IN THE SUPREME COURT OF CALIFORNIA

No. S230051

FACEBOOK, INC., INSTAGRAM, LLC, AND TWITTER, INC.,
Petitioners,

v.

THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,
Respondent.

DERRICK D. HUNTER and LEE SULLIVAN,
Real Parties in Interest.

After Published Opinion by the Court of Appeal
First Appellate District, Division 5, No. A144315

Superior Court of the State of California
County of San Francisco
The Honorable Bruce Chan, Judge Presiding
Nos. 13035657, 13035658

PETITIONERS' RESPONSE TO SUPPLEMENTAL BRIEF

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INTRODUCTION

The Providers' supplemental brief explained that this Court need not resolve the issues raised in the supplemental briefing order because many of the communications here were not accessible to the public. Defendants have not previously disputed the fact that the Stored Communications Act ("SCA") applies to the content they seek. (*Facebook, Inc. v. Superior Court* (2015), 240 Cal.App.4th 203, 213, review granted Dec. 16, 2015, No. S230051 [noting that "[i]t is undisputed that the materials Defendants seek here are subject to the SCA's protections."].) Nevertheless, they now respond to the Court's supplemental briefing order by arguing for the first time that the disclosure prohibitions of the SCA do not apply to communications that are publicly available or that were made to a group of people. The Court should decline to consider these arguments, which defendants waived by failing to timely assert.

If the Court does consider defendants' arguments, it should reject them. Defendants support their position with inconsistent interpretations of the disclosure prohibition of section 2702(a). They argue first that it does not apply at all, based on an incorrect application of the legislative history and case law related to provisions other than section 2702, such as the Wiretap Act and section 2701 of the SCA. But then they argue that disclosure of publicly available communications is subject to the voluntary consent exception of section 2702(b)(3), which presupposes that the prohibition applies.

Defendants also argue that the SCA should not extend to social media posts, which defendants say were not anticipated by Congress. But section 2702 is not limited to the specific technologies in use in 1986; it applies broadly to the "contents of electronic communications" as maintained by an "electronic communication service" or "remote computing service"

provider. To Providers' knowledge, every court to address the issue has held that section 2702 applies to content maintained by Providers.

There is also no support in the SCA, the Fourth Amendment, or related case law for defendants' assertions that a person lacks a reasonable expectation of privacy in a communication when the communication is sent to more than one person, or where the communication can be further disclosed by a recipient. Those theories would make the SCA and the Fourth Amendment inapplicable to almost all communications, since nearly every communication can be further disseminated by a recipient. And they would render privacy protections subject to arbitrary line drawing, requiring courts to determine how many "friends" or "followers" is too many. Finally, defendants' reference to case law holding that social media posts can be discoverable in litigation actually supports Providers' position that discovery should be directed to the participants of a communication, because the cases to which defendants refer all involve subpoenas issued directly to the parties to those communications, not to communications providers, and thus do not implicate the SCA.

The Court should reject defendants' invitation to rewrite the law to remove privacy protections for social media posts, and it should affirm the judgment of the Court of Appeal.[1]

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[1] Much of defendants' supplemental brief (the portion from page 14 onward) pertains to issues that are not within the scope of the Court's order for supplemental briefing. Providers therefore do not respond to those arguments in this brief and instead refer the Court to the parties' principal briefs.

ARGUMENT

A. Defendants' arguments have been waived because defendants have not previously disputed that section 2702(a) applies to the content they seek.

