IN THE SUPREME COURT OF CALIFORNIA

FACEBOOK INC., et al., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; THE PEOPLE, DERRICK HUNTER, and LEE SULLIVAN, Real Parties in Interest.	S230051 Ct.App. 1/5 A144315 (San Francisco County Superior Court Nos. 13035657 & 13035658.)

SUPPLEMENTAL BRIEF OF
***THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION* AND**
THE PUBLIC DEFENDER OF VENTURA COUNTY
(AMICI IN SUPPORT OF RPI)

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I.

Petitioners' complaint that the mode of analysis employed by the court of appeal precludes this court from considering the application, if any, of the SCA to public communications is unfounded after this court's order for supplemental briefing.

In their Supplemental Brief, petitioners urge this court not to consider the scope of SCA protections to the materials sought by the defendants because that was not the mode of analysis used by the court of appeal. (SB for Pet., at pp. 1 and 3.)

Any problems in this regard are clearly avoided by this court's order for supplemental briefing. Petitioners' opportunity to be heard at a meaningful time, in a meaningful manner, before this court's decision, is fully protected by Government Code, section 68081, and Rule 8.516(b)(2) of the California Rules of Court. The interplay of those two provisions was examined "in depth" by this

court in *People v. Alice* (2007) 41 Cal.4th 668, 674 [any problem avoided where the parties are provided an opportunity to brief an issue in the Supreme Court].)

The trial court ordered records to be produced one day before the commencement of jury selection. Production was necessary to ensure they would be available for a post-production in camera inspection by the court.

The gist of petitioners' position is that this order to produce exceeded the court's jurisdiction because of the SCA. The gist of the defendants' position is that provisions of the state and federal constitutions provide this criminal court with the necessary jurisdiction, much as the Fourth and Fourteenth Amendments provide jurisdiction and a constitutional mandate for a state criminal court to exclude certain evidence. (*Mapp v. Ohio* (1961) 367 U.S. 643.) Were it otherwise, they argue, these constitutional rights would just be valueless words, rather than meaningful protections implicit in our concept of ordered liberty.

The scope and application of the SCA to different types of communication is a pure question of law fairly included within the petition and answer. In any event, Rule 8.516 permits this court to reach that issue after reasonable notice to the parties. Indeed, one of the many benefits of input from amici is to alert the court to additional issues which may lead the court to an easier path to the right disposition.

Ultimately, this court is not judging the reasoning of the trial court, the court of appeal, or the parties. At the end of the day, the question is whether the trial court exceeded its jurisdiction by ordering the petitioners to produce records the day before the commencement of jury selection. If a trial court has the jurisdiction to make such an order in an appropriate case, then the order should be affirmed on any legal theory or mode of analysis providing a basis for jurisdiction.

This court's question "whether section 2702(a)(1) and (2) should be construed to apply to only those communications that were, when sent, configured to be private . . ." presents a pure question of law which can clearly be raised for

the first time on review. Petitioners' assertion the statutory construction issue has been "waived" (SB for Pet., at pp. 1 and 3) for consideration by this court is mistaken.

II.

It is important that the courts have a basic understanding of the configuration settings for social media.

Amici essentially agree with defendants that the SCA itself treats public communications differently than truly private messages. Nevertheless, amici believe that a basic understanding of the various configuration settings is necessary.

Facebook is a well-known example. The default setting in Facebook is "PUBLIC" which can be seen by *anyone on or off of Facebook.* Many people incorrectly assume that viewing is limited to the 1.79 billion people who use Facebook. (As of the third quarter of 2016, Facebook had 1.79 billion monthly active users.) This assumption is incorrect because "PUBLIC" posts also show up on other websites, such as Google Search. Those viewing such posts can, of course, share with whomever they choose.

If Facebook were a country, it would now be the most populous in the world - greater even than the population of China.

A Facebook declarant can alter the configuration to limit a post's initial audience to "FRIENDS." Each user is limited to 5,000 friends, although other users can "FOLLOW" your postings; each Friend is free to re-post to a different audience or share a post off of Facebook using screenshots or other methods. (The author of this brief shared both Facebook and Twitter screenshots with this court in his brief in *Packer v. Superior Court* (2014) 60 Cal.4th 695 to demonstrate the need for an evidentiary recusal hearing, and to explain why the assigned prosecutor's children were on the list of defense witnesses. This court

referred to those screenshots as a basis for its holding.)

