No. S230051

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., et al.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, SAN FRANCISCO

Respondent.

DERRICK D. HUNTER and LEE SULLIVAN,

Real Parties in Interest.

REAL PARTIES LEE SULLIVAN AND DERRICK HUNTER'S ANSWER TO GOOGLE'S SUPPLEMENTAL AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

From the Published Opinion of the Court of Appeal,
First Appellate District, Division Five, No. A144315

San Francisco San Francisco Superior Court Nos. 13035657, 13035658.) The Honorable Bruce Chan, Judge, Dept. 22

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ARGUMENT

I. THE FEDERAL CONSTITUTION, NOT THE SCA, NOR USERS' PRIVACY CONFIGURATIONS, CONTROLS WHETHER A SUPERIOR COURT JUDGE CAN REVIEW ELECTRONIC RECORDS *IN CAMERA* IN CRIMINAL CASES PRIOR TO TRIAL

This Court granted review to decide the issue of whether the Stored Communication Act's ("SCA's") ban on disseminating electronic records must yield to criminal defendants' federal constitutional right to obtain exculpatory evidence and, if so, whether a superior court judge can review those records *in camera*, one day prior to trial, to ensure defendants' have adequate time to prepare and mount an intelligent defense. Here, the subpoenaed records are not accessible to the defense either because they were deleted by the user or due to privacy settings that restrict public access, or limits access to an unknown number of "friends" or "followers", that do not include the defense in this case. Real parties' position is that regardless of whether electronic records were public at one time but no longer available, restricted to a limited number of other users, or in a private message, the SCA must yield to criminal defendants paramount federal constitutional rights to procure exculpatory evidence in a criminal case.

As briefed by the parties, the SCA is not a complete ban on divulging electronic records because law enforcement can procure these records by warrant or trial subpoena. (18 U.S.C. § 2702(b).) Because of the important constitutional rights at stake for criminal defendants who need exculpatory evidence to mount a defense, this Court should hold that the defense must have parallel access to electronic records utilizing the well established subpoena procedures which permit a superior judge to review records *in camera* and balance the privacy rights of third party against the

constitutional rights of criminal defendants. (Cal. Pen. § 1326, et seq; See generally, *People v. Kling* (2010) 10 Cal.4th 1068.) While the government uses search warrants pursuant to Penal Code section 1524 when the Fourth Amendment is implicated, criminal defendants who seek private records from non-parties use the parallel provisions of Penal Code section 1326, et seq., which authorizes the production of private third party records to the superior court upon a showing of good cause. (*Kling, supra,* 10 Cal.4th 1068.) The superior court judge reviews those records *in camera* and balances the record holder's' privacy rights against a criminal defendant's paramount federal constitutional rights to access exculpatory evidence needed to defend a criminal case. (*Ibid.*) This Court has long held that given a criminal defendant's important constitutional rights at stake, discovery 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.) In short, superior court judges, not providers, nor Congress should decide whether a non-party should produce records to the defense because courts are vested with the solemn duty to enforce a criminal defendant's federal constitutional rights.

The extent to which a user has limited or restricted public access to electronic records is relevant to the weight the superior court judge gives the user's privacy interests when balancing the user's interests against a defendant's constitutional right to exculpatory evidence. Users who make electronic records publicly available, or who disseminate electronic records to large groups should be entitled to the least amount of privacy protections in relation to the SCA when the superior court judge engages in the balancing process under Penal Code section 1326.

Google makes valid points regarding the practical problems of construing the SCA to permit providers to divulge records that were configured to public when originally posted, or with inferring user consent to disclose under 18 U.S.C. 2702(b), in light of 1) technological complexity in figuring out the initial privacy settings of a post that had been changed, 2) security breaches, 3) as well users' mistakes in improperly configuring privacy settings. (Google Supp. Br. pp. 3-7.)

Real parties' position is that once a criminal defendant shows "good cause" and the records are produced to a superior court judge for an *in camera* review, the superior court judge can take into consideration the extent to which the user sought to restrict public access, or limited access to a group, or made mistakes in disseminating records, when deciding how much weight to give to the privacy interest of a user when balanced against the constitutional rights of a criminal defendant. Information contained in a private message would obviously be entitled to greater privacy protections than a Facebook post to 5,000 friends. Superior court judges engage in this balancing process routinely when reviewing highly sensitive medical records, employment records, psychiatric records, juvenile records, and confidential police personnel records when they balance the important privacy rights of the holders against the constitutional rights of criminal defendants. The same procedures should apply to electronic records.

Google's argument regarding the technological complexities inherent in gathering up, analyzing, and producing electronic records, as well as the rapid technological advances in storing and using electronic records underscores real parties' argument that only providers, not users, should be responsible for complying with subpoenas duces tecum in criminal cases given a defendant's very life and liberty may depend on getting complete

records. Due to the technological complexities of obtaining complete and accurate set of electronic records, and to ensure a reliable chain of custody to the superior courts under Evidence Code section 1561, the records sought by defendants can only come from the providers' custodian of records. This very point was made by Honorable Bruce Chan when he denied petitioners' motion to quash the subpoena duces tecum in the respondent court. Google's argument certainly drives home the point that the majority of users do not have the technological ability to procure a complete set of electronic records particularly when information has been deleted or the user has died, the circumstances presented here. Users who do not have an advance degree in computer engineering, or who have a motive to conceal some or all of their electronic records, such as witness Reneesha Lee, cannot be relied upon to produce an accurate set of subpoenaed records. Most users do not have the technological capacity or wherewithal to record changes in privacy settings on a given post. To the extent information on changes to privacy settings are recorded and relevant, it is only recorded by the providers, not your average user.

