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 BRIEFS OF AMICUS CURIAE

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INTRODUCTION

The real parties in interest (defendants below) argued for the first time in response to the Court's supplemental briefing order that the disclosure prohibitions of the Stored Communications Act do not apply to communications that are publicly available or shared with a group of people. The supplemental briefs filed by amici curiae California Public Defenders Association and the Public Defender of Ventura County (CPDA), San Francisco Public Defender (SFPD), and California Attorneys for Criminal Justice and National Association of Criminal Defense Lawyers (CACJ) largely reiterate defendants' flawed arguments.

As a threshold matter, the Court should decline to consider amici's supplemental arguments. The Court of Appeal was not asked to consider whether the SCA applies to content shared with the public or with a group, and amici's arguments are based on unsupported and incorrect assertions of fact about Providers' services.

If the Court does consider amici's arguments, it should reject them. Amici present conflicting interpretations of the SCA's applicability to public content, and they support their interpretations with citations to legislative history and case law that address *interception* and *access* to public content, but do not concern the *disclosure* prohibition at issue here. Amici's difficulty in agreeing on the scope of the SCA may reflect the reality that, contrary to the assertions of defendants and some of the amici (see, e.g., CACJ Supp'l Br. at 3-4), weakening the SCA's protections might benefit some criminal defendants, but would harm many others—and jeopardize the privacy of everyone who uses electronic communications.

Amici argue that a user consents to disclosure by sharing content with the public. In fact, although a user who chooses to make a communication available to the public may have consented to its disclosure under section 2702(b)(3), a user may revoke that consent after initially

sharing the content. Thus, a determination of whether the content is public must be made at the time the disclosure is requested, and provider involvement is unnecessary for any content that is public at that time. Similarly, amici's repeated, unsupported arguments that the popularity of social media lowers users' expectations of privacy fail on multiple levels: users do not lose their expectation of privacy in non-public content by sharing it with a group of people, nor are their privacy interests vitiated by the possibility that their shared content may be further disseminated by others.

Finally, amici's constitutional arguments are outside the scope of the Court's supplemental briefing order, have already been addressed in Providers' principal briefs, and should be disregarded.

ARGUMENT

A. The Court should decline to consider amici's arguments that the SCA does not apply to content shared with the public or a group

As this case was litigated below, it was "undisputed that the materials Defendants seek here are subject to the SCA's protections." (*Facebook, Inc. v. Superior Court* (2015) 240 Cal.App.4th 203, 213, review granted Dec. 16, 2015, No. S230051.) The Court of Appeal therefore did not consider the arguments amici now advance about the applicability of the SCA to content shared with the public or with a group. This Court should decline to consider those arguments, which rely on inaccurate and unsupported assertions of fact about the operation of Providers' privacy settings and the extent to which users expect that their restricted content can or will be disseminated on Providers' platforms. (See CPDA Supp'l Br. at pp. 7-9; SFPD Supp'l Br. at pp. 2-4; CACJ Supp'l Br. at p. 3.)

For example, amici incorrectly assert that a user who makes a non-public social media post "effectively launch[es] the content into the public domain." (CPDA Supp'l Br. at p. 8; see also SFPD Supp'l Br. at p. 3

["Today's social media users cannot legitimately expect to maintain privacy of information or images sent out on social media."]; CACJ Supp'l Br. at p. 3 [arguing that "the 'private' settings distinction becomes meaningless"].) Amici's position represents a fundamental misunderstanding of the mechanics of social media platforms and the choices available to users in determining the intended audience for their social media communications. As Providers have previously explained, users may configure different privacy settings for different social media posts. Moreover, "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." (Petitioners' Response to Supp'l Br. at pp. 6-7.) Thus, far from amicus CPDA's factually inaccurate inference that Facebook users who share their posts with friends effectively share those posts with millions of others, the reality is that users have fine control over their audience—and it is *users'* expectations of privacy and choice of access restrictions that are material under the SCA.

