

COPY

IN THE SUPREME COURT OF CALIFORNIA

FACEBOOK INC.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN DIEGO  
COUNTY,

Respondent;

LANCE TOUCHSTONE,

Real Party in Interest.

) S245203

) Ct.App. 4/1 D072171

) (San Diego County  
) Superior Court No.  
) SCD268262.)

SUPREME COURT  
FILED

MAY 17 2018

Jorge Navarrete Clerk

Deputy



**JOINT APPLICATION TO APPEAR AS AMICI CURIAE  
IN SUPPORT OF REAL PARTY IN INTEREST  
LANCE TOUCHSTONE AND AMICI BRIEF**

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VENTURA COUNTY

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The CALIFORNIA PUBLIC DEFENDERS ASSOCIATION (CPDA) and the PUBLIC DEFENDER OF VENTURA COUNTY (Todd W. Howeth) make A JOINT APPLICATION TO APPEAR AS AMICI CURIAE IN SUPPORT OF REAL PARTY IN INTEREST LANCE TOUCHSTONE WITH ATTCHED AMICI BRIEF in support of Real Party in Interest, LANCE TOUCHSTONE.

A STATEMENT OF OUR INTEREST

**A. CPDA is the largest and most influential association of criminal defense attorneys and public defenders in the State of California. Our collective experience regarding the law and our appellate advocacy on criminal justice issues puts us in a unique position to assist the court in this case.**

CPDA's membership of nearly 4,000 public defenders and attorneys in private practice exceeds that of our comparable sister association, California Attorneys for Criminal Justice. We are both important voices of the criminal defense bar in California and nationally.

CPDA has been a leader in continuing legal education for defense attorneys for some 40 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education, Criminal Law Specialization Education, and Appellate Law Specialization Education. CPDA is one of only two organizations deemed by the Legislature to be an "automatically" approved legal education provider. (Bus. & Prof. Code, §6070, subd. (b).)

The courts have granted CPDA leave to appear as amicus curiae in many California cases which culminated in published opinions. We believe that our participation has been helpful in many important cases. (See, e.g., *People v. Adelman* (5/10/2018) S237602, 2018 Cal. LEXIS 3345 [Prop 47 petition should be filed in the original sentencing court], *People v. Sasser* (2015) 61 Cal.4th 1 [limitation on status-based enhancements]; *People v. Robey* (2013) 56 Cal.4th 1218 [warrant requirement for seized shipment]; *People v. Beltran* (2013) 56 Cal.4th 935 [heat of passion analysis]; *People v. Albillar* (2010) 51 Cal.4th 47 [sufficiency of the evidence in a gang-related prosecution]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [post-trial discovery]; *Galindo v. Superior Court* (2010) 50 Cal.4th 1 [pre-prelim discovery]; *People v. Lenix* (2008) 44 Cal.4th 602 [comparative juror analysis for first time on appeal], *People v. Nelson* (2008) 43 Cal.4th 1242 [DNA evidence in a cold-hit case]; *Chambers v. Superior Court* (2007) 42 Cal.4th 673 [*Pitchess* procedures]; *People v. Sanders* (2003) 31 Cal.4th 318 [search could not be a reasonable "parole search" without knowledge of the suspect's parole status]; *Manduley v. Superior Court* (2002) 27 Cal.4th 537 [no separation of powers violation by the direct filing of juvenile cases

in the criminal court]; *Morse v. Municipal Court* (1974) 13 Cal.3d 149 [mandate issued to compel consideration of diversion], etc.)

CPDA has also served as amicus curiae in the United State Supreme Court in numerous cases resulting in a decision on the merits. (See, e.g., *Gonzales v. Duenas-Alvarez* (2006) 549 U.S. 1076 [generic “theft offenses” under the Immigration and Nationality Act]; *California v. Trombetta* (1984) 467 U.S. 479 [the duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect’s defense]; *Monge v. California* (1998) 524 U.S. 721 [double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency]; *United States v. Knights* (2001) 534 U.S. 112 [parole searches]; *Lockyer v. Andrade* (2003) 538 U.S. 63 [recidivist sentencing and the Eighth Amendment], etc.)

