2d Cir. 2012) (invoking "the principle of

constitutional avoidance" to avoid a statutory "construction [that] would raise First Amendment concerns"). Section 2705(b) permits a court to issue gag orders if a court "determines that there is reason to believe that notification . . . *will* result" (emphasis added) in one of the enumerated threats. That language should be read to require concrete findings that the harm proffered by law enforcement to justify a gag order is certain, rather than merely theoretical. At a minimum, when the evidence sought has been preserved, this means a court must point to specific reasons why some other interest exists to maintain a gag order. A construction imposing that rule would be both permissible in terms of statutory language and consistent with the First Amendment.

## II. ONLINE PLATFORMS HAVE STANDING TO RAISE FOURTH AMENDMENT OBJECTIONS TO SEARCH WARRANTS ISSUED UNDER THE SCA

To the extent that online platforms like New York Amici intend to litigate the propriety of search warrants seeking user information, their position as holders of their users' private information requires that they be able to raise Fourth Amendment objections. Yet the Trial Court held that Facebook lacks Fourth Amendment standing because "it is the Facebook subscribers who could assert an expectation of privacy in their postings, not the digital storage facility, or Facebook." A6. This is incorrect for two reasons. Facebook, like most similarly situated online platforms, has third-party standing to raise the Fourth Amendment

objections of its users, many of whom—at least where a gag order is imposed—will have no idea the government has sought their information until after production. Moreover, companies have their own Fourth Amendment rights to assert—after all, they have a proprietary interest in the servers they own (or cloud computing space they rent), where they store user information. Either way, the companies are legitimate, logical parties to raise Fourth Amendment objections.

### A. Online Platforms Have Third-Party Standing To Assert The Fourth Amendment Rights Of Their Users

Under principles of third-party standing, a party may raise the rights of another when there is "some substantial relationship between the party asserting the claim and the rightholder"; it is "impossib[le] [for] the rightholder [to] asser[t] his own rights"; and there is a "need to avoid a dilution of the parties' constitutional rights." *New York Cnty. Lawyers' Ass'n v. State of New York*, 294 A.D. 2d 69, 75 (1st Dept. 2002) (permitting organization to raise third parties' rights to effective assistance of counsel). As Facebook has explained, it meets those requirements here. *See* Appellant's Br. at 24–25. Indeed, the same reasons will likely apply to most online platforms who seek to raise their users' Fourth Amendment rights with respect to warrants issued under the SCA.

But the Trial Court ignored these principles. Instead, and without analysis, the Trial Court applied the requirement of Fourth Amendment standing, developed

in the context of motions to exclude evidence for use in a criminal trial, to the circumstances here. That was done in error.

So-called Fourth Amendment standing is really "a matter of substantive [F]ourth [A]mendment law; to say that a party lacks [F]ourth [A]mendment standing is to say that *his* reasonable expectation of privacy has not been infringed." *United States v. Taketa*, 923 F. 2d 665, 669 (9th Cir. 1991); *see also People v. DiLucchio*, 115 A.D. 2d 555, 556 (2d Dept. 1985) ("Turning to the issue of 'standing', or more properly phrased, a basis to claim that one's own personal 4th Amendment rights were involved, . . . in order to have 'standing' to challenge a seizure, a defendant must demonstrate a reasonable expectation of privacy in the property seized.") (internal citation omitted). Because Fourth Amendment "standing" is really a merits question, it does not affect principles, like third-party standing, that govern who can assert the merits of a particular claim. In other words, whether or not a particular party can itself make out a Fourth Amendment claim is different from whether it can assert a claim on behalf of someone else. And, as explained above, New York law permits a party to raise the rights of another in certain situations (like the one here).