Amicus CPDA argues that the Court is authorized under California Rules of Court, rule 8.516 to decide whether SCA protections apply to public content. (CPDA Supp'l Br. at pp. 5-7.) Under that rule, "[t]he court *may* decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." (Cal. Rules of Court, rule 8.516(b)(2) [emphasis added].) But the more prudent course in this case would be to follow the Court's "normal policy of declining to consider an issue the Court of Appeal was not asked to consider." (*People v. McCullough* (2013) 56 Cal.4th 589, 591, fn.1.) The wisdom of that policy is self-evident where, as here, defendants' and amici's arguments rely on unsupported and inaccurate assertions of fact regarding the services

at issue. (See, e.g., *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal.4th 1, 6 [exercising discretion to decide a question not raised in the Court of Appeal in part because it was "an issue of law that does not turn on the facts of this case"].) The Court would be better served by considering amici's arguments in the context of a case with a developed factual record and with the benefit of prior consideration of the issues by the Court of Appeal.

B. Amici's conflicting arguments against SCA protection for "non-private" content lack merit

Amici present varied theories of what content should be considered effectively "public" and how that classification affects the SCA's prohibitions against providers' disclosing stored content. Their arguments lack merit.

1. The SCA disclosure provisions in Section 2702 apply to all communications

Amici do not agree about whether or how Section 2702 of the SCA applies to electronic communications initially configured to be publicly available. SFPD contends that the SCA's legislative history shows that such content was not intended to be encompassed within the disclosure provisions of the SCA. (SFPD Supp'l Br. at pp. 1-2.) CACJ, by contrast, *agrees* with Providers that "'public' posts fall within the ambit of the SCA," but contends the statute's prohibition against unwarranted disclosure is not effective when a user "vitiate[s]" his or her privacy interests by initially configuring a communication to be publicly available. (CACJ Supp'l Br. at 1-2.) Finally, CPDA does not expressly take a position, except to note that "[i]t makes sense that Congress and the courts would consider the configuration settings of a communication at the time it was shared." (CPDA Supp'l Br. at 9.)

Like defendants, amici conflate *interception*, *access*, and *disclosure*, all of which are treated differently in the Electronic Communications Privacy Act. For example, CACJ relies on 18 U.S.C. § 2511(2)(g)(i), which provides 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) [emphasis added]; CACJ Supp'l Br. at p. 2.) SFPD and CACJ similarly rely on legislative history describing exceptions to the prohibition on *interception* of electronic communications, contemporaneous with their transmission, in the Wiretap Act and its precursor in Congress. (CACJ Supp'l Br. at p. 2 [citing 132 Cong. Rec. E4128 (1985)]; SFPD Supp'l Br. at p. 2 [citing 131 Cong. Rec. S11790-03 (1985) (statement of Sen. Leahy); 131 Cong. Rec. E4128 (1985)].)

None of this authority concerns the *disclosure* of stored content by providers, which is addressed in Section 2702 of the SCA. Unlike the Wiretap Act or the access provisions of the SCA, Section 2702 does not include a public-content exception to its prohibition on disclosure—in fact, it does not distinguish between public and private content at all. (See also Supp'l Br. for the Petitioners, at pp. 4-5.) The exceptions for interception and access show that Congress was fully capable of distinguishing between public and private content when it wanted to make an exception for public content. (See, e.g., 18 U.S.C. § 2511(2)(g)(i).)

The absence of an exception for public content in Section 2702 is therefore telling evidence that Congress in fact *did* intend the Section to reach such content. (See *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 423 [declining to read an exception into a statute when "the Legislature clearly knows how to establish a[n] . . . exception . . . if it so desires" but "did not enact such an exception when it passed" the section at issue].) The

case law cited by CACJ is not to the contrary. (See CACJ Supp'l Br. at p. 2; *Viacom Internat. Inc. v. Youtube Inc.* (S.D.N.Y. 2008) 253 F.R.D. 256, 265 [it was "not clear from this record" whether plaintiffs correctly interpreted ECPA as providing that users consent to disclosure by sharing videos configured to be private with any interested member of the public]; *People v. Harris* (Crim. Ct. 2012) 949 N.Y.S.2d 590, 598 [holding that section 2703 of the SCA *applies* to publicly available content, even though the Fourth Amendment may not require the government to obtain a search warrant to compel disclosure of that content].)

