IN THE SUPREME COURT OF CALIFORNIA
No. S245203

FACEBOOK, INC.,
Petitioner,
vs.
SUPERIOR COURT OF THE COUNTY OF SAN DIEGO,
Respondent.
LANCE TOUCHSTONE,
Real Party in Interest.

After Published Opinion by the Court of Appeal, Fourth Appellate District, Division 1, No. D072171

Superior Court of the State of California, County of San Diego,
Case No. SCD268262
Hon. Kenneth K. So, Department SD-55
Tel. No. 619-450-5055

ANSWER TO PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Interested entities or persons required to be listed in this certificate under California Rules of Court 8.208 and 8.488 are as follows. The undersigned certifies that the below-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in Facebook, Inc.; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Full Name of Interested Entity or Person	**Nature of Interest**
Mark Zuckerberg	Ownership interest of 10% or more

DATED: November 22, 2017

PERKINS COIE LLP

By: _____

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I. INTRODUCTION

The Court of Appeal correctly issued a writ of mandate directing the Respondent Court to quash the subpoena issued by Real Party in Interest Lance Touchstone ("Defendant") and vacate the order endorsing it because the federal Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.* ("SCA") does not allow Defendant to use a subpoena to compel disclosure of electronic communications content from Facebook, Inc., ("Facebook"). The Court of Appeal also correctly held that the SCA does not infringe on Defendant's constitutional rights.

Defendant's Petition for Review ("Petition") neither satisfies any of the review criteria in California Rule of Court 8.500(b), nor raises any issue not already before this court in *Facebook, Inc. v. Superior Court (Hunter)* (2015) 192 Cal.Rptr.3d 443, 450, review granted and opinion superseded *sub nom. Facebook v. S.C.* (2015), 195 Cal.Rptr.3d 789 (hereafter *Facebook I*). Defendant suggests that review is necessary to settle an important question of law, but fails to identify any conflict or unsettled question. Both the Court of Appeal's decision in this case and in *Facebook I* rely on well-established legal principles regarding the SCA and criminal defendants' right to pretrial discovery, including principles repeatedly addressed and settled by this Court over the last 20 years. Accordingly, review is therefore neither necessary nor appropriate.

Courts in California and throughout the country have uniformly held that the SCA prohibits using a subpoena alone to compel service providers to disclose electronic communications content. Even a governmental entity must obtain a search warrant to compel disclosure. The Court of Appeal correctly applied the SCA, and noted that enforcement of Defendant's subpoena would violate the principle of federal supremacy because such enforcement would compel Facebook to violate the SCA. Defendant identifies no authority to the contrary.

The Court of Appeal also correctly rejected Defendant's constitutional arguments. Defendant's due process arguments fail because he is asking the Court to allow defendants to obtain by subpoena what the government may obtain only with a search warrant based on a finding of probable cause. Defendant's inability to obtain a search warrant does not create a constitutional issue because the government has long had access to investigative tools—such as search warrants, arrest warrants, and wiretap orders—unavailable to criminal defendants. But, creating new law establishing special discovery powers for criminal defendants would give them the unique ability to obtain broad access to the communications of a crime victim or a witness—without any probable cause determination or prior notice to the affected person—simply by seeking *in camera* review of information requested by a subpoena. This result would eviscerate privacy protections and disrupt the long-established balance in our criminal justice system.

The U.S. Supreme Court has long held that a criminal defendant does not have a constitutional right to pretrial discovery of evidence from a third party. This Court has also repeatedly and expressly declined to recognize such a right—not just in *People v. Hammon* (1997) 15 Cal.4th 1117, which Defendant cites, but in multiple other cases over the past twenty years. The cases Defendant cites in his Petition were correctly rejected by the Court of Appeals because they all predate *Hammon*. To the extent those cases are inconsistent with *Hammon*, they were overruled by *Hammon* and do not apply. In any event, the cases cited by Defendant do not address pretrial discovery of statutorily protected records.

Defendant asks this Court to overrule *Hammon*, but offers no good reason to do so. This Court has repeatedly applied *Hammon* beyond the psychotherapist-patient privilege to affirm that there is no general constitutional right to pretrial discovery. As *Hammon* recognized, before

trial a court will not have sufficient context to determine the constitutional significance of a particular request. Disclosure may turn out to be unnecessary—a witness may decline to testify; the government may decline to offer certain evidence; the case may resolve or be dropped—in which case an account holder's rights or statutory prohibitions (such as privileges or the SCA) would have been violated for no reason. Even at trial, any perceived due process concerns can be addressed by directing the state actor or a party to the desired communication to provide the discovery sought, rather than ordering a non-state actor like Facebook to violate federal law.

Defendant's Petition should also be denied because Defendant already possesses much of the content he seeks from Facebook, there are multiple avenues available to Defendant to obtain other information that may exist, and Defendant can obtain various forms of relief if he is unable to get the information. Defendant already has the publicly available content from the Facebook account in question. To obtain additional information, Defendant can issue a subpoena directly to the witness or to the other parties to the communications, who are not bound by the SCA. Defendant can also work with the People, or further petition the trial court (or ultimately appeal any adverse trial court ruling), to have a search warrant issued to Facebook.