The author of this amici brief is a California State Bar Certified Specialist in both Appellate Law and Criminal Law, a past-president of CPDA, and Co-Chair of the CPDA Amicus Committee. I have authored briefs and argued cases in the California courts (see, e.g., *Packer v. Superior Court* (2014) 60 Cal.4th 695 [recusal procedures]; *Kling v. Superior Court* (2010) 50 Cal.4th 1068 [criminal SDT procedures]; *People v. Salazar* (2005) 35 Cal.4th 1031 [*Brady* duties re expert witnesses]; *People v. Floyd* (2002) 27 Cal.4th 997 [jail privacy]; *Albertson v. Superior Court* (2001) 25 Cal.4th 796 [SVP procedures]; *People v. Douglas* (1999) 20 Cal.4th 85 [appealability].) and in the United States Supreme Court. (See, *Samson v. California* (2006) 547 U.S. 843; *United States v. Knights* (2001) 534 U.S. 112.) As an adjunct professor of law at two schools, I have taught classes on Advanced Evidence, Trial Practice, Moot Court, and Criminal Law.

CPDA is also involved in legislative solutions, as noted by the court in *People v. Wagner* (2009) 45 Cal.4th 1039 [1971 amendments to sentencing scheme]. Members of the CPDA Legislative Committee and our paid lobbyists attend key state Senate and Assembly committee meetings on a weekly basis and

take positions on hundreds of bills relating to the topics of constitutional rights, criminal discovery, evidence, criminal procedure, and the fair administration of justice.

In summary, CPDA and its legal representatives have the necessary experience, collective wisdom, and interest in matters of constitutional rights, discovery, evidence law and appellate/writ review to serve this court as an amicus curiae in this case.

**B. The Ventura County Public Defender's office is established pursuant to Government Code sections 27700-27712 to provide quality legal representation to indigent persons in the courts of Ventura County. Historically, the Public Defender is well-versed on all issues relating to California's criminal justice system and often provides amicus services to the California courts on issues of statewide significance.**

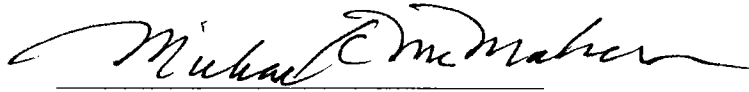
Todd W. Howeth is the Public Defender of Ventura County. Each year, the Public Defender provides a defense in nearly 16,000 new misdemeanor cases and over 3,500 new felonies. All of these cases involve discovery issues. Our collective trial and appellate experience well equips us to assist this court on the issues presented in this case.

The Public Defender of Ventura has been permitted to appear as amicus in our state Supreme Court since 1969. In 2005, that court also allowed the public defender to present oral argument as an amicus in *People v. Salazar* (2005) 35 Cal.4th 1031.

The Public Defender takes an active presence in our courts of review as a party, an attorney for a party, or in the role of amicus. (See, e.g., *Erwin v. Appellate Dept.* (1983) 146 Cal.App.3d 715 [Public Defender as petitioner].) The author of this brief has worked for the Ventura County Public Defender (VCPD)

for 18 years and is the Senior Deputy responsible for our appellate practice and training. I was counsel on some of the cases cited by the parties in this writ proceeding.

Dated: May 11, 2018

A handwritten signature in black ink that reads "Michael C. McMahon". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Michael C. McMahon, SBN 71909

*State Bar Certified Specialist - Criminal Law*

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For *The California Public Defenders Association* and  
*The Public Defender of Ventura County*,

Applicants for amici curiae status in support of real party in interest.

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**CPDA AND VCPD AMICI BRIEF  
IN SUPPORT OF RPI LANCE TOUCHSTONE**

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## Our Discussion and Observations

### Introduction

This case involves a potential conflict between certain provisions of the federal Stored Communications Act (SCA or, simply, the Act) (18 U.S.C., § 2701, et seq.) and criminal defendants' federal and state constitutional rights in a state prosecution. If those laws can be harmonized, the conflict is resolved and avoided.

Your amici have carefully read the briefing of the parties. For purposes of brevity and judicial economy, we will try to avoid repetition of any lengthy discussion of the scope of the various constitutional rights implicated by the petition or the record. (Most of these rights are both state and federal. For example, both the United States and California Constitutions grant a defendant the right “to have compulsory process for obtaining witnesses in his favor.” (U.S. Const., 6th Amend.; see Cal. Const., art. I, § 15 [affording “the right ... to compel attendance of witnesses in the defendant’s behalf”].) Here, the resistive witnesses are custodians of certain records sought by the defendants. (We do not include the alleged victim, Mr. Renteria, as he can’t be located and has not been served nor ordered to appear.)

We write to share our observations about how this controversy should be viewed by this court. In short, it appears the superior court did a very good job balancing the competing equities and legal interests, and *beginning* to resolve any potential tension between the SCA and the constitutional rights of the defendants. Importantly, review ensued before any final balancing or weighing by the trial court.

