In the Supreme Court of California

Facebook Inc. et al., Petitioners, v. **Superior Court of the City and County of San Francisco,** Respondent. **Derrick Hunter et al.,** Real Parties in Interest.	No. S230051 (San Francisco Superior Court Nos. 13035657 & 13035658) Hon. Bruce Chan, Judge

Supplemental brief of *Amicus Curiae*: San Francisco Public Defender

In response to Court's December 21, 2016 Order

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Application

The San Francisco Public Defender requests leave to file the attached supplemental *amicus curiae* brief supporting respondent court and real parties and responding the court's request for additional briefing. The San Francisco Public Defender's application to file an amicus curiae brief (Cal. Rules of Court, Rule 8.200(c) was previously granted on April 12, 2016.

Issue Presented

Amicus San Francisco Public Defender submits this supplemental brief in response to the questions posed by the Court's December 21, 2016 order, specifically whether the relevant provisions of 18 USC 2702(a)(1) and (2) should be construed to apply only to electronic communications configured, when sent, to be private.

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1. Legislative history of the SCA shows it was intended to cover only private communications.

Amicus San Francisco Public Defender agrees with Real Parties that the legislative history and case law cited in the Court's briefing order show that a proper construction of 18 U.S.C. § 2702 exempts public postings of social media from the prohibitions on third party disclosures. (See Real Parties Lee Sullivan and Derrick Hunter's Supplemental Brief as ordered by the Court on December 21, 2016, Section I(A).) We do not reiterate that analysis here, but only add the following.

The Stored Communications Act ("SCA"), part of the Electronic Communications Privacy Act (ECPA), was enacted in 1986, well before the pervasive use across all spectrums—private, governmental and commercial—of the Internet, email, and social media. No mortal legislator who considered the Act in the mid-1980s could have foreseen the explosion of electronic communication and social media over the ensuing decades. Even Facebook was not founded until nearly 20 years after the ECPA, in February of 2004. (See www.facebook.com/facebook/about.)

Still, the legislative history of the ECPA does show that electronic

records made readily available to the public were not meant to fall under the SCA provisions petitioners invoke here. (See, e.g., H.R. Rep. No. 99-647, at 66 (1986) ["electronic bulletin board" users deemed to have consented to disclosure]; 131 Cong. Rec. S11790-03 (1985) [Sen. Leahy on a bill that was the precursor to the ECPA, noting exceptions that would leave unaffected electronic communications sent through a system designed to be readily available to the public]; see also 131 Cong. Rec. E4128 (1985) [statement of Rep. Kastenmeier on the same bill].

Moreover, the legislative history and the ECPA's statutory scheme evince no congressional intent to prohibit the dissemination of electronic communications that were made publically accessible when created. The more difficult question is whether and how social media posts and tweets can be characterized as "private" when the very nature of the communication suggests an intent, or at least an awareness, that the most private material may be disseminated by the recipient, and even "go viral" once it is sent.

2. Social media communication is not "private" in the traditional sense of the word.

While the SCA's provisions in 2702(a)(1) and (2) can reasonably apply to truly private communications, construing them to apply to

social media posts and tweets that, when sent, were configured to be limited to "friends" or "followers" sweeps too broadly and will cause confusion. Whatever control over electronic content existed in the 1980s when Congress considered the SCA, it is not comparable to today's dilemma involving the ubiquitous nature of social media and the ensuing fluidity of concepts like "friend" and "private" and "public." (See Supp. Brief of California Public Defenders Association and the Public Defender of Ventura County (Amici in Support of RPI), Section II.)

Today's social media users cannot legitimately expect to maintain privacy of information or images sent out on social media. The whole point of social media platforms is to get the word or image out into the social square, however wide or narrow that social sphere might be. Especially since the many social media platforms that exist, and those to come, will continue to offer—indeed compete to offer—more unique and different ways to share.