As this case was litigated below, it was "undisputed that the materials Defendants seek here are subject to the SCA's protections." (*Facebook*, *supra*, 240 Cal.App.4th at p. 213.) In their principal briefs in this Court, defendants accepted that proposition. Specifically, they acknowledged "the SCA's provision prohibiting disclosure of electronic records except to law enforcement," and they argued "that the Court of Appeal [was] wrong *as a matter of constitutional law*" in declining to order disclosure notwithstanding the SCA. (Defs.' Br. at p. 10 [emphasis added].) Now, in response to this Court's order for supplemental briefing, defendants argue for the first time that the SCA does not apply to the content they seek. Their new position is not only that the SCA does not apply to publicly accessible content (which is the question posed by the Court), but also that the Court should treat messages made available to multiple recipients as if they were "publicly accessible." Because defendants have not previously raised those arguments, the Court should consider them waived. (*People v. Bryant* (2014) 60 Cal.4th 335, 363 ["If a party's briefs do not provide legal argument and citation to authority on each point raised, 'the court may treat it as waived, and pass it without consideration.'"] [quoting *People v. Stanley* (1995) 10 Cal.4th 764, 793].)

B. The disclosure prohibitions of the SCA apply to all content, regardless of its public availability.

Section 2702(a) of the SCA, which prohibits disclosure of communications content, does not distinguish between public and private content. Defendants argue that section 2702(a) does not apply to public content, but they support that position with legislative history confirming

that a user who posts content publicly could be considered to have consented to disclosure. (Defs.' Suppl. Br. at p. 3). That legislative history demonstrates why defendants are wrong: the consent exception to section 2702(a) is contained in section 2702(b)(3), which gives a provider discretion to disclose content when the provider has "lawful consent" of the user. (18 U.S.C. § 2702(b)(3).) That provision presupposes that section 2702(a) applies to public content because, if it did not, then a "lawful consent" exception would not be necessary. (See Pet'rs.' Suppl. Br. at p. 5.)

Defendants also erroneously refer to legislative history applicable to the Wiretap Act to support their position that SCA does not apply to public content because, they say, the "bar on interception" should not cover communications made through a system "designed so that such communication is readily available to the public." (See Pet'rs.' Suppl. Br. at p. 5.) They also err in citing 18 U.S.C. § 2511(2)(g)(i), which does not apply to disclosure prohibitions at all. Rather, that provision states that it "shall not be unlawful" under the SCA or Wiretap Act "for any person . . . to *intercept* or *access* an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public." (18 U.S.C. § 2511(2)(g)(i).)

As explained in Providers' supplemental briefing, the component statutes of the Electronic Communications Privacy Act, of which both the SCA and the Wiretap Act are a part, treat interception, access, and disclosure distinctly. (See Pet. Supp. Br., pp. 17-18) The Wiretap Act addresses *interception* of communications contemporaneous with their transmission, as well as *divulging* of such communications after they are intercepted. The SCA deals with *access* to stored communications maintained by a communications provider, as well as *divulging* of stored communications by the provider. If Congress wanted section 2511(2)(g)(i) to extend to the

disclosure provisions, it would have said so. (*See Russello v. United States* (1983) 464 U.S. 16, 23 [104 S.Ct. 296, 78 L.Ed.2d 17] ["[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."] [quoting *United States v. Wong Kim Bo* (5th Cir. 1972) 472 F.2d 720, 722].)

The case law also supports Providers' interpretation. The courts in *Konop v. Hawaiian Airlines, Inc.* (9th Cir. 2002) 302 F.3d 868, *Snow v. DirecTV, Inc.* (11th Cir. 2006) 450 F.3d 1314, and *Ehling v. Monmouth-Ocean Hospital Service Corporation* (D.N.J. 2013) 961 F. Supp. 2d 659 addressed the unlawful access provision of section 2701 and did not address the disclosure prohibition of section 2702. (Pet'rs.' Suppl. Br. at pp. 9-11.) Thus, their determination that section 2701 does not apply to publicly accessible content has no bearing on section 2702. Similarly, *Crispin v. Christian Audigier, Inc.* (C.D. Cal. 2010) 717 F.Supp.2d 965, while correctly decided, incorrectly relied on the legislative history of section 2701 when it suggested that section 2702 might not apply to public content. (Pet'rs.' Supp. Br. at pp 10-11.) Defendants' discussion of these cases ignores these critical points.