The strictures of Fourth Amendment "standing," on which the Trial Court relied, derive from cases where a criminal defendant sought to exclude evidence from trial. In those cases, the rule is that "[a] defendant seeking suppression of

evidence has the burden of establishing standing by demonstrating a legitimate expectation of privacy in the premises or object searched." *People v. Ramirez-Portoreal*, 88 N.Y. 2d 99, 108 (1996). This restriction rests on considerations particular to the exclusionary rule. Thus, in establishing the requirement of Fourth Amendment standing, the Supreme Court explained that "[c]onferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials" and "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights." *Rakas v. Illinois*, 439 U.S. 128, 138 (1978); *see also United States v. Calandra*, 414 U.S. 338, 348 (1974) ("[T]he application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."). The Court added that the person whose rights were violated would usually be able to either move to suppress the evidence against him or bring a civil suit. *See Rakas*, 439 U.S. at 134.

The context here is very different, and these prudential considerations do not apply. When companies like Facebook and New York Amici challenge search warrants issued under the SCA, there is no risk that, as courts have complained with respect to the exclusionary rule, "the criminal [will] 'go free because the constable has blundered.'" *Herring v. United States*, 555 U.S. 135, 148 (2009) (quoting *People v. Defore*, 242 N.Y. 13, 21 (1926) (Cardozo, J.). The company

moving to quash a search warrant is not seeking to suppress evidence; it is not under indictment. In fact, as in this case, the authorities may not have indicted *anyone* yet. Moreover, if it turns out that the company's objections are well-founded, say because the warrant is a facially invalid bulk search warrant, permitting the company to raise those objections *aids*, not hinders, a just prosecution. This is because, to the extent that a warrant is facially invalid, permitting legitimate objections ensures that, should prosecutors ultimately bring charges, the evidence on which they base those charges is procured lawfully.

Moreover, unlike the assumption the Supreme Court made in *Rakas*, many users whose privacy is violated will never be able to raise challenges on their own behalves. In this case, users of hundreds of Facebook accounts were never indicted, and the Trial Court ordered that they remain in the dark indefinitely. There was therefore no one other than Facebook to assert the interests of most of the users who were targeted.

In short, the Trial Court's rote application of Fourth Amendment "standing" improperly jammed a round peg into a square hole. The cases it relied upon arose from motions to suppress evidence in criminal trials. *See Ramirez-Portoreal*, 88 N.Y. 2d at 108 (cited at A5); *People v. Ortiz*, 83 N.Y. 2d 840, 842 (1994) (cited at A6). Yet, where Fourth Amendment claims arise outside of that context, courts evaluate the facts before them to determine whether the requirements of third-party

standing are met. *See Mia Luna, Inc. v. Hill*, No. 1:08-CV-585-TWT, 2008 WL 4002964, at *7 (N.D. Ga. Aug. 22, 2008) (permitting club owner to assert the Fourth Amendment rights of patrons stopped at roadblocks on an access road to the club); *Hometown Co-op. Apartments v. City of Hometown*, 495 F. Supp. 55, 57–58 (N.D. Ill. 1980) (permitting cooperative to make Fourth Amendment challenge to ordinance requiring inspection of cooperative property prior to sale or lease of units on behalf of prospective buyers and tenants); *see also Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 15–35 (D.C. Cir. 2010) (evaluating whether a son's Fourth Amendment claims could be asserted by his father under third-party standing and "next friend" doctrines); *Daly v. Morgenthau*, No. 98 CIV. 3299 (LMM), 1998 WL 851611, at *4 (S.D.N.Y. Dec. 9, 1998) (noting Fourth Amendment standing rule, but nonetheless evaluating whether third-party standing was appropriate in the circumstances). That is what the Trial Court should have done here.

### B. Online Platforms Have Standing To Raise Fourth Amendment Objections In Their Own Right

Not only do online platforms have third-party standing to assert the rights of users, but they have Fourth Amendment interests of their own at stake.

