New York County Clerk's Index No. 30207/13 and 30178/14

Court of Appeals
of the
State of New York

In re 381 Search Warrants Directed to Facebook, Inc.
and Dated July 23, 2013

FACEBOOK, INC.,

Appellant,

– against –

NEW YORK DISTRICT ATTORNEY'S OFFICE,

Respondent.

In the Matter of the Motion to Compel Disclosure of the Supporting Affidavit Relating To Certain Search Warrants Directed to Facebook, Inc., and Dated July 23, 2013

FACEBOOK, INC.,

Appellant,

– against –

NEW YORK DISTRICT ATTORNEY'S OFFICE,

Respondent.

MEMORANDUM OF *AMICI CURIAE* FOURSQUARE LABS, INC., KICKSTARTER, PBC, MEETUP, INC., AND VIMEO, LLC IN SUPPORT OF APPELLANT'S MOTION FOR LEAVE TO APPEAL

Of counsel:
RICHARD J. HOLWELL
JOHN M. DIMATTEO
DANIEL M. SULLIVAN
BENJAMIN F. HEIDLAGE

HOLWELL SHUSTER & GOLDBERG LLP
Attorneys for Amici Curiae
125 Broad Street, 39th Floor
New York, New York 10004
Tel.: (646) 837-5151
Fax: (646) 837-5150

COURT OF APPEALS RULE 500.1(f) DISCLOSURE STATEMENT

Pursuant to Rules 500.1(f) and 500.22(b)(5) of the Court of Appeals of the State of New York, Foursquare Labs, Inc. states that it has no parents or affiliates and one subsidiary, Foursquare Labs UK Ltd.

Pursuant to Rules 500.1(f) and 500.22(b)(5) of the Court of Appeals of the State of New York, Meetup, Inc. states that it has no parents, subsidiaries, or affiliates.

Pursuant to Rules 500.1(f) and 500.22(b)(5) of the Court of Appeals of the State of New York, Kickstarter, PBC states that it has the following direct and indirect subsidiaries: No. 2 Pencil LLC, 58 Kent LLC, and Kickstarter London Ltd.

Pursuant to Rules 500.1(f) and 500.22(b)(5) of the Court of Appeals of the State of New York, Vimeo, LLC states that is a wholly-owned subsidiary of IAC/InterActiveCorp ("IAC"), a publicly traded company (NASDAQ:IACI). IAC has no parent company, and no publicly-traded company owns more than 10% of IAC's common stock. Vimeo, LLC has one subsidiary: Cameo Acquisition LLC, a Delaware limited liability company. Vimeo, LLC has the following affiliates:

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- About Information Technology (Beijing) Co., Ltd. (China)
- About International (Cayman Is.)
- About, Inc. (U.S.)
- Amsel, LLC (U.S.)
- Apalon Apps LLC (Belr.)
- APN, LLC (U.S.)

- Aqua Acquisition Holdings LLC (U.S.)
- Ask Applications, Inc. (U.S.)
- Ask.fm Europe (Ir.)
- Buzz Technologies, Inc. (U.S.)
- Cameo Acquisition, LLC (U.S.)
- CH Pacific, LLC (U.S.)
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- CollegeHumor Press LLC (U.S.)
- Comedy News Ventures, Inc. (U.S.)
- Connect, LLC (U.S.)
- Connected Ventures, LLC (U.S.)
- ConsumerSearch, Inc. (U.S.)
- CraftJack Inc. (U.S.)
- CV Acquisition Corp. (U.S.)
- Daily Burn, Inc. (U.S.)
- DatingDirect.com Limited (U.K.)
- Delightful.com, LLC (U.S.)
- Diamant Production Services, LLC (U.S.)
- Diamond Dogs, LLC (U.S.)
- Dictionary.com, LLC (U.S.)
- ECS Sports Fulfillment LLC (U.S.)
- Electus Productions, LLC (U.S.)
- Electus, LLC (U.S.)
- Elicia Acquisition Corp. (U.S.)
- ES1 Productions, LLC (U.S.)
- ES2 Productions, LLC (U.S.)
- Failure to Appear Productions, LLC (U.S.)
- Falcon Holdings II, LLC (U.S.)
- FC & Co (Fr.)
- Felix Calls, LLC (U.S.)
- Five Star Matchmaking Information Technology (Beijing) Co., Ltd. (China)
- Format First, LLC (U.S.)
- FriendScout24 GmbH (Ger.)
- GetAFive, Inc. (U.S.)
- Good Hang, LLC (U.S.)
- Hatch Labs, Inc. (U.S.)
- High Line Venture Partners Follow On Fund GP, LLC (U.S.)