In sum, Defendant has identified neither a split in authority nor an unsettled issue of law necessitating review, nor any error by the Court of Appeal in applying this Court's precedent. Instead, Defendant ignores the supremacy clause issues identified by Facebook and recognized by the Court of Appeal, and asks this Court to create a new constitutional right that will allow defendants the unique ability to obtain communications content from providers with a mere subpoena.

Because Defendant cannot meet the standard for extraordinary review, this Court should decline review. Alternatively, because the issues raised in the Petition are fully briefed and awaiting argument in *Facebook I*, if the Court believes that Defendant has met the standard for review, the appropriate course of action would be to grant and hold review pending the Court's disposition in *Facebook I*.

II. PROCEDURAL HISTORY

Defendant has been charged with attempting to murder his sister's boyfriend, victim Jeffrey R.[1] The victim survived and has posted updates of the incident and of court proceedings on his Facebook page.[2] The victim has also publicly posted regarding his personal use of firearms and drugs.[3]

Defendant contends that non-public content may exist in the victim's Facebook account and that any such content might provide exculpatory evidence.[4] But, Defendant has not issued a subpoena to the victim for such content.[5] Defendant asserts that he has been unable to locate the victim, but has not sought the Court's or the People's assistance to locate and serve the witness with a subpoena.[6] Defendant has also not explained why he cannot obtain any of the victim's remaining content not already in his possession from the other parties to the communications, including Defendant's sister, who is the victim's girlfriend, or from the victim himself (described as the prosecution's key witness), when he testifies at trial.[7] Defendant concedes

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[1] *Facebook, Inc. v. Superior Court* (2017) 15 Cal.App.5th 729, 733 (hereafter *Facebook II*).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] 1 AE 81, 130.
[6] *Facebook II*, *supra*, 15 Cal.App.5th at p. 747.
[7] *Id.* at pp. 747-748.

that "[i]t is unknown whether additional relevant posts have been made to" the victim's "page that are not visible to the public."[8]

Instead of issuing a subpoena to the victim or to the parties to the communications, on March 20, 2017, Defendant served a pretrial court-endorsed subpoena on Facebook seeking the content of communications from the victim's Facebook account.[9]

On April 6, 2017, Facebook moved to quash Defendant's subpoena and vacate the accompanying order.[10] In its motion to quash, Facebook explained that the SCA prohibits service providers from disclosing the content of communications and that the subpoena was invalid for purporting to command a violation of federal law.[11] On April 27, 2017, the Honorable Kenneth K. So denied Facebook's Motion, and ordered Facebook to produce the account contents for *in camera* review by May 22, 2017.[12]

On May 15, 2017, Facebook petitioned for a writ of mandate from the California Court of Appeal, Fourth Appellate District.[13] The Court of Appeal stayed the superior court's order, and upon the completion of briefing, requested supplemental briefing on three issues: (1) whether the supremacy clause prevented enforcement of Defendant's subpoena; (2) whether a subscriber could be compelled to consent to disclose his account; and (3) preservation procedures.[14]

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[8] 1 AE 78-79.
[9] 1 AE 21-25, 31-35.
[10] 1 AE 3-14.
[11] 1 AE 4-14.
[12] 1 AE 114.
[13] *Facebook II*, *supra*, 15 Cal.App.5th at pp. 729, 734.
[14] *Id.* at p. 735.

On September 26, 2017, the Court of Appeal granted Facebook's writ of mandate in a published opinion.[15] The opinion analyzed the SCA, and held, consistent with other courts, that no exception applies to permit a criminal defendant to compel disclosure of content from a provider, and that that private content did not become "less private" merely because the content was shared with other persons.[16] The Court of Appeal addressed each of Defendant's constitutional arguments, and, like *Facebook I*, reaffirmed that under relevant California and federal precedent, a criminal defendant does not have a general constitutional right to discovery and that due process does not entitle a criminal defendant to a general right to discovery or investigative tools reciprocal with those of the People.[17]

Finally, the Court held that Defendant had other ways to obtain the information he sought from Facebook, such as by directing his request to the account holder or any addressee or intended recipient of the communications.[18] If the account holder could not be located or was uncooperative, a criminal defendant could seek the court's assistance to enforce his subpoena to the account holder.[19]

Defendant filed a Petition for Review in this Court on November 2, 2017.