The Court's legislative history question seems to accept that only communications "configured" to be public are "generally accessible to the public." By implication, then, communications that are sent out only to friends or followers have some veneer of privacy. But that is not necessarily so. Once a communication is issued, be it a tweet

or a post, the sender loses control over the privacy of the content. So the Court's question begets other questions: What is public? How many different privacy configurations might there be? Does a restriction to followers and friends make it not *publicly accessible* when friends and followers can disseminate the material to anyone with a single click? Will the interpretation of what is "private" depend on the intent of the sender? The answers to these questions are bound to be uncertain, because in the end social media is about sharing information, and the electronic social media world is generally anathema to privacy. As noted in section II of CPDA's Supplemental Amicus Brief, there are a few ways to send person-to-person communications via social media, and these should be considered private—but the rest is not.

However, as discussed next, criminal defendants and civil litigants stand in vastly different procedural worlds. In the criminal sphere, whether the content is private or not, a statute cannot constitutionally bar access where it interferes with a defendant's rights to due process, a fair trial, and to secure relevant evidence.

3. Because of the constitutional rights particularly afforded criminal defendants, the SCA restrictions on disclosure must yield to the right to obtain relevant information, subject to trial court oversight of privacy interests.

Petitioners do not address the unavoidable conclusion that the SCA drafters simply overlooked the potential impact of the SCA on criminal defendants. Not only did the legislature in 1986 have no reason to address the private-public quandary that modern social media presents, but the drafters appeared to have not considered at all the potential impact of the SCA on a criminal defendant. The prominent authors of a law review article addressing this legislative gap speak of a glaring need for Congress to address the constitutional problem of denying access of relevant material to a criminal defendant. (See Zwillinger, Marc J., Genetski, Christian S.; *Criminal Discovery of Internet Communications Under the Stored Communications Act: It's Not a Level Playing Field*, Journal of Criminal Law and Criminology, Northwestern University School of Law, Vol. 97, No. 2, 2007 at p. 2.) Indeed, Author Zwillinger has represented social media and is considered an expert in application of the SCA. (See www.zwillgen.com/crb_team/marc-zwillinger.)

Legislative history is of little help where the lawmakers entirely failed to consider the subject matter. However, none of the legislative

that does exist signals that Congress intended to weaken or limit the constitutional rights afforded criminal defendants.

Petitioners have yet to address the problem of denying a criminal defendant access to needed materials. Repeatedly invoking civil case examples, social media exhibits its misapprehension of this problem—which rears its head *only* in criminal cases, where life and liberty are stake. By contrast in civil cases, because only property and assets are at stake, the array of constitutional rights under the 5th and 6th Amendments relating to criminal cases does not apply. Whatever hardship application of the SCA may place on civil litigants, that topic involves different legal standards and a different issue. Here, what is squarely before this Court is the SCA's effect on the constitutional rights of criminal defendants.

The magnitude of the rights afforded criminal defendants, as opposed to civil litigants, was described by Justice Rehnquist in *M.L.B. v. S.L.J.*, 519 U.S. 102, 139-140 (U.S. 1996) (dissenting). There, he explained that the Constitution "provides for a series of protections of the unadorned liberty interest at stake in criminal proceedings." (*Ibid.*) Among them are the Sixth Amendment right to present a defense and the Fifth and Fourteenth Amendment due process right to a fair trial; the Sixth Amendment right to a speedy

and public jury trial, to confront witnesses, and of compulsory process and assistance of counsel. (*Ibid; Washington v. Texas* (1967) 388 U.S. 14.) And these rights are exclusive to criminal defendants: "*These protections are not available to the typical civil litigant.* Even where the interest in a civil suit has been labeled 'fundamental,' as with the interest in parental termination suits, *the protections extended pale by comparison.*" (*M.L.B., supra,* 519 U.S. at 140.)