- High Line Venture Partners Follow On Fund, L.P. (U.S.)
- High Line Venture Partners GP II, LLC (U.S.)
- High Line Venture Partners GP III, LLC (U.S.)
- High Line Venture Partners GP, LLC (U.S.)
- High Line Venture Partners II, L.P. (U.S.)
- High Line Venture Partners III, L.P. (U.S.)
- High Line Venture Partners, L.P. (U.S.)
- Higher Edge Marketing Services, Inc. (U.S.)
- Home Industry Leadership Board (U.S.)
- HomeAdvisor B.V. (Neth.)
- HomeAdvisor, Inc. (U.S.)
- HowAboutWe, LLC (U.S.)
- HSN Capital LLC (U.S.)
- HSN Home Shopping Network GmbH (Ger.)
- HSN, LLC (U.S.)
- HTRF Ventures, LLC (U.S.)
- Humor Rainbow, Inc. (U.S.)
- IAC 19th St. Holdings, LLC (U.S.)
- IAC Falcon Holdings, LLC (U.S.)
- IAC Family Foundation, Inc. (U.S.)
- IAC Search & Media (Canada) Inc. (Can.)
- IAC Search & Media B.V. (Neth.)
- IAC Search & Media Brands Computer Technology Co., Ltd. (China)
- IAC Search & Media Brands, Inc. (U.S.)
- IAC Search & Media Deutschland GmbH (Ger.)
- IAC Search & Media Europe Limited (Ir.)
- IAC Search & Media Finance Co. (Cayman Is.)
- IAC Search & Media Hong Kong, Limited (H.K.)
- IAC Search & Media International, Inc. (U.S.)
- IAC Search & Media Massachusetts, Inc. (U.S.)
- IAC Search & Media Technologies Limited (Ir.)
- IAC Search & Media UK Limited (U.K.)
- IAC Search & Media Washington, LLC (U.S.)
- IAC Search & Media, Inc. (U.S.)
- IAC Search Europe B.V. (Neth.)
- IAC Search, LLC (U.S.)
- IAC Shopping International, Inc. (U.S.)

- IAC/Expedia Global, LLC (U.S.)
- IACF Developments LLC (U.S.)
- ImproveNet, Inc. (U.S.)
- Insider Pages, Inc. (U.S.)
- InstantAction, LLC (U.S.)
- InterActiveCorp Films, Inc. (U.S.)
- InterActiveCorp Films, LLC (U.S.)
- InterCaptiveCorp, Ltd. (Berm.)
- Internet Shopping Network LLC (U.S.)
- Investopedia Canada, Inc. (Can.)
- Investopedia LLC (U.S.)
- iWon Points LLC (U.S.)
- La Centrale des Marchés Privés S.à r.l. (Fr.)
- Life123, Inc. (U.S.)
- Lucky Morning Productions, LLC (U.S.)
- M8 Singlesnet LLC (U.S.)
- Maker Shack, LLC (U.S.)
- Mash Dating, LLC (U.S.)
- Massive Media Europe NV (Belg.)
- Massive Media Limited (U.K.)
- Massive Media Match NV (Belg.)
- Match Group, LLC (U.S.)
- Match ProfilePro, LLC (U.S.)
- Match.com Canada Ltd. (Can.)
- Match.com Europe Limited (U.K.)
- Match.com Events LLC (U.S.)
- Match.com France Limited (Fr.)
- Match.com Global Investments SARL (Lux.)
- Match.com Global Services Limited (U.K.)
- Match.com HK Limited (H.K.)
- Match.com International Holdings, Inc. (U.S.)
- Match.com International Limited (U.K.)
- Match.com Investments, Inc. (Cayman Is.)
- Match.com Japan KK (Japan)
- Match.com Japan Networks GK (Japan)
- Match.com LatAm Limited (U.K.)
- Match.com Nordic AB (Swed.)