Facebook cites *People v. Hammon* (1997) 15 Cal.4th 1117 (*Hammon*). Amici urge this court to carefully scrutinize and revisit the basis of that opinion, here, in a context where *in camera* review could be time-consuming as a jury waits.



Your amici also ask this court to affirm the order of the superior court on the narrowest grounds possible and to avoid any sweeping proclamations regarding the constitutionality of the SCA. Your opinion should simply hold that the SCA does not *categorically* preclude a trial court from ordering an *in camera* judicial inspection of records to determine if the defendants' entitlement to due process, compulsory process, and confrontation, warrant redacted disclosures with appropriate protective orders. The petition should then be denied on that basis.

## I.

**The SCA permits the limited disclosures at issue here provided Facebook discloses to the court in good-faith reliance on the court order.**

Congress realized that it would be difficult to predict and provide for all future situations in which a court of lawful authority might order a service provider to disclose content.

Instead, it simply created a broad safe harbor for providers in 18 U.S.C. 2707, subdivision (e). Providers are fully protected from any adverse consequences if they act in good-faith reliance upon a court warrant or order or a request of a governmental entity. The Superior Court of the County of San Diego is a governmental entity with the meaning of the SCA.

## II.

**In denying Facebook's motion to quash, the trial court made an implied factual finding that the Facebook records were not available to Mr. Touchstone by other means or from other sources.**

Facebook continues to assert that their motion to quash had to be granted because the records were available to Mr. Touchstone by other means or from other sources that would not implicate the SCA. This was a hotly disputed issue of fact concerning the motion to quash.

The record suggests that the trial court denied Facebook's motion to quash a judicially-issued subpoena, in part because Mr. Touchstone tried to get the People to obtain the records by search warrant or subpoena but the People refused and the trial court (a different judge) would not order them to do so. (R.T., 4/27/2017, at pp.128-129.) Mr. Renteria, the Facebook user and alleged shooting victim, is homeless and transient and the defense cannot locate him to solicit his access to the records or to serve him a subpoena to lodge the records with the clerk. He previously objected to release of his medical records to establish a gunshot wound and has been uncooperative with the defense. (*Id.*, at p. 130.) Attempts to locate Mr. Renteria (App., at pp.79-81, 97, 99) through the prosecution were unsuccessful. (Your amici suggest that such hostile and uncooperative witnesses are the circumstances which gives rise to the right to compulsory process.)

Your amici submit the facts recited here constitute implied findings by the superior court that are entitled to great deference on review. Where there are factual disputes, and the trial judge made no express findings, the appellate court will imply findings in support of the order. (*Federal Home Loan Mortg. Corp. v. La Conchita Ranch Co.* (1998) 68 CA4th 856, 860.)

It is simply far too late in the process to still be arguing whether Mr. Touchstone can get the Facebook records directly from Mr. Renteria. The trial court concluded he could not.

### III.

**The trial court's factual finding that the records were not available to the defendants by alternative means is entitled to great deference.**

A large component of the petitioners' motions to quash, and oral argument at the January 2015, hearings on those motions, is that the defendants

were able to get the necessary records from other sources. This factual contention was repeatedly rejected by the trial court in both hearings.

When reviewing factual findings, the reviewing court does not reweigh the evidence in the record because a trial court “generally [is] in a better position to evaluate and weigh the evidence.” (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 385.) Instead, the reviewing court should consider the record in the light most favorable to the trial court’s factual findings and “defer to the superior court’s express and implied factual findings if they are supported by substantial evidence.” (*People v. Woods* (1999) 21 Cal.4th 668, 673.)

#### IV.

##### **Facebook’s assertion that compliance with the SDT is unduly burdensome is not supported by evidence.**

Facebook makes conclusory assertions that compliance with the SDT is unduly burdensome. (App., at pp. 12-13.) However, one of the great advantages of Facebook is its ability to store, sort, search and produce vast amounts of data in a few seconds, with a few mouse clicks.

The sheer volume and scale of data processing is unprecedented. Facebook released its amazing first quarter 2018 results on April 25, 2018. Worldwide, there are now over 2.20 billion monthly active Facebook users for Q1 2018 (Facebook MAUs), which is a 13 percent increase over last year.

Users depend on Facebook to sort through the mountains of data and display that which is sought on their phones, in seconds. The production ordered here is not unduly burdensome.

/

/

V.