In addition, contrary to defendants' assertion, the court in *People v. Harris* (Crim. Ct. 2012) 949 N.Y.S. 2d 590, held that section 2703 of the SCA *applies* to public content. The *Harris* court required the government to obtain SCA-compliant legal process to compel disclosure of public content. To the extent *Harris* addressed public content, it did so only to explain its disagreement with *United States v. Warshak* (6th Cir. 2010) 631 F.3d 266, regarding the type of legal process needed and hold that the *Fourth Amendment* does not require the government to obtain a search warrant to compel disclosure of publicly available content. (*Harris*, at pp. 594-95, fn.

7.) But the *Harris* court nonetheless required the government to comply with the SCA when seeking public content. (*Id.* at pp. 598.)

C. The SCA contains no exception for "social media posts."

Defendants argue that the SCA does not apply to "social media posts" because, they say, social media providers are not "analogous to outdated computer bulletin board systems (BBS)." (Defs.' Suppl. Br. at p. 12.) In their view, because technology has become more accessible, "it is reasonable to assume that anything one posts on social media to a large group can and will be disseminated in the public realm" and thus should be considered "readily available" to the public. (*Id.* at pp. 13-14.) That theory is both factually and legally flawed.

As a factual matter, defendants are incorrect that non-public posts "can and will be disseminated in the public realm." (Defs.' Suppl. Br. at p. 12.)[2] Facebook, Instagram, and Twitter users who restrict access to their posts also restrict further sharing, such that the posts cannot be further disseminated within those services to anyone outside the original intended audience. Thus, if a user posts something on Facebook to a restricted audience, that user can limit sharing to members of that audience. (See Facebook Help Center, *When someone re-shares something I posted, who can see it?* <https://www.facebook.com/help/569567333138410> (as of

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[2] Amici California Public Defenders Association and the Public Defender of Ventura County ("Amici") provide inaccurate and unsupported descriptions of the privacy settings offered by Providers. (Amici Supp'l. Br. at pp. 7-9.) Amici are wrong that by making a non-public social media post, a user "effectively launch[es] the content into the public domain." (*Id.* at p. 8.) But the details of how a user can customize his or her intended audience do not affect the analysis, because if a post were "effectively" in "the public domain," defendants could access it directly. However, defendants argue that they have no way to obtain the posts other than to compel disclosure from Providers, confirming that the posts are not "effectively in the public domain." (See Defs.' Reply Br. at. pp. 18-20 [explaining how defendants are "deprived" of access to records if not produced by Providers].)

Feb. 3, 2017) ["When someone clicks Share below your post, they aren't able to share your photos, videos, or status updates through Facebook with people who weren't in the audience you original selected to share with."].) If a user posts something on a private Twitter or Instagram account, it cannot be shared with others who do not have access to that account. (See Twitter Help Center, *About public and protected Tweets* <https://support.twitter.com/articles/14016> (as of Feb. 3, 2017) ["When you protect your Tweets . . . [y]our followers will not be able to use the Retweet button to Retweet or quote your Tweets"]; Instagram Help Center, *Controlling Your Visibility*, <https://help.instagram.com/116024195217477/> (as of Feb. 3, 2017) ["You can make your posts private so that only followers you approve can see them."].)

As a legal matter, defendants are wrong to say that a user "has no reasonable expectation of privacy in [a] post" if "there is no restriction on its subsequent dissemination." (Defs.' Suppl. Br. at p. 8.) A letter written on paper and sent in the mail carries "no restriction on its subsequent dissemination"; the recipient can photocopy it and mail it to others, or scan it and post it online. Yet it has long been established that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable." (*United States v. Jacobsen* (1984) 466 U.S. 109, 114 [104 S.Ct.1652, 80 L.Ed.2d 85].)