- Match.com Offshore Holdings, Ltd (Mauritius)
- Match.com Pegasus Limited (U.K.)
- Match.com, Inc. (U.S.)
- Match.com, L.L.C. (U.S.)
- Matchcom Mexico, S. de R.L., de C.V. (Mex.)
- Matvin, LLC (U.S.)
- Meetic Espana, SLU (Spain)
- Meetic Italia SRL (It.)
- Meetic Netherlands BV (Neth.)
- Meetic SAS (Fr.)
- Mhelpdesk, Inc. (U.S.)
- Mile High Insights, LLC (U.S.)
- Mindspark Interactive Network, Inc. (U.S.)
- MM LatAm, LLC (U.S.)
- Mojo Acquisition Corp. (U.S.)
- Neu.de GmbH (Ger.)
- Newsweek Philippines Inc. (Phil.)
- Nexus Limited (U.K.)
- Nice Little Day, LLC (U.S.)
- Notional, LLC (U.S.)
- NRelate LLC (U.S.)
- Parperfeito Comunicacao SA (Braz.)
- People Media, Inc. (U.S.)
- People Media, LLC (U.S.)
- Picnic, LLC (U.S.)
- Pricerunner Denmark ApS (Den.)
- Pricerunner International AB (Swed.)
- Pricerunner SAS (Fr.)
- Pricerunner Sweden AB (Swed.)
- Pricerunner, Ltd. (U.K.)
- Pronto, LLC (U.S.)
- Rebel Entertainment, Inc. (U.S.)
- Riviere Productions (U.S.)
- Search Floor, Inc. (U.S.)
- ServiceMagic Canada Inc. (Can.)
- ServiceMagic Europe S.à r.l. (Lux.)
- ServiceMagic GmbH (Ger.)

- ServiceMagic International S.à r.l. (Lux.)
- ServiceMagic IP Ireland Limited (Ir.)
- ServiceMagic Limited (U.K.)
- Shanghai Huike Network Technology Co., Ltd. (China)
- Shoebuy.com, Inc. (U.S.)
- Shoptouch, Inc. (U.S.)
- SIA "Ask.fm" (Lat.)
- Slimware Utilities Holdings, Inc. (U.S.)
- Soulmates Limited (N.Z.)
- Soulmates Technology Pty Ltd. (Austl.)
- SpeedDate.com, LLC (U.S.)
- Stage Four, LLC (U.S.)
- Starnet Interactive Ltd. (Isr.)
- Starnet Interactive, Inc. (U.S.)
- Styleclick Chicago, Inc. (U.S.)
- Styleclick, Inc. (U.S.)
- Styleclick.com Enterprises Inc. (U.S.)
- Targeted Media Solutions LLC (U.S.)
- TDB Holdings, Inc. (U.S.)
- The Daily Beast Company LLC (U.S.)
- The IAC Foundation, Inc. (U.S.)
- Tinder, Inc. (U.S.)
- TMC Realty, L.L.C. (U.S.)
- TPR Education Canada, ULC (Can.)
- TPR Education Holdings, Inc. (U.S.)
- TPR Education IP Holdings, LLC (U.S.)
- TPR Education Offshore Holdings LLC (U.S.)
- TPR Education Worldwide, LLC (U.S.)
- TPR Education, LLC (U.S.)
- Tutor.com, Inc. (U.S.)
- USA Electronic Commerce Solutions LLC (U.S.)
- USA Video Distribution LLC (U.S.)
- USANi LLC (U.S.)
- USANi Sub LLC (U.S.)
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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae Foursquare Labs, Inc., Kickstarter, PBC, Meetup, Inc., and Vimeo, LLC (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 October 2015, Foursquare had over 60 million users who have made over 7 billion "check-ins" and left over 75 million tips about places they have gone; in addition, Foursquare had over 90,000 developers using the Foursquare "Location Cloud" platform. 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 9.5 million backers to pledge over $2 billion in order to fund over 93,000 projects. Kickstarter has 117 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 people around the things that matter to them. There are about 23.3 million Meetup members and more than 215,000 Meetup groups. The company currently employs about 130 people, the majority in downtown New York. Vimeo, LLC operates one of the world's largest video sharing networks. Launched in 2005, Vimeo, LLC has

over 35 million registered members, reaches a global audience of over 150 million per month, and delivers over 1 billion video plays per month. The company employs over 190 employees, the majority in Manhattan.