**Facebook users have given implied consent to judicial review of their data because there is no reasonable expectation of privacy that the data is not shared.**

Many uninvited people and Artificial Intelligence (AI) reading computers read content that users share through Facebook, starting with Facebook employees, internal AI systems, and their business partners. Users have been warned their communications are not confidential. (Most users are apparently happy if their family photo is not used in an advertisement for herpes medication.)

Facebook's "Security Watchdog" program allows Facebook employees to review content sent by users, to discourage spamming, bullying, racist viewpoints, etc. They are carefully reading precisely for content. The user is not constantly reminded that their content is being viewed by these employees. Facebook has confirmed that it automatically scans all the text and image content of Messenger and Whatsapp conversations to prevent violations of Facebook's "Community Standards" and the spread of spam or abuse. Facebook routinely scans the content of even "private messages" and uses the same tools to prevent abuse there that it does on its social network more generally. All content must abide by the same community standards. People can report posts or messages for violating those standards, which would prompt a review by the company's "Community Operations" team. Powerful automated tools also do this work.

Your amici direct the court's attention to the brief of California Attorneys for Criminal Justice (CACJ) which points out that "*Facebook Users Consent to Content Production Under the Stored Communications Act, 18 U.S.C. §2702 (b)(3) by agreeing to Facebook's Terms of Service and Data Policy."* (CACJ, at pp. 4-11.) CACJ quotes extensively from the most current editions of these ever-changing public policies. We will not repeat those excerpts here.

It is important to remember that Facebook is constantly revising and amending these so-called privacy policies, which Facebook used to call their “Statement of Rights and Responsibilities,” at least through the early part of 2015. Users consent merely by using the Facebook services.

Mr. Renteria’s acceptance and agreement to these Facebook policies should fairly be viewed as an implied consent to the disclosure ordered in the instant case. Once Mr. Renteria shared content with Facebook *on their terms*, he was on actual notice that it would be read by a larger audience than his target viewers.

Even in the wake of the Cambridge Analytica “scandal” regarding the harvesting and use of personal “private” data, Facebook admits to no wrongdoing under their terms of service. The public outcry has provoked new and heightened privacy policies, however users still won’t be able to delete data that they had “given” to third-party apps on the platform previously, even if it was used for reasons other than what was agreed to. Some of that data, generated over years of games and personality quizzes that had access to private information, is still stored outside of Facebook’s control by the private individuals and companies that built those applications. The genie is out of the bottle and the cat won’t go back in the bag.

## VI.

### **Mr. Renteria impliedly consented to disclosure of his content by making other exculpatory public posts relevant at trial.**

Although Facebook seeks to characterize the court’s order as a “fishing expedition” (App. at p. 12), Mr. Renteria publically posted trial-relevant content on Facebook. (*Id.*, at pp. 77-78.)

When doing so, Mr. Renteria is presumed to be aware of California Evidence Code section 356, which makes additional Facebook content admissible

if it is necessary to more fully understand the other parts of his declaration or conversation on Facebook. That section provides: “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.”

The graphic structure of Facebook lends itself to the application of section 356. Facebook invites “comments” and “replies” directly below posted content. Content is listed by topic, not the time of the posting. Its Messenger and WhatsApp apps conveniently store all parts of a conversation in one place even if the conversation unfolded over time.

By posting content relevant at trial on Facebook, Mr. Renteria impliedly consents to Facebook’s providing related parts of the conversation for an *in camera* inspection.

## VII.

**Amici are unconvinced that a superior court can order witnesses to “consent” to disclosures by Facebook or other third-parties.**

In *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854, the Court of Appeal appeared to have concluded that the superior court could compel a trial juror to consent to disclosures by Facebook relevant to that juror’s misconduct. Assuming that the case was correctly decided, the facts are quite different than the facts presented in the instant case.

Amici remain unconvinced that, absent a finding of juror or witness misconduct, courts may coerce or compel persons to consent to disclosures by Facebook or other third-parties. Coerced or compelled consent may be legally

vitiated by those conditions. The fictive consent is merely the product of the underlying court order and concern by the person about the sanctions of contempt for defiance.

Amici are also not of the opinion that this issue was squarely resolved in *Negro v. Superior Court* (2014) 230 Cal.App.4th 879, which was greatly complicated by the fact that Mr. Negro was asserting inconsistent positions in two courts. “He [Negro] seeks to have the best of both worlds by complying with the court’s order while denying that his decision to do so should be given legal effect.” (*Id.*, at p. 899) Under these circumstances, the Court of Appeal properly declined to entertain Mr. Negro’s ex post facto attack on the validity of his previous consent.