In any event, even if modern technology has made it easier for the recipient of a communication to disclose it to others, changes in technology are not a basis for this Court to rewrite the statute to exempt communications that are clearly covered by its text. Section 2702(a) of the SCA applies to the "contents of electronic communications" maintained by "electronic communications service" ("ECS") and "remote computing service" ("RCS") providers. (18 U.S.C. § 2702(a)(1), (2).) Each provision is broadly defined:

an ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." (18 U.S.C. § 2510(15).) An RCS involves "the provision to the public of computer storage or processing services by means of an electronic communications system." (18 U.S.C. § 2711(2).) An "electronic communication" extends to "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system[.]" (18 U.S.C. § 2510(12).)

Every court to address the issue has held that Providers are covered by these definitions. (See *United States v. Martin* (D. Ariz. July 21, 2015, No. CR-14-00678-PHX-DGC) 2015 WL 4463934, at p. *4 [holding that Facebook and Twitter are ECS providers under the SCA]; *Ehling*, *supra*, 961 F. Supp. 2d at 667 [Facebook is an ECS because it "provides its users with the ability to send and receive electronic communications, including private Facebook messages and wall posts."]; *Harris*, *supra*, 949 N.Y.S.2d at 593 ["While Twitter is primarily an ECS, it also acts as an RCS"] [citation omitted]; *Crispin*, *supra*, 717 F.Supp.2d at 982, 990 [holding that Facebook is both an ECS and RCS provider]; see also *In re Facebook, Inc.* (N.D. Cal. 2012), 923 F.Supp.2d 1204, 1206 [quashing subpoena seeking disclosure of content of deceased Facebook user based on the SCA]; *In re § 2703(d)* (E.D.Va. 2011) 787 F.Supp.2d 430, 441 [applying section 2703 of the SCA to Twitter]; *cf. In re Zynga Privacy Litig.* (9th Cir. 2014) 750 F.3d 1098 [analyzing application of section 2702 of the SCA to Facebook].) Providers clearly "provide their users with the ability to send and receive electronic communications," and thus are ECS providers. (*Martin*, *supra*, 2015 WL 4463934, at p. *4.) They also "collect[] and store" communications, and thus are RCS providers. (*Harris*, *supra*, 949 N.Y.S.2d at p. 593.) Defendants point to no contrary authority, because there is none.

Defendants essentially ask this Court to limit the SCA to the technologies contemplated by Congress in 1986. (Defs.' Suppl. Br. at p 8.) But Congress chose to use broad language in the SCA, which was designed in part to encourage business to "develop[ ] new innovative forms of telecommunications and computer technology" to ensure privacy protection did not "gradually erode as technology advances." (Sen. Rep. No. 99–541 (1986 2d Sess.) p. 5, reprinted in 1986 U.S.C.C.A.N., 3555, p. 3559.) That broad language covers Providers' services, as courts have repeatedly held, and the Court should decline defendants' request to rewrite the statute.

D. The SCA contains no exception for non-public content made available to groups of people.

Defendants point to no authority to support their contention that section 2702(a) excludes "social media posts disseminated to large groups of friends and followers under 18 U.S.C. § 2511(2)(g)(1)." (Defs.' Suppl. Br. at p. 12.) Defendants observe that under section 2511(2)(g)(1), it "is not unlawful . . . to access electronic communications that are readily available to the public." (*Ibid.*) But defendants are seeking *disclosure* of stored communications, not *access* to communications that are readily available. If they wanted to access readily available communications, defendants could do so on their own. They would not need to seek to compel Providers to *disclose* communications that are *not* readily available to them.

Nothing in the SCA (or, for that matter, the Wiretap Act) creates an exception for communications sent to a group of people. Nor does the law limit the number of people to whom a communication may be sent before it ceases to be covered by the statute. Courts have repeatedly held that content is not readily available to the public if access is restricted in any way, even if the content is available to a large group of people. In *Konop*, for example, the Ninth Circuit held that section 2701 protected a website that was accessible to a large group of people, but which required a password to access. (*Konop*,

supra, 302 F.3d at p. 875.) Because Konop "took certain steps to restrict access" to the website, the website was not readily accessible to the public—even though unauthorized users were able to circumvent these restrictions by obtaining the passwords from other users. (*Id.* at pp. 875-76.) The courts in *Ehling* and *Crispin* likewise recognized that content is only public if it is, in fact, publicly available; if the user restricts access in any way, it is not public. (*Ehling*, *supra*, 961 F.Supp.2d at p. 668 ["Privacy protection provided by the SCA does not depend on the number of Facebook friends that a user has."]; *Crispin*, *supra*, 717 F.Supp.2d at p. 990 ["basing a rule on the number of users who can access information would result in arbitrary line drawing"].)