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 "[b]ecause of the growth of the tech/information sector, New York City's share of the nation's private sector employment now stands at its highest level since 1992."[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. Indeed, Foursquare and Kickstarter

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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 Oct. 22, 2015).

[2] "Tech-Information Now the Second Largest Engine of NYC Economy, Supporting 262,000 Jobs," MikeBloomberg.com, Sept. 30, 2013, available at http://www.mikebloomberg.com/news/tech-information-now-the-second-largest-engine-of-nyc-economy-supporting-262000-jobs/ (last visited Oct. 22, 2015).

have developed law enforcement guidelines, which they publish in an effort to make their responses 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. For example, Kickstarter's charter as a Delaware public benefit corporation includes the commitment to "zealously defend the privacy rights and personal data of the people who use its service, including in its dealings with government entities."[4] New York Amici also have an interest in the right to provide notice to users of information requests, which allows users to make their own decisions (which might differ from New York Amici's independent legal decision) regarding how to respond and 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

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[3] "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 Oct. 22, 2015); "Law Enforcement Guidelines," Kickstarter, PBC, available at http://www.kickstarter.com/law-enforcement (last visited Oct. 22, 2015).
[4] "Kickstarter is a Benefit Corporation," Kickstarter, PBC, available at https://www.kickstarter.com/charter (last visited Oct. 22, 2015).

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.

PRELIMINARY STATEMENT

This appeal asks whether recipients of bulk search warrants under the Stored Communications Act ("SCA") will ever have an opportunity to challenge such warrants when they violate the First or Fourth Amendments to the United States Constitution. The search warrants issued in this case are draconian: Facebook was conscripted to perform a dragnet search and produce massive amounts of data contained in 381 user accounts *and* prohibited from notifying its users that their personal information had been targeted. Worse, in denying Facebook's motion to quash the search warrants, Supreme Court, New York County (the "Trial Court"), held that recipients of SCA search warrants lack "standing" to object to the validity of the warrants under the Fourth Amendment and reaffirmed the gag order prohibiting Facebook from disclosing their existence to users. On appeal, the Appellate Division, First Department, further closed the courthouse door: It dismissed Facebook's appeal, holding that online platforms that receive SCA search warrants have no right to challenge the warrants "pre-enforcement" and, therefore, they cannot appeal the denial of such a challenge.

These holdings put Facebook—and by implication any internet-based company that receives an SCA search warrant, especially small and mid-size companies like New York Amici—between a rock and a hard place. 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 First Department's decision, as well as the trial court order it left in place, denies both options. The double bind in which these decisions leave online platforms is unlawful. This Court should grant leave to appeal.

First, online platforms must be permitted to challenge the validity of search warrants under the Fourth Amendment, both on behalf of users and to vindicate their own interests. The First Department's contrary conclusion rests on its view of Facebook's challenge as "pre-enforcement," i.e., before criminal charges are brought against the targets of the search. From that vantage point, the Court held that the remedy of a pretrial suppression motion suffices to "eliminate any need for a suspected citizen to make a pre-execution motion to quash a search warrant." *In re Search Warrants Directed to Facebook*, __ A.D.3d __, 14 N.Y.S. 3d 23, 24, 27–28 (1st Dept. 2015). But, with respect, the First Department's decision blinks reality. From Facebook's perspective, there *is no* further criminal proceeding in which it could raise its objections "post-enforcement" because neither Facebook nor most of the targeted users will be charged with a crime; Facebook's challenge

is not "pre-" anything. Its objections—whether on behalf of itself or on behalf of the hundreds of users here who were never indicted—must be heard now or never.

By dismissing this critical fact, the First Department rendered its analysis essentially a non sequitur and created a conflict with the case law of both this Court and other departments of the Appellate Division. *See* 22 N.Y.C.R.R. § 500.22(b)(4). When it comes to the appealability of orders in criminal cases, New York courts "look[] to the true nature of the proceeding and to the relief sought." *Matter of Abrams*, 62 N.Y.2d 183, 191 (1984). SCA search warrants are close cousins to subpoenas, which are immediately appealable even when issued in relation to a criminal proceeding. Further, Facebook's motion to quash need not and did not precede a criminal proceeding, either against it or the targeted users, tightening the analogy to a motion to quash a subpoena. And where, like here, the recipient of the search warrants will have no other opportunity to raise its objection, immediate appeal is proper. *See, e.g.*, *People v. Marin*, 86 A.D.2d 40, 42–43 (2d Dept. 1982).