The compelled consent issue is simply not presented in the instant case because Mr. Renteria is not physically available or locatable to be given any orders by the court. Any proclamations of this court on the topic should await a case in which the issue is squarely presented.

## VIII.

### **A trial court should be allowed to begin trial discovery proceedings before commencing jury selection.**

The trial court acted within its discretion in scheduling a discovery hearing before the formal commencement of the rest of the trial. The trial court may have correctly concluded that the SCA might have to yield to the defendants’ Sixth Amendment right of confrontation at trial. Allowing *the court* to examine the records before jury selection to identify any potentially relevant and material content would greatly reduce the risk of mid-trial delay.

Amici remind the court that the trial court’s order did not involve any disclosure of social media records to the parties. The Court of Appeal does not contend that the constitutional rights to ensure a fair trial will never outweigh

the public policy interests sought to be furthered by the SCA. The order at issue here merely compelled that records be lodged with the clerk for potential *in camera* review by the trial court at some unspecified date and time. The issuance of a subpoena duces tecum is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described therein until a judicial determination has been made that the person is legally entitled to receive them. Review is difficult (or premature) on the instant record because the important judicial determination has yet to be made.

The actual *in camera* review may well have occurred during trial. Trial courts should have the discretion to avoid unnecessary delay by ordering non-parties to locate and to lodge relevant records at the threshold of the trial. Importantly, a ruling on the threshold of trial does not preclude the court from changing its ruling based on other developments during trial.

The power to conduct judicial proceedings involves the power inherent in every court to control the disposition of the causes on its docket with an economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance. The record in this case supports the conclusion that the trial court was doing just that.

## IX.

**Due Process will sometimes require the disclosure of private, personal information, regardless of the format in which it is stored. A literal reading of the SCA as prohibiting Due Process rights would present a serious question regarding its constitutionality, which this court should avoid.**

Due Process often requires the disclosure of private, personal information. It appears the Petitioners concede the point.



If private, personal information is directly relevant to, and essential to, a fair criminal trial, privacy rights give way if there is a compelling and countervailing state interest related to the rights of the parties. (Cf., *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853-1854 [disclosures of sexual harassment civil suit].) The format in which the information is stored should be afforded minimal weight when balancing those competing interests.

When enacting the SCA, Congress was well-aware of the operation of the judicial branch, the separation of powers, and constitutional exceptions read into legislation. “In determining a statute’s constitutionality, we start from the premise that it is valid, we resolve all doubts in favor of its constitutionality, and we uphold it unless it is in clear and unquestionable conflict with the state or federal Constitutions.” (*Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 122); accord, *California Housing Finance Agency v. Elliott* (1976) 17 Cal. 3d 575, 594.)

## X.

**The Confrontation Clause of the Sixth Amendment may afford criminal defendants a right to discovery on the eve of trial of privately held documents when such discovery is necessary to a fair trial. Due Process and the Confrontation Clause will sometimes require that rights historically viewed as “trial rights” attach shortly before jeopardy to be meaningful.**

Amici contend that the record here is distinguishable from the record in *Hammon* in a manner which dictates a different result. We further contend the dissenting opinions in *Hammon* are better reasoned than the majority opinion, which overruled previous precedents. Although the result in *Hammon* may have been correct, the majority opinion goes too far, and is generally read to resolve important constitutional issues that should have been avoided.

In *Hammon*, the trial court failed to identify the documents it reviewed *in camera* to facilitate meaningful appellate review. This court

concluded that Hammon had forfeited such a claim by not asking the trial court to make such a record. (*Hammon, supra*, 15 Cal.4th, at p. 1124.) This court also described the trial court’s characterization of the records it had examined as merely a “cryptic statement.” This flawed and inadequate appellate record provides a shaky foundation for an important component of our state’s constitutional jurisprudence.

Importantly, in the instant case, it seems highly likely that trial court would have made an adequate record to ensure meaningful appellate review and that nothing would have been provided to the defendants unless such production was demonstrably necessary for the conduct of a fair trial.

## XI.

**This is not a case about a conflict between state and federal law. The SCA must be applied to this state prosecution in a manner that comports with the many federal constitutional rights made applicable to the states through the Due Process Clause of the Fourteenth Amendment.**

“[When] it appears that an Act of Congress conflicts with [a constitutional] [provision], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation.” *Trop v. Dulles* (1958) 356 U.S. 86, 104 (plurality opinion). “[T]he Constitution is the supreme law of the land, and all legislation must conform to the principles it lays down.” (*Rostker v. Goldberg* (1981) 453 U.S. 57, 112, dis. opn. J. Marshall with J. Brennan.)