Fourth Amendment protection extends to a corporation's place of business. *See Mancusi*, at 367 (". . . [T]he protection of the Amendment may extend to commercial premises."); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.) (applying Fourth Amendment to a corporation). And a

corporation "has standing with respect to searches of corporate premises and seizure of corporate records." *United States v. Leary*, 846 F. 2d 592, 596 (10th Cir. 1988). Thus, "[a] government agency typically must secure a warrant"—and a valid one at that—"before conducting a search of commercial premises or a business," and its failure to do so may be challenged by the business. *Big Ridge, Inc. v. Fed. Mine Safety and Health Review Comm'n*, 715 F. 3d 631, 644 (7th Cir. 2013); *see also See v. City of Seattle*, 387 U.S. 541, 543 (1967) (applying equal Fourth Amendment scrutiny to search of business as to search of residence).

Moreover, in the physical world, an invasion of a protected property interest, without any further inquiry into an expectation of privacy, suffices to make out a Fourth Amendment violation on the part of the property-holder. That is, "by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the [Supreme] Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment." *Rakas*, 439 U.S. at 143 n.12; *see also Auster Oil & Gas v. Stream*, 835 F. 2d 597, 600–01 (5th Cir. 1988) (corporation could assert Fourth Amendment claim based on violation of "possessory" interest in equipment).

The Supreme Court recently reiterated that Fourth Amendment protection extends to property interests as well as conversational privacy. *See Jones*, 132 S. Ct. at 949 n.2 & 950–51 (finding unconstitutional the placement of a GPS device

on undercarriage of a car defendant did not own, but in which he "had at least the property rights of a bailee"). *Jones* relied on *Alderman v. United States*, 394 U.S. 165 (1969), pointing out that, there, the Court had held that defendants could exclude "conversations between other people obtained by warrantless placement of electronic surveillance devices in [defendants'] homes" even though the "conversational privacy of the homeowner" had not been invaded." *Jones*, 132 S. Ct. at 950–51 (quoting *Alderman*, 394 U.S. at 176).

Applying these principles to the digital world, a seizure of data, regardless of whose privacy interests it implicates, triggers the Fourth Amendment rights of online platforms as business proprietors. Companies like New York Amici hold their users' information by storing it either on servers that they own and operate on business premises, or in space they rent in a "cloud"—essentially a digital storage unit. *See* Quentin Hardy, "The Era of Cloud Computing," THE NEW YORK TIMES, June 11, 2014. In analyzing the Fourth Amendment implications of such technology, courts should draw functional, rather than formal, analogies. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2489–91 (2014) (Deeming search of a smart phone incident to arrest improper because it was analogous to, if not more invasive than, a search of a house). Thus, just as a personal "computer hard drive [is] akin to a residence in terms of the scope and quantity of private information it may contain," *United States v. Galpin*, 720 F. 3d 436, 446 (2d Cir. 2013), so a

business's servers or cloud space is the digital equivalent of a storage warehouse. It should be treated as such for Fourth Amendment purposes.

Thus accounting for modern technology, it becomes clear that online platforms like Facebook and New York Amici are in a similar position as the homeowner in *Alderman*. It may be that the information sought in an SCA search warrant implicates the privacy concerns of users rather than of the companies themselves. But that does not mean that the companies have no right to protest the digital equivalent of a search and seizure of files from a corporate warehouse. On the contrary, businesses have a right to be secure in their premises, and an intrusion onto those premises, as surely as surveillance of a home, implicates the Fourth Amendment rights of the companies as well as their users.

## III. RECIPIENTS OF SEARCH WARRANTS UNDER THE SCA MAY IMMEDIATELY APPEAL ORDERS DENYING MOTIONS TO QUASH

As New York companies, New York Amici have a strong interest in protecting their rights to immediate appellate review in New York courts of orders denying motions to quash search warrants issued under the SCA. The Government suggests that Facebook seeks appellate rights broader than those available to a criminal defendant objecting to the admission of evidence obtained from a search. *See* Govt MTD at 9. Not so. Motions to suppress precede full-blown criminal trials, from which defendants may take an appeal if they are convicted. But the

ancillary proceeding regarding Facebook's motion to quash is now as over as it ever will be. Furthermore, companies like New York Amici should be able to choose which search warrants they contest with the knowledge that they will have full appellate rights in New York court.