For similar reasons, the First Department was wrong to leave in place the Trial Court's holding that Facebook and companies similarly situated lack "standing" to challenge SCA warrants. The Trial Court wrongly applied the doctrine of Fourth Amendment standing—a judge-made limit on the judge-made exclusionary rule—which derives from the inapposite context of a motion to

suppress in a criminal proceeding. Instead, online platforms may invoke the well-established doctrine of third-party standing to represent the privacy interests of their users. Moreover, the Trial Court ignored Facebook's *own* Fourth Amendment interests in protecting its property from the digital equivalent of the compelled production of corporate archives and records. *See 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"). In short, when they decide to do so, online platforms like Facebook and New York Amici must be permitted to raise Fourth Amendment challenges on behalf of both their users and themselves.

Second, the First Department also denied Facebook the right to appeal the Trial Court's gag order, even though none of its reasoning bears on the critical First Amendment interests the gag order implicates. This alone was reversible error. And the mistake was significant given the costs that such gag orders impose, especially on small and mid-size online platforms like New York Amici. Companies like New York Amici make legal determinations regarding which search warrants and other information requests to challenge, and, as explained above, they must have the right to raise such challenges. But it is just as important that their users receive notice so that they have the opportunity to make their own determinations. Indeed, smaller, early-stage start-up companies may lack the

resources to fully litigate the propriety of search warrants, making notice and a chance to object a critical protection for users.

Prior restraints like the gag order here are said to have a "freezing" effect on speech. In this case, 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 and other reasons, the First Amendment requires that online platforms be able to provide their users with notice of search warrants seeking their private information. At a minimum, the SCA should be read to prohibit the imposition of a gag order without particularized findings that the order is justified, which this Trial Court did not make.

These arguments show that this appeal presents issues of public importance meriting this Court's review. *See* 22 N.Y.C.R.R. § 500.22(b)(4). Left unreviewed, the First Department's decision will deny search warrant recipients the opportunity to ever present their constitutional concerns. According to the court below, even where a search warrant or an accompanying gag order is unconstitutional—and here both are—the recipient has no remedy. That cannot be the law, and the error imposes a particular hardship on small and mid-size companies like New York Amici. This Court should grant Facebook's motion for leave to appeal.

REASONS THIS COURT SHOULD GRANT LEAVE TO APPEAL

I. ONLINE PLATFORMS SHOULD BE PERMITTED TO CHALLENGE SEARCH WARRANTS ISSUED UNDER THE SCA

A. Recipients Of Search Warrants Under The SCA May Immediately Appeal Orders Denying Motions To Quash

The First Department's holding that a party may not challenge bulk search warrants issued under the SCA threatens to impose a significant and unconstitutional burden on online platforms, especially small and mid-size companies like New York Amici. Under the First Department's approach, law enforcement can force internet-based companies to expend significant resources to gather information on their users on behalf of the Government with no opportunity to object (or to inform users, as discussed further below). As Facebook ably explains, the First Department's holding conflicts with this Court's rule that "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" (*Abrams*, 62 N.Y.2d at 192), as well as the Second Department's application of that rule in circumstances, like here, where a third party has no other avenue for appellate relief (*see Marin*, 86 A.D.2d at 42–43). New York Amici join those arguments.

New York Amici write separately to emphasize the degree to which the First Department fundamentally misunderstood the position in which online platforms that receive SCA bulk search warrants (especially small and mid-size companies)

find themselves. The First Department approached this case from the context of the garden-variety search-and-seizure situation, in which the law guarantees Fourth Amendment rights by providing the "ex ante" protection of a neutral magistrate who reviews and approves a search warrant before it is issued and the "ex post" protection of a pretrial suppression motion in a criminal proceeding once charges are brought. 14 N.Y.S. 3d at 27. In particular, the Court leaned heavily on the availability of the suppression motion, calling it "vital, because it can lead to the suppression of unconstitutionally seized evidence." *Id.* And because "[t]hese protections eliminate any need for a suspected citizen to make a pre-execution motion to quash a search warrant," the First Department reasoned, there is no right to make such a motion. *Id.* at 27–28.