Every reasonable jurist is aware that Congress passes a fair amount of questionable and ill-advised legislation. Some of these Acts of Congress facially conflict with the federal constitution, and others could be unconstitutional if literally applied to a particular case or controversy. (Compare *Citizens United v.*

*FEC* (2010) 558 U.S. 310 [federal ban on corporate-funded independent expenditures under 2 USC § 441b *facially* violated the First Amendment] with *United States v. Raines* (1960) 362 U.S. 17 [upholding the constitutionality of the Civil Rights Act of 1957 *as applied* to the parties to the litigation].)

On other occasions, federal regulations conflict with an Act of Congress and are unenforceable, but only as applied to the status of the parties. (See, e.g. *Burwell v. Hobby Lobby Stores, Inc.* (2014) 573 U.S. \_\_\_, 134 S.Ct. 2751 [closely-held, for-profit corporations are not required to provide certain forms of birth control seemingly mandated by the Affordable Care Act].)

When such conflicts arise, as in the instant case, it is the duty and province of the courts to resolve them. Over the years, our courts have invalidated hundreds of provisions in Acts of Congress or, more commonly, construed the statute in a manner that avoids a question regarding their constitutionality. A statute should be interpreted in a way that avoids placing its constitutionality in doubt. The “constitutional-doubt canon” of statutory construction militates against not only those interpretations that would render the statute unconstitutional, but also those applications which would even raise serious questions of constitutionality. It is essential in this proceeding for the court to follow its “duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality.” (*Richmond Co. v. United States* (1928) 275 U.S. 331, 346.) This constitutional-doubt canon is sometimes referred to as the “doctrine of constitutional avoidance.”

Again, this is not a case about a conflict between state and federal law. The SCA must simply be applied to this prosecution in a manner that comports with the federal and state rights to due process, including its compulsory process and confrontation components.

Criminal prosecutions constitute “ongoing” criminal investigations, at least until the entry of a judgment. It is left to the court to determine if there are

reasonable grounds to believe that the records sought are “relevant and material” to the investigation of the case. Consistent with the Compulsory Process Clause, California and other jurisdictions provide both parties with the means to participate in the pretrial investigation of the crime and the identity of the perpetrators. (See, e.g., Pen. Code, § 1326 [providing for *in camera* review of records produced under a defense’s subpoena duces tecum (SDT)].) Section 1326 was analyzed extensively in *Kling v. Superior Court* (2010) 50 Cal.4th 1068, and the author of this brief argued and briefed that case in the California Supreme Court.

California also requires a criminal defendant to share some of the fruits of his or her criminal investigation with the prosecution at least thirty days before trial. (See Pen. Code, § 1054.3.) California’s criminal investigation and disclosure scheme is ongoing and reciprocal. For example, the People’s obligations under *Brady* are ongoing, even post-judgment. (*People v. Davis* (2014) 226 Cal.App.4th 1353, 1366.)

In *Mapp v. Ohio* (1961) 367 U.S. 643, 655, the High Court held “all evidence obtained by searches and seizures in violation of the [federal] Constitution is, *by that same authority*, inadmissible in a state court.” (Emphasis added.) Mapp’s federal constitutional rights were viewed as self-effectuating in her Ohio prosecution, without the need of further codification by Congress or by the state government. The applicable federal constitutional rights must be enforced by the state court. “To hold otherwise is to grant the [constitutional] right but in reality to withhold its privilege and enjoyment.” (*Id.*, at p. 656.)

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## XII.

**The order for an *in camera* inspection in this case is consistent with the due process requirement that criminal prosecutions “comport with prevailing notions of fundamental fairness” and that “criminal defendants be afforded a meaningful opportunity to present a complete defense.”**

In the first instance, we need to trust and afford some deference to our trial court judges, who are generally far better informed about the specific facts and circumstances of their cases than we will ever be. Those judges attempt to harmonize and apply seemingly inconsistent statutory and constitutional mandates to a particular case.

In the instant case, the defendants’ showing of a necessity, good cause, and legal entitlement to the documents was quite strong and compelling. In a different case, it may not be as strong. Here, the order for an *in camera* inspection was fair and appropriate to protect the due process rights of the defendants.

A defendant’s due process rights include the right to present material evidence in his or her defense. Rules excluding evidence from criminal trials do not necessarily “abridge an accused’s right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” (*United States v. Scheffer* (1998) 523 U.S. 303, 308; quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 56.) *Rock v. Arkansas* guides us here. The High Court did not invalidate the legislation, it merely ruled there must be a constitutionally-compelled exception in *Rock*’s particular case. As here, the text of the legislation was not the source of the exception.