III. ARGUMENT

A. Standard of Review

Defendant fails to meet the standard for review. A Court of Appeal decision is reviewable by this Court "[w]hen *necessary* to secure uniformity

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[15] *Id.* at p. 733.
[16] *Id.* at pp. 737-738.
[17] *Id.* at pp. 739, 743-744.
[18] *Id.* at pp. 745-748.
[19] *Id.* at p. 747.

of decision or to settle an important question of law."[20] Review should be denied where the Court of Appeal "correctly declares the conclusions . . . that have been reached" by this Court.[21] Defendant did not file a petition for rehearing in the Court of Appeal and has failed to call the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact. This Court must, therefore, accept the issues and facts as set forth by the Court of Appeal.[22]

As the Court of Appeal in *Facebook I* did before it, the Court of Appeal in *Facebook II* applied the SCA in a manner consistent with other California decisions as well as decisions of federal and state appellate courts throughout the country. The Court of Appeal also correctly analyzed the Fifth and Sixth Amendments to the U.S. Constitution as repeatedly and consistently applied by this Court. Thus, review is not "necessary" to "secure uniformity of decisions" or to "settle" any issue of law.[23] The SCA is settled. Defendant has failed to carry his burden for review and his Petition should be denied.

B. The Court of Appeal Correctly Held that Federal Law Prohibits Facebook from Disclosing Communications Content in Response to Defendant's Subpoena.

The Court of Appeal correctly held that the SCA prohibits enforcement of Defendant's subpoena. The SCA is a federal criminal statute that makes it unlawful for a provider of an electronic communication service to "divulge to any person or entity the contents of a communication while in electronic storage by that service."[24] The statute

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[20] Cal. Rules of Court, rule 8.500(b) [emphasis added].
[21] *Bohn v. Better Biscuits, Inc.* (1938) 26 Cal.App.2d 61, 72.
[22] Cal. Rules of Court, rule 8.500(c)(2); *People v. Correa* (2012) 54 Cal.4th 331, 334, fn. 3.
[23] Cal. Rules of Court, rule 8.500(b)(1).
[24] 18 U.S.C. § 2702(a)(1).

defines "contents" to include "any information concerning the substance, purport, or meaning" of an electronic communication.[25]

The SCA enumerates only a few, narrow exceptions to the prohibition on disclosing the contents of a communication, none of which include a subpoena issued by a criminal defendant.[26] Instead, compelled disclosure of communications content can take place only in response to a search warrant "issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures)."[27] For certain categories of content, the statute permits a "governmental entity" to require disclosure under an administrative subpoena or court order obtained by the governmental entity.[28] However, courts have held that because people enjoy a reasonable expectation of privacy in the content of their electronic communications, providers cannot be compelled to disclose content except in response to a warrant based on probable cause.[29] And in any event, Section 2703 does

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[25] 18 U.S.C. § 2510(8).

[26] See, e.g., *Facebook II, supra,* 15 Cal.App.5th at p. 748 [directing superior court to grant Facebook's motion to quash Defendant's subpoena for content because "[t]he SCA expressly prohibits electronic communication service providers from 'knowingly divulg[ing] to any person or entity the contents of a communication'"]; *Facebook I, supra,* 192 Cal.Rptr.3d at p. 450 ["The SCA provides no direct mechanism for access by a criminal defendant to private communications content"]; *United States v. Pierce* (2d Cir. 2015) 785 F.3d 832, 842 ["The SCA does not, on its face, permit a defendant to obtain [communications content] information."].

[27] 18 U.S.C. § 2703(a).

[28] 18 U.S.C. § 2703(b)(1)(B).

[29] See, e.g., *United States v. Warshak* (6th Cir. 2010) 631 F.3d 266, 288; Pen. Code, § 1546.1, subds. (a), (b) [requiring governmental entities to obtain a search warrant or wiretap order before obtaining "electronic communications information"].

not apply to criminal defendants, because they are not a "governmental entity."[30]

When the SCA prohibits disclosure, it preempts any provision of state law—including court orders—that would otherwise require that disclosure.[31] For that reason, "California's discovery laws cannot be enforced in a way that compels [a provider] to make disclosures violating the [SCA]."[32]

Here, Defendant agrees that the SCA contains no exception that would permit Facebook to comply with the subpoena by disclosing the contents of communications to Defendant. Accordingly, as the Court of Appeal recognized, "the language of section 2702(a)(1) and (2) broadly prohibits providers from voluntarily sharing subscribers' communications[.]"[33]

The language of the SCA is clear. Defendant has failed to show that review of the Court of Appeal's decision is necessary to secure uniformity of decision or settle any question regarding the SCA.

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[30] See 18 U.S.C. § 2711(4) [defining "governmental entity"].
[31] U.S. Const., art. VI; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815 [explaining that a State law conflicts with federal law, and is therefore preempted, "where it is impossible for a private party to comply with both State and federal requirements"].
[32] *Negro v. Superior Court* (2015) 230 Cal.App.4th 879, 888-889; *Facebook II*, *supra*, 15 Cal.App.5th at pp. 729, 744 ["The order here cannot be enforced without compelling Facebook to violate the SCA and thus runs afoul of the principle of federal supremacy."]; *Facebook I*, *supra*, 192 Cal.Rptr.3d at p. 443 [citing *Negro v. Superior Court*, *supra*, at p. 889]; *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1442 [holding that it would be an "unlawful act" for a service provider to comply with a subpoena seeking the content of a user's communications, even if required to do so by a court order].
[33] *Facebook II*, *supra*, 15 Cal.App.5th at p. 737; see also *Facebook I*, *supra*, 240 Cal.App.4th at p. 213 ["[i]t is undisputed that the materials Defendants seek here are subject to the SCA's protections."].