But the First Department ignored that, for recipients of SCA search warrants like Facebook and New York Amici, the "vital" ex post protection of a suppression motion is meaningless. A motion to suppress invokes the exclusionary rule to preclude the Government from introducing at trial evidence obtained in violation of the Fourth Amendment. That rule is a judicially created device whose purpose is to deter law enforcement from unconstitutional searches by imposing a cost for such searches. It is not "designed to 'redress the injury' occasioned by an unconstitutional search." *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011).

Facebook, however, is not a target of investigation and will not be indicted; it can make no motion to suppress. Neither can the over 300 users whose account information was produced to the Government but who were never indicted. And unlike the way the exclusionary rule typically operates, Facebook and the unindicted users *do s*eek redress for a constitutional violation—among other things, return of the information unlawfully seized. Thus, for Facebook and the majority of its users, the First Department's invocation of the motion to suppress as the "sole remedy" to which they are entitled (14 N.Y.S.3d at 28) is tantamount to saying there is no remedy at all. That cannot be right, and constitutes another violation of this Court's instruction to focus on "the true nature of the proceeding and . . . the relief sought." *Abrams*, 62 N.Y.2d at 191.

Barring challenges to bulk search warrants issued under the SCA risks significantly burdening online platforms like New York Amici. Collectively, New York Amici have over 127 million users and fewer than 600 employees. And law enforcement increasingly targets the user data similar to the data New York Amici maintain.[5] This presents New York Amici with the possibility of burdensome and invasive requests that sap the companies' resources and undermine users' confidence in the privacy of their data. It is thus critical that New York Amici, and

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[5] Chris Gayomali, "Facebook Data Requests from Law Enforcement are Increasing," Fast Company, Nov. 5, 2014, available at http://www.fastcompany.com/3038087/facebook-data-requests-from-law-enforcement-are-increasing (last visited Oct. 22, 2015).

other online platforms, have the opportunity to challenge overbroad and unconstitutional search warrants.

B. Online Platforms Have Standing To Raise Fourth Amendment Objections To Search Warrants Issued Under The SCA

The First Department's dismissal of Facebook's appeal left intact the Trial Court's holding that online platforms like Facebook and New York Amici lack standing to raise Fourth Amendment objections—another barrier to review that the lower courts here erected against online platforms. The Trial Court had 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 (Order at 3).[6] This is incorrect: Facebook and other online platforms have standing to raise the Fourth Amendment objections of their users under the doctrine of third party standing. Further, they can also assert their own Fourth Amendment rights against unlawful searches of their property—namely 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.

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[6] References to "A" followed by a page number refer to the Appendix of Appellant Facebook in New York County Clerk's Index Number 30207/13.

1. Online Platforms Have Third Party Standing

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] assert[] his own rights"; and there is a "need to avoid a dilution of the parties' constitutional rights." *New York Cnty. Lawyers' Ass'n v. New York*, 294 A.D.2d 69, 75 (1st Dept. 2002) (permitting organization to raise third parties' rights to effective assistance of counsel). The Trial Court ignored these principles. Instead, and without analysis, it 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 error.

So-called Fourth Amendment standing is not jurisdictional; it is "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. Wesley*, 73 N.Y.2d 351, 356 (1989) ("the issue of 'standing' [is] simply an application of substantive Fourth Amendment doctrine"). 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 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 just explained, New York law answers the latter question by permitting a party to raise the rights of another in situations like this one.

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 other words, the requirement limits the application of the exclusionary rule, and it rests on considerations particular to that rule. When it established Fourth Amendment standing, the United States 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, 137 (1978). That is, application of the exclusionary rule inherently risks 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.)), and therefore courts have limited the reach of the rule through Fourth Amendment "standing."

But there is no such risk when companies like Facebook and New York Amici challenge search warrants issued under the SCA. The recipient of the search warrant is not seeking to suppress evidence; it is not a target of

investigation. And, as in this case, the challenge to the search warrant frequently comes *before* criminal charges are brought. Thus, if it turns out that the company's objections are well-founded, permitting it to raise them—and correcting mistakes in response, which the Government here refused to do—ensures that the evidence on which prosecutors ultimately bring charges is procured lawfully. That *aids*, not hinders, just prosecution.