On the record presented here, the trial court may have concluded that to interpret the SCA to categorically prohibit any judicial inspection of records in this particular case would be “disproportionate” to the purposes intended for the SCA. That conclusion is not unreasonable.

### XIII.

**The petition should be denied without prejudice because this court has an inadequate record for meaningful review and the exculpatory value of the subpoenaed records is unknown at this time.**

Because petitioners have not yet produced the records for judicial inspection, it impossible to assess, at this time, whether the prejudice to the defendants is of constitutional magnitude.

Such an assessment could be made if the records were examined at an *in camera* hearing with the trial court making an adequate record for meaningful review.

After the *in camera* hearing, the entire controversy may be moot if the trial court determines that the defendants have no entitlement to see the records. If the trial court concludes that some records or redacted records should be released to the defendants subject to appropriate protective orders, petitioners should be afforded an adequate window of time to file a successor petition. Writ review can then be conducted, aided by the sealed transcript of the *in camera* hearing and review of the sealed records sought to be disclosed.

California procedure facilitates this process. Under Penal Code, § 1326, subdivision (c), an entity responding to a third party SDT in a criminal case must deliver the subject materials to the clerk of court so that the court can hold a hearing to determine whether the requesting party is entitled to receive them. When the defendant is the requesting party, the court may conduct that hearing *in camera*. In light of the SCA, it seems appropriate that the defendants should be excluded from a portion of that *in camera* hearing. The issuance of an SDT pursuant to section 1326 is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described in the SDT until a judicial determination has been made that the party is legally entitled to receive them. Again, this is yet to occur.

Part of the trial court's role when presented with materials produced under a defense SDT to a third party is to assess the defendant's constitutional rights regarding the records sought. To the extent the trial court has not completed that assessment, the petition is premature. (Cf., *Kling v. Superior Court* (2010) 50 Cal.4th 1068 [remand required because the Court of Appeal had not reviewed the transcript of the *in camera* proceedings].)

Our Supreme Court's guidance in *People v. Mooc* (2001) 26 Cal.4th 1216, supports the conclusion that meaningful review cannot occur in a vacuum. "The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential [sealed] file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision of whether to disclose or not to disclose, would be nonexistent. Of course, to protect the officer's privacy, the examination of documents and questioning of the custodian should be done *in camera* in accordance with the requirements of Evidence Code, section 915, and the transcript of the *in camera* hearing and all copies of the documents should be sealed. [Citation omitted.]" (*Id.*, at p. 1229.)

#### XIV.

**As applied to this prosecution, the SCA violates the defendants' right to due process if it is interpreted to prohibit any judicial assessment of the exculpatory significance of the subpoenaed records.**

In construing and applying the words of a statute to a particular controversy, common sense should be a guide.

When Congress enacted the SCA, it was presumed to have done so with full knowledge of then-existing law, including the federal constitution and its amendments. Each Act of Congress need not enumerate any constitutionally-compelled deviations from its text, because those exceptions are read into the Act by the Judicial Branch, when and if the need arises. (*Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137 [“The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.”].) Congress also knows that the courts are the forum where controversies such as the one here will be resolved and that the courts will determine their own procedures.

California’s due process protections are broader than its federal counterpart. Under California law, for example, “due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate.” (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625). However, the United States Supreme Court has never held that a criminal defendant has a constitutional right to a pre-trial line-up.

State and federal due process require that an exception be read into the SCA to permit an *in camera* inspection of user content when the court finds that content is relevant and material at trial and is not reasonably available by other means.

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## XV.

### **Social media evidence has become outcome-determinative in many criminal prosecutions.**

“It seems as if every week there’s a news story about someone committing a crime and confessing to it on Facebook, bragging about it on Twitter or sharing photos of it via Instagram. In many ways, social media has been a boon for law enforcement, handing the police ready admissions of guilt, equipping criminal investigators with new types of evidence and empowering prosecutors to better dispel reasonable doubt of guilt.” (The New York Times, February 16, 2014, on page SR5 of the New York edition with the headline: Social Media, a Trove of Clues and Confessions.)

This court recently acknowledged that social media records can be “particularly significant” to pretrial motions which have nothing to do with the guilt or innocence of a defendant. The evidence the unanimous court labeled as “particularly significant” were records stored by a petitioner in this case, Twitter, Inc. (*Packer v. Superior Court* (2014) 60 Cal.4th 695 [court erred in denying a recusal motion without an evidentiary hearing].) In *Packer*, the defense was forced to make its case, in large part, with social media records because, as here, the witnesses were uncooperative or unavailable. This court’s unanimous opinion is rife with reliance upon the social media records. (E.g., *Id.*, at p. 704 (MySpace record), and pp. 706, 708, 709, 711 (Twitter, Inc. records).]