C. Review of Defendant's Constitutional Issues Is Not Warranted Because Defendant Can Seek the Records from Other Sources.

A court may not "anticipate a question of constitutional law in advance of the necessity of deciding it."[34] Yet that is exactly what Defendant seeks in this case. Defendant can obtain the communications content he seeks from multiple other sources—directly from the victim account holder, from his sister (who is the victim's girlfriend), or from other addressees or intended recipients of the communications.[35] Indeed, Defendant admits that he already has much of what he seeks from Facebook, and that he is not aware that there is anything else relevant in other communications.[36] Because there are numerous alternate ways for Defendant to obtain the information he seeks from Facebook, it is not necessary to consider Defendant's constitutional challenge.

In addition, courts presume statutes are constitutional and must construe them to avoid constitutional problems where possible.[37] Here, the SCA merely seeks to replicate the procedure for obtaining "old-fashioned written correspondence" by requiring that defendants "direct his or her effort to the parties to the communication and not to a third party [service provider]."[38] Discovery should be directed to one of the parties to a desired communication rather than a non-party bailee.[39]

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[34] *Wash. State Grange v. Wash. State Rep. Party* (2003) 552 U.S. 442, 451.
[35] *Facebook II*, *supra*, 15 Cal.App.5th at pp. 745-747.
[36] 1 AE 65, 78-79; Pet. at pp. 10-11.
[37] *INS v. St. Cyr* (2011) 533 U.S. 289, 299-300 [holding that courts are obligated to construe statutes to avoid constitutional problems]; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1252 ["In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act."].
[38] *Facebook II*, *supra*, 15 Cal.App.5th at p. 747 [quoting *O'Grady v. Superior Court*, *supra*, 139 Cal.App.4th at p. 1446].
[39] *Juror No. One v. Superior Court* (2012) 206 Cal.App.4th 854, 868 ["[T]he SCA protects against disclosure by third parties, not the posting

Defendant concedes that he can subpoena the victim's communications directly from the victim, or from any other parties to the communications, but asks this Court to hold the SCA unconstitutional because he would prefer to obtain the information from Facebook.[40] Defendant also speculates that the victim may invoke his Fifth Amendment right to not disclose communications or otherwise be untruthful or incomplete in responding to a subpoena.[41] Neither of these reasons justify finding the SCA unconstitutional.

As the Court of Appeal found, "[s]hould the third party witness refuse to comply with a subpoena, the court can immediately order the witness to comply and fashion an appropriate order for noncompliance."[42] A trial court has wide latitude to fashion appropriate discovery remedies if the user wrongly refuses to comply, such as holding the user in contempt or precluding the People from calling the user as a witness unless the user

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party."]; *United States v. Pierce*, *supra*, 785 F.3d at p. 842 ["[Defendant] failed to subpoena Parsons and the individual who created the account in his name, the two direct potential sources for the contents of the account. [Defendant], therefore, has not shown any injury from the [SCA]. We reject [his constitutional] claim."]; *see also Suzlon Energy Ltd. v. Microsoft Corp.* (9th Cir. 2011) 671 F.3d 726, 731 [holding that the user "himself is the person who should be responsible for disclosing his own emails."]; *Flagg v. City of Detroit* (E.D. Mich. 2008) 252 F.R.D. 346, 366 [noting that "it seems apparent" that it would be unlawful for the provider to disclose content in response to a subpoena, and ordering the issuing party to direct his request to the account holder].

[40] Pet. at p. 19 [speculating that "the productions from Facebook directly, compared to a user-prompted download, are vastly different in content, format, and magnitude"].

[41] *Id.* at pp. 18-19.

[42] *Facebook II*, *supra*, 15 Cal.App.5th at p. 746; *see also Negro v. Superior Court*, *supr*a, 230 Cal.App.4th at p. 889 [court may order consent on pain of discovery sanctions for failure to comply].

produces his account contents before trial.[43] Indeed, Defendant admits that the account holder is the "sole complaining witness" and refers to him as the prosecution's star witness.[44] Thus, the Court can fashion an appropriate remedy to protect Defendant's rights.

Additionally, Defendant fails to address why he cannot obtain the content that he speculates exists from other people who were party to the communications.[45]

The trial court could also address Defendant's desire for discovery by directing the People to obtain the information by obtaining a search warrant.[46] That the trial court apparently declined to do so here does not justify compelling a third party to risk contravening federal law. In any event, the Defendant could challenge that ruling on appeal of any conviction.