A declarant can also alter the configuration to "FRIENDS AND FRIENDS OF FRIENDS." Assuming everyone had the maximum number of friends and no more mutual friends than one (which is unlikely), that privacy setting would limit the initial viewing audience to some 25 million people.

One doesn't achieve any substantial privacy unless a user sends a private message (PM) to one or more users in a small group. Most other configurations effectively launch the content into the public domain. Additional information is currently available at: https://www.facebook.com/about/basics .

Although there are some 974 million existing Twitter accounts, many of these account holders view content but don't "tweet." Twitter appears designed primarily for sharing information and hyperlinks to enormous audiences. Twitter is also public by default, which means anyone can see and interact with your posts. Its configuration settings are a bit less easily found. Twitter's most well-known user is probably President Donald J. Trump, who uses it to communicate with many millions of people instantly and directly.

Importantly, Twitter can capture and store the location of a user at the time their tweet is posted.

Twitter, however, also allows users to direct message (DM) another user or group of users. On the street, if two acquaintances commence a more private or intimate friendship, that transition is sometimes referred to as "sliding into DM." More information about that configuration can currently be found at: https://support.twitter.com/articles/14606# .

The Twitter website reminds users that "recipients may download or re-share links to media that you share in a Direct Message."

Similarly, by default, anyone can view your profile and posts on Instagram. As of December 2016, Instagram - a mainly mobile photo-sharing network - had reached 600 million monthly active users, up from 500 million in

June 2016. More information is currently available at: https://help.instagram.com/116024195217477 .

At the time the SCA was enacted, this network of social networks did not exist. It exploded in both size and volume in 2007. Around that time, Facebook started allowing people to register with either an email address or a mobile phone, thereby making it possible for people who do not have email addresses to register. In 2007, Twitter usage grew dramatically after it was showcased at the influential South by Southwest Interactive (SXSW) conference. Instagram began hosting content in 2010.

Other than the private or direct messages, persons posting on social media are consenting to release their content into the public domain. They turn over control to large numbers of recipients, who are encouraged by petitioners to re-tweet, share, and re-post that content. This culture is driven by advertising revenue which depends largely upon not the total number of accounts, but by the number of "monthly active users." Re-tweeting, sharing, and re-posting content increases the number of monthly active users. Petitioners make almost all of their money from advertising.

It makes sense that Congress and the courts would consider the configuration settings of a communication at the time it was shared. Upon an in camera inspection following remand, the court should consider that information, along with the exculpatory materiality of such content.

A court may order petitioners to produce the records the day before a trial commences, even if the court defers inspection to a later date. The court needs to know the records are available.

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III.

Petitioners have sole access to the records they are withholding. Because they have not lodged them under seal with the clerk, it is impossible to evaluate several factual assertions they have included in their supplemental briefing.

Petitioners' supplemental briefing contains several factual assertions which are difficult to evaluate on the record they have provided and vague as to time. We direct the court's attention to some of them:

- "Much of the content at issue in this case is not accessible to the public . . . ." (p. 1.) (To be sure, however, the court's question focuses on the configuration of the post when it was sent, a fact known only by petitioners.)
- "Most of the content at issue in this case is not public . . . ." (p. 2.)
- "Specifically most, if not all, of the Facebook or Instagram content sought by defendants is not readily accessible to the public, ..." (p. 3.) ("Much," "Most," "all"- which is it? And are they referring to postings that are currently not accessible, or configured to some initial audience when sent.)

We leave it to the reader to observe other examples, but not before pointing out that it is petitioners' obligation to provide the reviewing court with an adequate record for meaningful review. By failing to lodge the records under seal with the clerk, petitioners have prevented the court from any knowledge of the "public" or "private" characteristics of the records at the time they were sent.

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IV.

An amendment to the SCA acknowledging that the criminal courts must determine the rights of defendants on a case by case basis might be helpful, however it is unnecessary because the constitutional rights at issue are self-effectuating.

Defendants' supplemental brief touches upon the desirability of an amendment to the SCA acknowledging the need to accommodate the rights of those being criminally prosecuted. (Def. SB at pp. 20-21.) Indeed, such an amendment may have avoided the instant litigation.

But often it is the court that must demonstrate the desirability of some additional codification. "A defendant's motion to discover [from a non-party] is addressed solely to the sound discretion of the trial court, which has inherent power to order discovery when the interests of justice so demand." (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535; Cf. Pen. Code, § 1326.) Following this court's leadership in the *Pitchess* case, the Legislature enacted Evidence Code, sections 1043 through 1047.