Contrary to petitioners’ assertion, the actual business records are often necessary to overcome an authentication objection when an uncooperative witness will not do so. (See, *id.*, at p. 709 [“the prosecutor objected to the introduction of the [Twitter, Inc.] message, “really over not being able to tweet my whereabouts” that had appeared on Elizabeth’s Twitter account, arguing that “there has been no showing that the ‘tweet’ can be attributed to Elizabeth Frawley.”].)

Again, the significance of social media records, such as those sought here, cannot be over-stated.

### **Conclusion**

This court should affirm the order of the superior court on the narrowest grounds possible and avoid any sweeping proclamations regarding the constitutionality of the SCA. Your opinion should simply hold that the SCA does not *categorically* preclude a trial court from ordering an *in camera* inspection of records on the eve of trial to determine if the defendant's entitlement to due process warrants redacted disclosures with appropriate protective orders. The petition should be denied on that basis.

DATED: MAY 11, 2018

Respectfully submitted,

TODD W. HOWETH, Public Defender

A handwritten signature in black ink, appearing to read "Michael C. McMahon", with a long horizontal flourish extending to the right.

Michael C. McMahon, Senior Deputy

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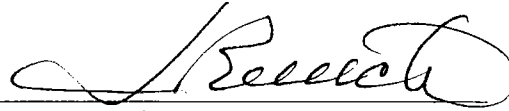
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VENTURA COUNTY

CERTIFICATE OF WORD COUNT

I do hereby certify that by utilizing the word count feature of MSWord, Times New Roman #13 font, there are 8754 words in this document, excluding Declaration of Service.

May 11, 2018

A handwritten signature in black ink, appearing to read "Jeane Renick", written over a horizontal line.

Jeane Renick  
Legal Mgmt. Asst. III

## DECLARATION OF SERVICE

Case Name: **Facebook Inc., Petitioner, v. Superior Court of San Diego County, Respondent; Lance Touchstone, Real Party in Interest;**  
Case No. **S245203 (from C. App. 4/5 SCD268262)**

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On May 11, 2018, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender at 800 South Victoria Avenue, Ventura, California 93009. On this date, I served the attached **Joint Application to Appear as Amici Curiae in Support of Real Party in Interest Lance Touchstone, via electronic service, as indicated, AND/OR** by placing in the U. S. Mail, a full, true, and correct copy thereof in an envelope addressed to the persons named below at addresses set out below, in the ordinary course of business:

- 1) San Diego Superior Court, Hon. Kenneth So., Judge, 1100 Union St., San Diego, CA 92101 via U.S. Mail; Respondent;
- 2) Court of Appeal, 4th Appellate Dist., Div. 1, 730 B Street, Ste. 300, San Diego, CA 92101 via U.S Mail;
- 3) Atty. James Snell @ [jsnell@perkinscoie.com](mailto:jsnell@perkinscoie.com); Petitioner counsel;
- 4) Atty. Christian Lee @ [cllee@perkinscoie.com](mailto:cllee@perkinscoie.com); Petitioner counsel;
- 5) Atty. Joshua Lipshutz @ [jlipshutz@gibsondunn.com](mailto:jlipshutz@gibsondunn.com); Respondent counsel;
- 6) Atty. Michael Holecek @ [mholecek@gibsondunn.com](mailto:mholecek@gibsondunn.com); Respondent counsel;
- 7) Chf. Dep. Megan Marcotte, Alt. Public Defender, 450 B Street, Ste. 1200, San Diego, CA 92101; RPI counsel;
- 8) Kate Tesch, Dep. Alt Public Defender, 450 B Street, Ste. 1200, San Diego, CA 92101 via U. S. Mail; RPI counsel.
- 9) Atty. Donald Landis, Jr., @ [Don@donlandislaw.com](mailto:Don@donlandislaw.com)
- 10) Atty. Stephen Dunkle @ [sdunkle@sangerswysen.com](mailto:sdunkle@sangerswysen.com)
- 11) Atty. John Philipsborn @ [jphilipsbor@aol.com](mailto:jphilipsbor@aol.com)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on the above date at San Buenaventura, California.

TODD W. HOWETH, Public Defender

By 

Jeane Renick  
Legal Mgmt. Asst. III