D. The Court of Appeal Correctly Held that the SCA Does Not Violate Defendant's Due Process Rights.

Defendant cannot carry his "heavy" burden to establish that the SCA violates his due process rights. Even if Defendant's due process arguments could provide a basis for enforcing a court order directing Facebook to violate a federal statute, and even if this Court had not already rejected Defendant's constitutional theories in *Hammon* and other cases, this Court

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[43] See *Facebook II*, *supra*, at p. 747 ["[T]he victim is the complaining witness and it is reasonable to infer that the prosecution will be in contact with him before the start of trial."].

[44] Pet. at p. 10 [stating that victim's "character and credibility . . . must be explored in the pending trial which boasts [the victim] as the sole complaining witness"].

[45] *Facebook II*, *supra*, 15 Cal.App.5th at pp. 747–748 ["Touchstone made no showing that he contacted any of the victim's Facebook 'friends' who were recipients of the private communications to obtain the desired information."].

[46] *Id.* at p. 748; see also *Evans v. Superior Court* (1974) 11 Cal.3d 617 [holding that trial court could order People to call a lineup on behalf of defendant].

should still reject the proposition that the due process clause entitles a criminal defendant to discovery of stored communications content from Facebook.

1. The Court of Appeal Correctly Held that Due Process Does Not Entitle Defendant to the Content Protected by the SCA.

Defendant claims he possesses "the right to pretrial discovery . . . and that any law diminishing the criminal defendant's right to pretrial discovery should be limited or overruled[.]"[47] This proposition contravenes longstanding precedent of both the California Supreme Court and the United States Supreme Court, which held more than 40 years ago that "[t]here is no general constitutional right to discovery in a criminal case."[48] As summarized by the Court of Appeal in *Facebook I*, "[t]he consistent and clear teaching of both United States Supreme Court and California Supreme Court jurisprudence is that a criminal defendant's right to pretrial discovery is limited, and lacks any solid constitutional foundation."[49]

"The courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity. When, as here, the contention is that a State rule violates due process, the defendant must show that the rule 'offends some principle of justice so rooted in the traditions

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[47] Pet. at p. 6.

[48] *Facebook II*, *supra*, 15 Cal.App.5th at p. 739 [quoting *Weatherford v. Bursey* (1977) 429 U.S. 545, 559]; *Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1243 ["Both the United States and California Supreme Courts have held that a criminal defendant does not possess a general constitutional right to discovery."]; *Facebook I*, *supra*, 192 Cal.Rptr.3d at p. 451 ["There is no general constitutional right to discovery in a criminal case, and . . . '[t]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . .'" [citation omitted]].

[49] *Facebook I*, *supra*, 192 Cal.Rptr.3d at p. 459.

and conscience of our people as to be ranked as fundamental.'"[50] Defendant's reliance on *Chambers v. Mississippi*[51] and *United States v. Nixon*[52] is misplaced and does not show that the SCA offends a fundamental principle of justice.

First, Defendant relies on *Chambers* for the expansive proposition that laws cannot deprive a criminal defendant of his due process rights in any manner.[53] *Chambers*, however, dealt only with the right to confront and cross-examine witnesses, as Defendant's own reading of the case acknowledges.[54] Here, the SCA does not prevent Defendant from confronting or cross-examining a witness: it merely limits Defendant's ability to obtain stored content from Facebook with a subpoena.

Next, Defendant cites *Nixon* for the proposition that a "generalized interest in confidentiality" does not preclude a subpoena for relevant evidence.[55] But *Nixon* is inapposite because Facebook's inability to produce communications is based on a federal statute, not on a "generalized interest in confidentiality."[56]

Defendant has not established that denying him the right to compel a provider to disclose social media records in a criminal case offends a

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[50] *Facebook II*, *supra*, 15 Cal.App.5th at p. 744 [quoting *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10-11]; *Facebook I*, *supra*, 192 Cal.Rptr.3d at p. 455 ["To prevail on a claim that a statute violates due process, a defendant 'must carry a heavy burden.' [citations]"].
[51] *Chambers v. Mississippi* (1972) 410 U.S. 284.
[52] *United States v. Nixon* (1974) 418 U.S. 683.
[53] Pet. at p. 7
[54] *Id.* at p. 8 ["The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."] [quoting *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 294].
[55] *Id.* at p. 8.
[56] See, e.g., *United States v. Warshak*, *supra*, 631 F.3d at p. 288 [holding that there is a reasonable expectation of privacy in electronic communications and construing the SCA].

principle of fundamental justice, and there is no issue of law that this Court must resolve.

2. The Court of Appeal Correctly Held that Due Process Does Not Require that Criminal Defendants and the People to Have the Same Investigatory Tools.

Defendant does not dispute that he does not have access to all the same investigatory tools as the government.[57] Nevertheless, despite multiple appellate opinions to the contrary, Defendant claims under *Wardius v. Oregon* and *Evans v. Superior Court* that he is entitled to reciprocal discovery tools to which the People have access.[58] But those cases do not help Defendant.