Those holdings are consistent with settled principles of Fourth Amendment law. A conference call is not subject to a warrantless wiretap simply because it has a large number of participants, any more than a home is subject to a warrantless search simply because the homeowner has chosen to host a large dinner party.

Lastly, defendants point to cases holding that social media posts can be discoverable from the participants to a communication. (Defs.' Supp. Br. at pp. 8-10.) These cases actually support the Providers' positon and are unhelpful to defendants because they involve requests made to Facebook users, not Facebook itself, and thus did not involve either section 2702 or the Fourth Amendment. (See *United States v. Meregildo* (S.D.N.Y. 2012) 883 F.Supp.2d 523 [considering Facebook user's disclosure of information to law enforcement]; *Patterson v. Turner Constr. Co.* (N.Y.App. Div. 2011) 88 A.D. 3d 617 [considering civil subpoena to Facebook user]; *Fawcett v. Altieri* (App.Div. 2013) 960 N.Y.S.2d 592 [same]; *Chaney v. Fayette County Pub. School* (2013) 977 F.Supp.2d 1308 [same].) As Providers have acknowledged, the recipient of a communication can be compelled to disclose it in discovery. (See Facebook, Instagram and Twitter's Petition for

Writ of Mandate at 28.) But there is an important difference between compelling the recipient of a communication to produce it in discovery and compelling an intermediary to produce a communication sent through the intermediary's service. The latter is the equivalent of a search and is protected by the SCA and Fourth Amendment, while the former is not. (See *Warshak*, *supra*, 631 F.3d at 288.)

* * * * *

Defendants' construction of the law would render the SCA and Fourth Amendment meaningless as applied to electronic communications, all of which can be accessed, photographed, copied, or otherwise shared by their recipients. In addition to being legally wrong and practically unworkable, it would undermine the privacy rights of all users, including those of criminal suspects and defendants. If the SCA excluded electronic communications that are made to groups of people, then it would necessarily place no restriction on private party or *law enforcement* access to such communications. And if people had no reasonable expectation of privacy in communications sent through and maintained by the intermediary, simply because those communications could be later shared by their recipients, that would remove all Fourth Amendment protections for communications as well. The result would be that anyone, including the government and private parties, could compel disclosure of electronic communications without any judicial oversight whatsoever. This Court can avoid that erroneous result by applying the SCA according to its plain terms.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

DATED: February 6, 2017

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PROOF OF SERVICE

Facebook, Inc., et al. v. Superior Court of San Francisco
Case No. S230051

I, Marla J. Heap, declare:

I am a citizen of the United States and employed in the County of Santa Clara, State of California. I am over the age of 18 years and am not a party to the within action. My business address is Perkins Coie LLP, 3150 Porter Drive, Palo Alto, California 94304-1212. I am personally familiar with the business practice of Perkins Coie LLP. On February 6, 2017, I caused the following document(s) to be served on the following parties by the manner specified below:

PETITIONERS' RESPONSE TO SUPPLEMENTAL BRIEF

☒ (BY U.S. MAIL) On this day, I placed the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California addressed as set forth below.

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☒ (BY TRUEFILING) On this day, I caused to have served the foregoing document(s) as required on the parties and/or counsel of record designated for electronic service in this matter on the TrueFiling website.

Clerk of the Court
Court of Appeal, First District, Div. 5
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 6, 2017 at Palo Alto, California.

Marla J. Heap