Because of the greater protection afforded criminal defendants, different procedures often apply to civil litigation: "...civil litigation is entirely different from criminal litigation, and there is no requirement the two systems be similar." (*People v. Rountree* (2013) 56 Cal.4th 823, 863.) So it has long been recognized that civil discovery procedure has no relevance to criminal prosecutions. (*Robinson v. Superior Court* (1978) 76 Cal.App.3d 968, 973.)

This Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, specifically recognized that criminal discovery is not controlled by civil discovery statutes and the right to discovery in a criminal case derives from and protects the right to a fair trial and an intelligent defense "in light of all relevant and reasonably accessible information." (*Id.*, at 535-537.)

Another familiar decision, *People v. Hammon* (1997) 15 Cal.4th

1117, built upon this distinction. There, this Court recognized that the rights of confrontation and cross-examination required disclosure of privileged psychiatric information when necessary—only limiting the timing of the disclosure. But because the Sixth Amendment by its own terms applies only to "criminal prosecutions," civil litigants cannot rely on it, or other constitutional protections afforded criminal defendants. Rather, civil litigants are generally restricted by evidentiary rules on confidentiality and privilege. (See generally, Evidence Code, § 1010 et seq.)

Another relevant example of the distinction between criminal and civil discovery is embodied in Penal Code section 1326, which controls the subpoena process in criminal cases. The enactment of that statute addressed the very privacy concerns about which petitioners here are concerned, with the California Legislature acknowledging what the SCA left unaddressed: the need in criminal cases for access to relevant information, even when a privacy concern or privilege is at stake. Accordingly, in criminal cases Penal Code section 1326 built in to the subpoena *duces tecum* procedure the protection of privileged or otherwise private information, requiring the subpoenaed third party to produce the materials *only to the court*. (Pen. Code, § 1326; *Kling v. Superior Court of Ventura*

Cnty. (2010) 50 Cal.4th 1068, 1074.) The defendant gets *nothing* until the trial court has reviewed the materials, assessed the defendant's need for them, and considered any appropriate protective orders. (*Ibid.*)

Social media petitioners' objections may be well taken in the *civil* subpoena context, governed by a different statute altogether. (Evidence Code, § 1560 (b) and (e).) But they continue to avoid the different and specific problem of denying access to relevant evidence in criminal cases, access to which criminal defendants—unlike civil litigants—are constitutionally entitled. Petitioners' expressed privacy concerns are sufficiently protected by the Section 1326 procedure, and cannot outweigh a defendant's 5th and 6th Amendment rights to due process and a fair trial.

Conclusion

Privacy interests under the SCA—to whatever extent they exist in social media postings—do not overcome a criminal defendant's federal constitutional rights. No statute—state or federal—can validly limit the due process rights of criminal defendants. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39.) Respondent court properly ordered petitioners to comply with the subpoena on the ground that a federal

statute cannot be invoked to deny a criminal defendant the right to relevant evidence in his defense.

Dated: February 6, 2017

Respectfully submitted,

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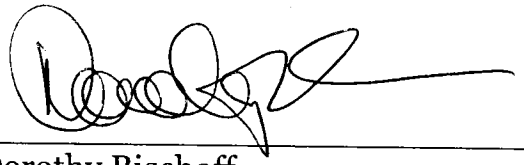
Certificate of Word Count

I, Dorothy Bischoff, counsel for amicus curiae the San Francisco Public Defender, hereby certify that the word count of the attached application to file amicus brief and brief of amicus curiae in support of respondent court and real parties is 2,599 words as computed by the word count function of Word, the word processing program used to prepare this brief.

Dated: February 6, 2017



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Proof of Service

I, the undersigned, say:

I am over 18 years old and not a party to the above action. My business address is 555 Seventh Street, San Francisco, California 94103. On February 6, 2017, I served the attached Application of the San Francisco Public Defender's Office to Appear as *Amicus Curiae* on the following parties by mailing a copy to the addresses listed, and placing the envelopes with postage affixed in the U.S. Mail:

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