Defendant incorrectly claims that prosecutors have "unbridled access" to communications content "upon a low threshold showing," while Defendant is "barred from obtaining the same records under any standard."[59] Not so. Under both state and federal law, the prosecution must obtain a search warrant supported by probable cause and reviewed by a neutral magistrate in order to seek content from a service provider.[60] And Defendant is not barred from obtaining content: "the records Touchstone seeks are also available by subpoena to any addressee or intended recipient of the private communications."[61]

In *Wardius*, the United States Supreme Court invalidated a state statute that required the defendant to disclose the names of his alibi witnesses but did not require the People to do the same. The Court held

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[57] See Pet. at pp. 13-14.
[58] *Id.* at pp. 12-13 [claiming a due process violation because of a "lack of reciprocity in pretrial discovery"].
[59] *Id.* at p. 13.
[60] Pen. Code, § 1546.1, subd. (a); *United States v. Warshak*, *supra*, 631 F.3d at p. 288.
[61] *Facebook II*, *supra*, 15 Cal.App.5th at p. 747 [citing 18 U.S.C. § 2702(b)(3)].

that "the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants."[62] But, the "discovery" in *Wardius* involved only the disclosure of information already in the government's possession, and only if the state required disclosure of alibi witness information from defendant. The Court did not hold that "discovery rights" meant that defendants must have the same investigatory powers as the government or that it conferred discovery rights against nonparties.

In *Evans*, this Court held that a trial court had the power to order the state to order a lineup where "eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve."[63] But, *Evans* does not support Defendant's claim to reciprocal discovery tools. Instead, it supports only that the trial court can order the People, not a private third party, to perform certain investigatory actions on behalf of Defendant upon a proper showing. Here, the trial court could compel the People to issue a search warrant to Facebook, in the same way that it addressed Defendant's desire for preservation by indicating that the court "can order the prosecution to request that Facebook take all necessary steps to preserve records[.]"[64]

As the Court of Appeal recognized, there is a long line of authority confirming that due process does not confer reciprocal discovery rights to a defendant in all circumstances.[65] Defendant claims that he "is not asking

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[62] *Wardius v. Oregon*, *supra*, 631 F.3d at p. 472.
[63] *Evans v. Superior Court*, *supra*, 11 Cal.3d at p. 625.
[64] *Facebook II*, *supra*, 15 Cal.App.5th at p. 746.
[65] See, e.g., *Facebook II*, *supra*, 15 Cal.App.5th at p.729 ["We are not persuaded by Touchstone's argument that the SCA must allow a mechanism through which criminal defendants can gain access to the same records routinely obtained by the prosecution and the government."]; *Facebook I*,

for authority to arrest, issue search warrants, conduct wiretapping, or seize assets[.]"[66] Indeed, Defendant actually seeks to do more: he seeks to obtain with a subpoena what the People need a search warrant to obtain.[67]

Because there is no dispute that Defendant does not have a constitutional right to use the same investigatory tools as the government,

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supra, 192 Cal.Rptr.3d at p. 457 ["[A] variety of investigative and evidence collection procedures are routinely available to governmental agencies that are not provided to a criminal defendant. The prosecution, for example, can obtain search warrants and compel attendance of witnesses before a grand jury."]; *United States v. Turkish* (2d Cir. 1980) 623 F.2d 769, 774 ["Subject to constitutional and statutory limits, the Government may arrest suspects, search private premises, wiretap telephones, and deploy the investigative resources of large public agencies. Few would seriously argue that the public interest would be well served either by extending all of these powers to those accused of crime or by equalizing the procedural burdens and restrictions of prosecution and defendant at trial."]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 834-835 ["[A] criminal proceeding is not 'symmetrical' as the prosecution and defense have different rules, powers and rights."]; *People v. Hansel* (1992) 1 Cal.4th 1211, 1221 ["[M]ere mechanical repetition of the word 'reciprocity' is not enough to show that [a defendant's] right to a fair hearing [has been] violated."]; *United States v. Pierce*, *supra*, 785 F.3d at p. 842, fn.2 ["[T]he search warrant provisions of Fed. R. Crim. P. 41(b) and the wiretap application provisions of 18 U.S.C. § 2516(a) both provide a means for the government to obtain evidence without a mechanism for defendants to do so."]; *United States v. Tucker* (S.D.N.Y. 2008) 249 F.R.D. 58, 63 ["It is inherent in our criminal justice system that defendants will virtually always be outmatched in investigatory resources, funds, and time to prepare for litigation. This does not offend the Constitution."]; *State v. Bray* (Or. 2016) 281 383 P.3d 883, 895 [holding that due process does not confer a "constitutional obligation to ensure 'reciprocal discovery rights' to defendant"].

[66] Pet. at p. 14.