Similarly, the regulation of electronic surveillance provides an example of a judicial decision leading to a congressional response. After the Supreme Court of the United States held that electronic surveillance constitutes a search even when no property interest is invaded in *Katz v. United States* (1967) 389 U. S. 347, 353-359), Congress responded by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211. (See also 18 U.S.C., § 2510 et seq.)

Because of the unforeseeable vagaries of individual prosecutions, no amendment could or should result in a categorical rule other than the observation that the SCA must be read in conjunction with the applicable constitutional rights and protections. Any other construction of the SCA would lead to unconstitutional results.

V.

Because the right to Compulsory Process is limited to criminal prosecutions, consideration of other cases must proceed with caution.

The right to compulsory process applies to criminal prosecutions in state courts. (*Washington v. Texas* (1967) 388 U.S. 14.) It "is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (*Id.*, at p. 19.)

Amici have read and considered the defendants' discussion of cases dealing with the SCA. (See, for example, Def. SB, at pp. 4-7.) Amici agree with defendants that configuration settings are relevant to the question of whether any particular content even falls with the scope of section 2702. (18 U.S.C., § 2702.) However, the initial configuration can be changed at a later time. A public post can be deleted, at least from the poster's account. And a configuration to limit the initial audience can be later altered to allow unfettered access.

As a result, the initial configuration (when the content was posted or sent) may be considered along with any subsequent alterations. To assume that defendants have current access merely because the original post was public would be a mistake.

Presumably, however, petitioners have some continuing access to deleted posts and have not destroyed any records since service of the subpoena.

VI.

This court should construe the SCA without heavy reliance on its legislative history because that history is of limited help.

Amici agree with the defendants that Congress did intend the SCA to accommodate the rights of defendants in criminal prosecutions. (Def. SB at pp.

20-21.) We doubt, however, that those rights were "simply overlooked."

Congress could reasonably defer to the courts to construe the application of the SCA in such cases. At the time of enactment, Congress was poorly positioned to anticipate and to evaluate the wide array of configuration settings and the huge broadcast footprint of contemporary social media.

Additionally, "...not the least of the defects of legislative history is its indeterminacy. If one to search for an interpretive technique that, on the whole was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history." (*Conroy v. Aniskoff* (1993) 507 U.S. 519 (Scalia, J., concurring in the judgment.)

Relying on legislate history is fraught with perils.

Conclusion

The trial court's factual finding that the records are not available to the defendants by alternative means is entitled to great deference. This court should write an opinion affirming the trial court's order for production of the social media records on the narrowest grounds possible, and the opinion should 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 opinion should also provide guidance for an in camera inspection that includes, among other things, consideration of the configuration settings at the time the content was posted or sent. If necessary, the order for inspection may be modified to specifically include that information. Any resulting disclosure of exculpatory records should include protective orders that such

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information only be used in the defense of the defendants.

DATED: February 2, 2017

Respectfully submitted,

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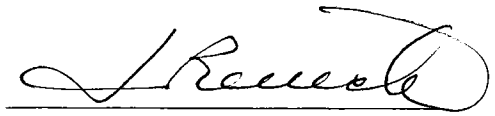
CERTIFICATE OF WORD COUNT

I do hereby certify that by utilizing the word count feature of MSWord, Times New Roman #13 font, there are 3300 words in this document, excluding Declaration of Service.

Dated: February 2, 2017



Jeane Renick
Legal Mgmt. Asst. III

DECLARATION OF SERVICE

Case Name: **Facebook Inc., et al., Petitioner, v. Superior Court of the County of San Francisco, Respondent; The People, Derrick Hunter, and Lee Sullivan, Real Parties in Interest;**
Case No. **S230051 (from C. App. 1/5 A144315)**

On February 2, 2017, 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 **Supplemental Brief of the California Public Defenders Association and the Public Defender of Ventura County (Amici in Support of RPI)** ***by electronic service, as indicated,*** or by placing in the U. S. Mail, a full, true, and correct copy thereof in an envelope addressed to the person named below at the address set out below, by sealing and depositing said envelope in the Ventura County U.S. Mail collection center in the ordinary course of business:

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10) **Jeff Adachi, Public Defender,** S.F. Public Defender's Office, 555 7th St., S. F., CA 94103 (Counsel for S.F. Public Defender's Office, amici curiae), via U. S. Mail.

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.

STEPHEN P. LIPSON, Public Defender
By _____
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Legal Mgmt. Asst. III