Real parties assert that users can waive privacy protections of the SCA by sharing information with the public and large groups and that widely disseminated information is entitled to lessened privacy protections when the superior court judge engages in balancing under Penal Code section 1326 and *Kling*. In response, Google asserts that a user can reclaim a privacy interest under the Fourth Amendment by changing their settings from public to private. (Google Supp. Br. pp. 9-11.)) Even if Fourth Amendment cases are useful by way of analogy to for purposes of debating the extent to which social media users can reasonably expect information shared to large groups or to the public remain private, we reiterate that even

if a user has Fourth Amendment protections in his or her electronic records, the Fourth Amendment only constrains the government from warrantless searches. (*Coolidge v. New Hampshire* (1971) 403 U.S. 443, 487-490 ; *Burdeau v. McDowell* (1921) 256 U.S. 465.) It does not prevent a criminal defendant from procuring records from third parties because no state action is involved.

Google contends defendants' only remedy is to petition Congress to change the law, not seek relief in the state and federal courts. (Google Supp. Br. p. 11.) Courts have the last word on the constitutionality of a statute, not legislatures. (*Marbury v. Madison* (1803) 5 U.S. 137.) Google fails to acknowledge that courts are required to ensure that criminal defendants receive evidence necessary to defend a criminal case even in the face of conflicting statutes. (See *Pennsylvania v. Ritchie* (1987) 480 U.S. 39; *Davis v. Alaska* (1974) 415 U.S. 308.) The United States Supreme Court did not tell the defendants to petition the legislature for a change in law when statutes precluded them obtaining information necessary to cross-examine witnesses or procuring exculpatory evidence in *Davis* and *Ritchie,* respectively. Rather, the Supreme Court recognized that a defendant's constitutional rights in criminal cases are paramount to statutory privacy rights and carved out exceptions to the statutes and ordered the records produced. Specifically, the Court carved out exceptions to the privacy statutes when those statutes were not an absolute ban, but authorized disclosure in some circumstances. *(Ritchie*, supra, 480 U.S. at 58.) Thus, Google's concession that the SCA is not an absolute ban because it permits disclosure of electronic records to law enforcement, requires this Court to create parallel access to criminal defendants who need exculpatory electronic records necessary to defend a criminal case. Because the SCA is

a partial, but not absolute, ban on dissemination, this Court can and must hold that the SCA must yield to criminal defendants' paramount constitutional rights to obtain exculpatory electronic records necessary to defendant a criminal case.

Also, Congress need not act before this Court does in protecting a criminal defendants rights to exculpatory evidence. Court opinions often pave the way for legislative action as the supplemental amicus brief filed by California Public Defender's Association/Ventura County Public Defender's Office rightly pointed out on page 11. This Court has established that "[s] defendant's motion to discover [from a nonparty] 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, supra,* 11 Cal.3d at 535; Cf. Pen. Code, § 1326.) Following this Court's decision in *Pitchess*, the Legislature enacted Evidence Code sections 1043, et seq. Similarly, governmental regulation of electronic surveillance provides an example of a judicial decision leading to a congressional action. 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* (1961) 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.) Thus, Google's position that this Court is precluded from acting to protect a criminal defendant's right to secure exculpatory electronic records until Congress does, is without merit.

Finally, Mr. Sullivan and Mr. Hunter do not have the luxury of waiting for Congress to amend the SCA and give them the electronic records they need to mount a defense in this special circumstances homicide

case. They need these records now and they are not alone. Criminal defendants throughout California and the nation have been deprived in past, and are currently being denied, exculpatory electronic records they need to defend criminal cases because of the SCA's silence regarding defense access to exculpatory electronic evidence. This Court should act swiftly and comprehensively to address this important issue and protect the rights of criminal defendants, who are disproportionately poor and people of color. If this Court does not protect these important rights, defendants in this state have no hope of receiving fair trials do to the pervasive nature of electronic records. To permit an outright ban on a defendant's access to exculpatory electronic records, or to delay disclosure until trial commences, renders these important constitutional rights meaningless and erodes the constitutional principles upon which this country was founded.

CONCLUSION

For the reasons stated herein, Mr. Sullivan and Mr. Hunter respectfully request that the opinion of the Court of Appeal be reversed, and that petitioners be ordered to produced the subpoenaed records forthwith.

Respectfully submitted this 22nd day of March, 2017.

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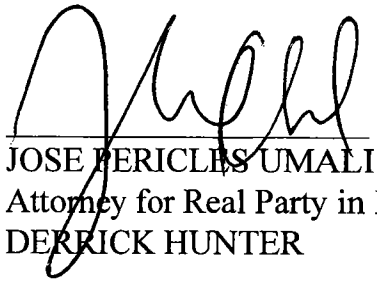

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CERTIFICATION

I hereby certify that *Real Parties Lee Sullivan and Derrick Hunter's Answer to Google's Supplemental Amicus Curiae Brief in Support Petitioners* consists of 1901 words and that the font used was 13 point Times New Roman.

Dated: March 17, 2017

Respectfully Submitted,

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LEE SULLIVAN

PROOF OF SERVICE BY U.S. MAIL

Re: Facebook v. Superior Court No. S230051

I, JANELLE E. CAYWOOD, declare that I am over 18 years of age and not a party to the within cause; my business address is 3223 Webster Street, San Francisco, California 94123. On March 22, 2017, I served a **REAL PARTIES LEE SULLIVAN AND DERRICK HUNTER'S ANSWER TO GOOGLE'S SUPPLEMENTAL AMICUS BRIEF** on each of the following by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid and deposited in United States mail addressed as follows:

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I declare under penalty that the foregoing is true and correct. Executed this 22nd day of March , 2017, at San Francisco, California.

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