[67] *Facebook II*, *supra*, 15 Cal.App.5th at p. 745 [enforcing subpoena for content would allow Defendant to "obtain information that the government can only acquire with a warrant based on probable cause."]; see also *Facebook I*, *supra*, 192 Cal.Rptr.3d 459 [enforcing subpoena for content would lead to the "anomalous result" where the People must seek a warrant supported by probable but defendants could issue a subpoena with "no required notice to the subscriber or prosecuting authority—and which may, or may not, be subject to meaningful judicial review."].

there is no issue of law that this Court needs to resolve with respect to the scope of Defendant's discovery rights.

E. The Court of Appeal Correctly Held that Defendant's Other Constitutional Arguments Lack Merit.

Defendant fails to show that any of his rights under the Sixth Amendment are unsettled. Defendant merely concludes, without argument or support, that the compulsory process clause entitles him to communications content.[68] The Compulsory Process Clause guarantees "the right to the government's assistance in compelling the attendance of favorable witnesses at trial."[69] But, the clause does not provide a right to discovery of evidence from non-parties.[70] In any event, as the Court of Appeal explained, compulsory process claims are better analyzed under due process.[71]

As *Facebook I* explained, there is "even less support for [the] contention that the compulsory process clause" authorizes a subpoena or court order for communications content.[72] Defendant provides no argument and cites no authority to suggest that this right requires the ability to compel the disclosure of evidence from a non-party, and accordingly there is no basis for review by this Court.

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[68] Pet. at p. 7.
[69] *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.
[70] See, e.g., *People v. Clark* (2011) 52 Cal.4th 856, 983 [declining "to recognize a Sixth Amendment violation when a defendant is denied discovery that results in a significant impairment of his ability to investigate and cross-examine a witness."]; *People v. Prince* (2007) 40 Cal.4th 1179, 1234, fn.10 [holding that "[t]o the extent defendant's claim concerns pretrial discovery and is based upon the confrontation or compulsory process clauses of the Sixth Amendment, it is on a weak footing."]; *People v. Hammon*, *supra*, 15 Cal.4th at p. 1117 [holding there is no constitutional right to compel pretrial disclosure of privileged information].
[71] *Facebook II*, *supra*, 15 Cal.App.5th at p. 742.
[72] *Facebook I*, *supra*, 192 Cal.Rptr.3d at p. 454.

F. Defendant Concedes that *Hammon* is Controlling and Fails to Offer Any Compelling Reason to Overrule *Hammon*.

Defendant provides no reason for this Court to review *Hammon* except that he disagrees with its outcome.[73] This does not justify overruling twenty years of precedent in which this Court has reiterated in different contexts that there is no constitutional right to pretrial discovery. Defendant acknowledges as much, but nevertheless asks this Court to create a new exception because according to Defendant, the records here are allegedly more material than those in *Hammon*, and because the records "do[] not involve any statutory or legal privilege."[74] Defendant's arguments lack merit and, in any event, do not support the relief he seeks.

First, *Hammon* establishes that there is no general constitutional right to pretrial discovery. *Hammon* involved a defendant accused of committing lewd acts on a minor, and the defendant wanted the victim's psychotherapists to disclose records about the victim. The Court noted that "[w]hen a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon . . . to balance the defendant's need for cross-examination and the State policies the privilege is intended to serve."[75] But it also noted that this balancing could not be done "[b]efore trial," because "the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily."[76]

Defendant offers no argument or authority in support of a constitutional right to pretrial discovery. Instead, he claims that "*Hammon* involved a weak showing of materiality . . . which distinguishes that case

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[73] Pet. at p. 15.
[74] *Id.* at pp. 15-16.
[75] *People v. Hammon*, *supra*, 15 Cal.4th at p. 1127.
[76] *Ibid.*

from the instant one."[77] But contrary to Defendant's assertion, the Court of Appeal recognized, "***even upon a sufficient showing [of materiality]***, a trial court is not required to allow pretrial 'review or grant discovery of privileged information in the hands of third party psychotherapy providers.'"[78] Moreover, Defendant has also offered no reason to consider the pretrial records he desires as material, especially where he concedes that he has no reason to believe that the Facebook account actually contains any additional relevant information.[79]

Second, Defendant claims that *Hammon* is distinguishable because the social media records here "do[] not involve any statutory or legal privilege."[80] But, unlike a state-law evidentiary privilege that this Court has authority to interpret and limit, the SCA is a federal statute, and this Court may not create exceptions to federal statutes without running afoul of the supremacy clause. In addition, the SCA's privacy protection is far broader than that of any limited privilege—it covers *all* communications content, including communications that may be independently privileged or immune from discovery for reasons unknowable to the court or the parties without the subscriber's involvement.