Under New York law, "a motion to quash subpoenas, even those issued pursuant to a criminal investigation, is civil by nature and not subject to the rule restricting direct appellate review of orders in criminal proceedings." *Matter of Abrams*, 62 N.Y. 2d 183, 193 (1984). The reasons justifying this rule apply equally to motions to quash search warrants issued under the SCA.

In determining whether a proceeding is civil or criminal, a court must look "to the true nature of the proceeding and to the relief sought." *Id.* at 191. Applying this functional approach, it is clear that search warrants issued under the SCA should be immediately appealable. For one thing, an SCA search warrant is procedurally similar to a subpoena *duces tecum*—a third party is directed to produce material, and has the option of moving to quash the warrant if it objects.

Moreover, several of the factors courts have said justify immediate review of criminal investigation subpoenas are present here. Facebook is "a nonparty [that] would otherwise be precluded from vindicating its position before an appellate body." *People v. Purley*, 297 A.D. 2d 499, 501 (1st Dept. 2002); *see also People v. Bagley*, 279 A.D. 2d 426, 426 (1st Dept. 2001); *People v. Marin*, 86 A.D. 2d 40,

42–43 (2d Dept. 1982). And, as in *Abrams*, no criminal charges had been or necessarily would be filed at the time the trial court issued the order appealed from. *See* 62 N.Y. 2d at 193–94. Finally, Facebook's Fourth Amendment claim "would [have] be[en] treated the same whether it arose in the context of a purely civil lawsuit or . . . in the context of a criminal investigation." *Id.* at 194.

What courts have *not* found dispositive are the factors on which the Government relies. The cases do not limit immediate appeal to orders entered after a criminal conviction. Indeed, in *Abrams* itself, the criminal investigation had not even resulted in any indictments when the orders appealed from were issued. *See also, e.g., Marin*, 86 A.D. 2d at 42–43 (post-indictment, but not post-conviction). Nor is it relevant that the Trial Court here relied in part on the Criminal Procedure Law. *See Matter of Codey ex rel. New Jersey*, 82 N.Y. 2d 521, 526–27 (1993) (order respecting application under CPL §640.10, to produce a witness to appear before a grand jury investigation in another State, is immediately appealable); *contra* Govt MTD at 5 (suggesting that the fact that subpoenas are governed by the Civil Practice Law and Rules "may explain" why subpoena-related orders are immediately appealable). Nor is it correct, as the Government suggests, that the rule is some sort of aberration limited to subpoena-related orders. *See* Govt MTD at 5 ("This exception 'has a peculiar analytic basis' . . . .") (quoting *Matter of Cunningham v. Nadjari*, 39 N.Y. 2d 314, 317 (1976)). In *Abrams*, which post-

dates *Cunningham*, the Court of Appeals held that an order disqualifying an attorney of the subpoena respondents was immediately appealable. *See* 62 N.Y. 2d at 192; *see also Matter of Hynes v. Karassik*, 47 N.Y. 2d 659, 661 n.1 (1979) (holding that order to seal the court record is "civil, for although it relates to a criminal matter, it does not affect the criminal judgment itself, but only a collateral aspect of it . . .").

In short, Facebook's objections to the bulk search warrants were fully resolved in the Trial Court once the motion to quash was denied; no further proceedings remain. The Government supplies no good reason to deny immediate appeal from the order the Trial Court entered resolving this civil proceeding.

## CONCLUSION

This Court should reverse the Trial Court's Order and quash the bulk warrants.

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## PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 N.Y. C.R.R. § 600.10(d)(1)(v) that this brief was prepared, using Microsoft Office Word 2013, to the following specifications:

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