Unsurprisingly, then, where vicarious Fourth Amendment claims arise outside of the context of the exclusionary rule, 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.

2. Online Platforms Can Raise Fourth Amendment Objections In Their Own Right

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

Fourth Amendment protection extends to a corporation's place of business. *See, e.g.*, *Mancusi v. DeForte*, 392 U.S. 364, 367 (1968). And a corporation "has standing with respect to searches of corporate premises and seizure of corporate records." *Leary*, 846 F.2d at 596. Thus, "[a] government agency typically must secure a warrant"—a valid one—"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 alone 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, Inc. 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).

Indeed, the United States Supreme Court recently reiterated that Fourth Amendment protection extends to property interests as well as conversational privacy. *See United States v. Jones*, 132 S. Ct. 945, 949 n.2 & 950–51 (2012) (finding unconstitutional the placement of a GPS device on undercarriage of a car in which defendant "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 permitted defendants to 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 server or cloud space is like a storage warehouse. It should be treated as such for Fourth Amendment purposes.

The First Department, however, ignored these principles in favor of a surprisingly cramped interpretation of the Fourth Amendment. In a sweeping and unsupported statement, the First Department seemed to think that because "computer records are stored in a technologically innovative form" it raises "the question whether they are sufficiently like other records to engender the 'reasonable expectation of privacy' required for Fourth Amendment protection." 14 N.Y.S.3d at 30. The Court hinted that computer records get "far weaker" Fourth Amendment protection on the ground that "[u]nlike the tangible physical objects mentioned by the Fourth Amendment," they "typically consist of ordered magnetic fields or electrical impulses." *Id.* at 30 & n.6. But one does not lose Fourth Amendment protection by communicating through new technology. *See,*

e.g., *Riley*, 134 S. Ct. 2473. Given how much information today is stored electronically, the First Department's approach is as disturbing as it is misguided.

Online platforms like Facebook and New York Amici are simply in a technologically updated version of the position of 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 (although it may very well implicate both). But that does not mean that the companies have no right to protest the digital equivalent of the compelled production of files from a corporate warehouse. On the contrary, businesses have a right to the security of the data they maintain in their storage systems, and the seizure of that data implicates the Fourth Amendment rights of the companies as proprietors.

II. SEARCH WARRANTS SEEKING USER INFORMATION CANNOT BE SEALED INDEFINITELY

A. Unconstitutional Gag Orders Are Subject To Judicial Review

The bulk search warrants issued to Facebook included a blanket gag order "pursuant to 18 U.S.C. § 270[5](b)" that prohibited Facebook from "notif[ying] or otherwise disclos[ing] the existence or execution of [each] warrant/order to any associated user/account holder." A11–12 (Warrant at 3–4). The gag order had no time limit—forever barring Facebook from disclosing the existence of the warrants. Facebook challenged this prior restraint before the Trial Court and the First Department as impermissible under both the SCA and the First Amendment;

it repeats its objections here. *See* Facebook Mem. at 10–13, 23–24. New York Amici join those arguments. For small and mid-size online platforms, gag orders impose as much hardship, if not more, as the overbreadth of the warrant itself.

Notwithstanding the importance of this issue, the First Department failed to address it, dismissing the challenge to the gag order along with Facebook's Fourth Amendment challenge. This alone was reversible error. The First Department's rejection of Facebook's appeal relied entirely on its (incorrect) conclusion that Facebook's only remedy is the ex-post suppression of evidence unconstitutionally obtained. *See generally* 14 N.Y.S.3d 23. But Facebook's challenge to the gag order is distinct from its challenge to the scope of the warrant. The Trial Court's gag order "implicate[s] [a warrant recipient's] rights under the First Amendment because it [is] both a content-based restriction of speech and a prior restraint on speech." *In re Application of the United States of America*, No. 14-480 (JMF), 2014 WL 1775601, at *2 (D.D.C. Mar. 31, 2014) (citation omitted). It is well accepted that the subject of the gag orders can challenge such a restriction. *Id.* By sweeping Facebook's challenge to the gag order under the rug, the First Department effectively held there was no remedy for the violation of Facebook's First Amendment rights. This Court should remedy that serious error.