Furthermore, nothing in *Hammon* or the rich precedent that follows it suggests that the Court intended to limit it to a particular type of privilege

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[77] Pet. at p. 15.
[78] *Facebook II*, *supra*, 15 Cal.App.5th at p. 740 [emphasis added] [construing *People v. Hammon*, *supra*, 15 Cal.4th at p. 1119].
[79] 1 AE 78 ["It is unknown whether additional relevant posts have been made to Mr. Renteria's page that are not visible to the public, . . ."], 79 ["[The] Facebook account is relevant because (1) it *may* contain additional information that is inconsistent . . . , (2) it *may* contain additional information that demonstrates a motivation . . . , (3) it *may* contain additional information that demonstrates a character . . . , and (3) [sic] it *may* contain additional information that provides exonerating, exculpatory evidence . . . ." [emphasis added]].
[80] Pet. at p. 16.

or even to privileges in general. As the Court of Appeals observed, this Court has applied the rule in *Hammon*—that a criminal defendant does not have a general constitutional right to discovery—broadly beyond records protected by the psychotherapist-patient privilege.[81]

Defendant's suggestion that a trial court, for efficiency purposes, could be equipped to determine materiality pretrial, ignores this Court's warning that "if pretrial disclosure is permitted, a serious risk arises" that information "will be disclosed unnecessarily."[82] Indeed, *Hammon* itself "illustrates the risk inherent in entertaining such pretrial requests," because the defendant's admission at trial "largely invalidat[ed] the theory on which he had attempted to justify pretrial disclosure of privileged information."[83] In other words, while the pretrial judge may be informed about the facts and circumstances of the discovery, he or she cannot predict what will occur prior to the start of trial or how the trial will proceed: a witness may

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[81] *Facebook II*, *supra*, 15 Cal.App.5th at pp. 740-741; see, e.g., *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1135 [holding that the Sixth Amendment does not require pretrial disclosure of witness identities]; *People v. Clark* (2011) 52 Cal.4th 856, 983 [holding that there is no Sixth Amendment violation where the prosecution does not disclose a witness's criminal conviction before trial]; *People v. Martinez* (2009) 47 Cal.4th 399, 454, fn.13 [holding the Sixth Amendment does not require granting a pretrial discovery motion for juvenile records]; *People v. Prince* (2007) 40 Cal.4th 1179, 1234, fn.10 [to the extent defendant's claim to pretrial discovery of an FBI database was based on the Sixth Amendment, it was on "weak footing"]; *cf. People v. Gurule* (2002) 28 Cal.4th 557, 592-594 [affirming that defendant did not have a pretrial right to discover records protected by both the psychotherapist-patient and attorney-client privileges]; *People v. Valdez* (2012) 55 Cal.4th 82, 105-110, 144 [no constitutional violation in withholding witnesses' identities before trial]; *People v. Maciel* (2013) 57 Cal.4th 482, 507-508; *People v. Anderson* (2001) 25 Cal.4th 543, 577, fn. 11 ["the confrontation clause gives no right to pretrial discovery that would override a statutory or constitutional privilege"].

[82] *People v. Hammon*, *supra*, 15 Cal.4th at p. 1127.

[83] *Ibid.*

choose not to testify, the case may resolve, or testimony may proceed in a fashion that obviates the need for discovery sought pretrial.

In sum, Defendant's arguments do not overcome the principles of *stare decisis*, which counsels in favor of adhering to *Hammon* and the many subsequent cases that have followed it.[84] As this Court has recognized, "a court usually should follow prior judicial precedent even if the current court might have decided the issue differently if it had been the first to consider it."[85] That rule applies with even greater force where, as here, "'the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'"[86] Here, there is a long history of reliance on *Hammon* and its progeny.

Because, Defendant has offered no compelling reason for this Court to disturb twenty years of decisions following the rule announced in *Hammon*, there is no reason for this Court to do so and this Court should decline to review *Hammon*.

G. If The Court Finds that Defendant Has Met the Standard for Review, It Should Grant and Hold the Petition.

Defendant has not met the standard for review. The legal issues raised by Defendant are already before the Court in *Facebook I*, and there is no need for the Court to grant a second petition here, where Defendant has

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[84] *Facebook II*, *supra*, 15 Cal.App.5th at pp. 740-741.
[85] *Bourhis v. Lord* (2013) 56 Cal.4th 320, 327.
[86] *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 504 [quoting *Hilton v. S.C. Public Rys. Comm'n* (1991) 502 U.S. 197, 202]; see also *Moradi–Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 296 ["This policy . . . is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." [internal quotation marks and citations omitted]].

various alternatives to obtain the records he seeks. However, should the Court determine that Defendant has, in fact, met the standard of review, it should grant and hold the Petition pending this Court's disposition in *Facebook I*.[87]

IV. CONCLUSION

For the foregoing reasons, Facebook respectfully request that this Court deny Defendant's Petition and decline review.

DATED: November 22, 2017 ***PERKINS COIE LLP***

By: _____

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[87] Cal. Rules of Court, rule 8.512(d).

WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rule 8.520(c), counsel of record hereby certifies that the foregoing Answer Brief to Petition for Review consists of 7,076 words, including footnotes, as counted by the Microsoft Word program used to prepare this brief.

DATED: November 22, 2017 **PERKINS COIE LLP**

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PROOF OF SERVICE

IN THE SUPREME COURT OF CALIFORNIA
No. S245203

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STATE OF CALIFORNIA
Supreme Court of California

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