B. The Gag Order Is Improper And Imposes A Particular Hardship On Small And Mid-Sized Companies

As explained above, indefinite gag orders like the one the Trial Court issued are content-based, prior restraints on speech. As other *amici* explain, the gag order cannot even pass muster under the strict scrutiny standard applicable to content-based speech restrictions, to say nothing of the higher hurdle that prior restraints must surmount. *See* Mem. of *Amici Curiae* Dropbox, Inc., et al., at 28–31; *see also In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 882 (E.D. Tex. 2008) ("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.").

Prior restraints like the Trial Court's indefinite gag order are especially damaging to small and mid-size online platforms like New York Amici. 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 at 882 n.11 (quoting Alexander M. Bickel, The Morality of Consent 61 (1975)); *see also United States v. Brown*, 250 F.3d 907, 915 (5th Cir. 2001) (Prior restraints "are constitutionally

disfavored in this nation nearly to the point of extinction."). And for companies like New York Amici, the freeze is deep.

Small and mid-size companies do not, in fact cannot, 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 be able 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 provide notice to users of a governmental request for information. Such notice can be the *only* way users learn of 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) (discussing 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).

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. Users are concerned about data security.[7] Indefinite gag orders discourage them from participating in online services, risking serious harm to small and mid-size online platforms. This is not only an economic harm, it is also a First Amendment harm—New York Amici, like other small and mid-size online platforms, provide a forum for 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) ("[C]onstitutional 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, the Trial Court's prior restraint violates the First Amendment.

C. The SCA Must Be Interpreted To Avoid Violation Of The First Amendment

The SCA authorizes courts to "command[] 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

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[7] *See* "Public Perceptions of Privacy and Security in the Post-Snowden Era," Pew Research Center, Nov. 12, 2014, 11–12, available at http://www.pewinternet.org/files/2014/11/PI_PublicPerceptionsofPrivacy_111214.pdf (last visited Oct. 22, 2015).

tampering with evidence." 18 U.S.C. § 2705(b), (b)(3). The Trial Court relied on this provision, but it must be read to avoid violation of the First Amendment by requiring a court to make particularized factual findings supporting a gag order.

In this case, the Trial Court made no factual determinations in support of its order, merely 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." A7 (Order at 4). In the first place, the warrant itself addresses the former concern—it directs Facebook to produce information deleted or removed by users. A9 (Warrant at 1). In any event, if the Court's ipse dixit proclamation sufficed under the SCA to issue a gag order, the statute would violate the First Amendment. Section 2705(b) authorizes courts to issue content-based speech restrictions, which means it must be "justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011). But without particularized findings that one of the threats listed in the SCA exists, the statute's authorization to restrict speech is not 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 must therefore be construed to require courts to make the

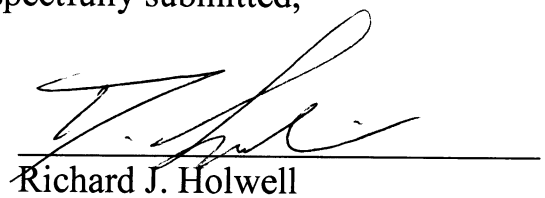
particularized findings that the Trial Court failed to make here. *See, e.g.*, *United States v. Caronia*, 703 F.3d 149, 160 (2d Cir. 2012) (invoking "the principle of constitutional avoidance" to avoid a statutory "construction [that] would raise First Amendment concerns").

CONCLUSION

For the foregoing reasons, Foursquare Labs Inc., Kickstarter PBC, Meetup Inc., and Vimeo, LLC respectfully request that the Court grant Appellant's request for leave to appeal the Decision.

Dated: New York, New York
October 23, 2015

Respectfully submitted,

By: 

Richard J. Holwell
John M. DiMatteo
Daniel M. Sullivan
Benjamin F. Heidlage

HOLWELL SHUSTER &
GOLDBERG LLP
125 Broad Street, 39th Floor
New York, New York 10004
Tel.: 646-837-5151
Fax: 646-837-5150
dsullivan@hsgllp.com
Attorneys for Amici Curiae