Finally, the legislative history of the consent exception in Section 2702(b)(3), cited by CACJ and SFPD, establishes that the general prohibition against disclosure in Section 2702(a) encompasses public content. (CACJ Supp'l Br. at p. 2; SFPD Supp'l Br. at p. 2.) Specifically, the ECPA House Report explains that a user "who places a communication on a computer 'electronic bulletin board,' with a reasonable basis for knowing that such communications are freely made available to the public, should be considered to have given consent to the disclosure or use of the communication." (H.R. Rep. No. 99-647, at p. 66 (1986).) Because consent is an "[*e*]*xception*[] for disclosure of communications" that allows but does not require a provider to divulge the contents of a communication (18 U.S.C. § 2702(b) [emphasis added]), that explanation would have been necessary only if disclosing public content is generally prohibited.

2. Any consent inferred from privacy settings must be determined by the settings when disclosure is requested

Providers agree with CACJ that a user who makes content available to the public *may have* provided "lawful consent" to disclosure under section 2702(b)(3). (See Supp'l Br. for the Petitioners, at pp. 1-2, 5-7.) As CPDA points out, however, services may permit the initial privacy setting for an electronic communication to "be changed at a later time"; "[a] public

post can be deleted"; and privacy settings may be changed such that a limited "initial audience can be later altered to allow unfettered access." (CPDA Supp'l Br. at 12.) Whether a user has provided "lawful consent" to disclosure therefore must be determined at the time disclosure is requested, not based on the privacy settings used the first time content was sent or shared.

For example, a user who posts content that was originally private could decide to make that content public. By removing previous restrictions on access and making content readily available to the general public, the author may have provided lawful consent to disclosure under section 2702(b)(3). (See H.R. Rep. No. 99-647, at p. 66.)

Conversely, a user who initially posts content to the public could reconsider and make the content private or delete it altogether. In doing so, the user would have "actively restrict[ed] the public from accessing the information"—even if the public *at one point* had been capable of doing so. (*Ehling v. Monmouth-Ocean Hosp. Serv. Corp.* (D.N.J. 2013) 961 F.Supp.2d 659, 668.) By taking these "steps to limit access," the user would have effectively revoked any consent to disclosure that may have been implicitly provided, and the "lawful consent" exception to disclosure in 2702(b)(3) would not apply. (*Ibid.*)

To the extent amici take the position that implied consent to disclosure based on initial publication to the public is irrevocable, their position is unsupported and not persuasive. As previously indicated, the consent exception allows a provider to "divulge the contents of a communication . . . with the lawful consent" of the user. (18 U.S.C. § 2702(b)(3).) Nowhere does the SCA indicate that consent is not revocable. Indeed, it is a "common law principle that consent is revocable." (*Van Patten v. Vertical Fitness Grp., LLC* (9th Cir. 2017) 847 F.3d 1037, 1047.) Thus, if a user takes steps to restrict access to a once-

public communication, thereby signaling a revocation of consent to disclose the communication to the public, any disclosure made by the provider could no longer be made "with the lawful consent" of the user. Accordingly, whether a user has consented to the provider's disclosing his or her communications must be determined based on the privacy settings used when the disclosure is requested.

3. The popularity of social media does not eliminate expectations of privacy in non-public shared content

Amici suggest, without any support, that the increased use of social media and sharing communications with multiple people should exempt these communications from the SCA's protection. Specifically, they assert that, "[t]oday's social media users cannot legitimately expect to maintain privacy of information or images sent out on social media." (SFPD Supp'l Br. at 3; see also CPDA Supp'l Br. at 7-9; CACJ Supp'l Br. at 3.) They seek to further erode the SCA's privacy protections by arguing that the line between "private" and "public" content has disappeared such that group messages or any other restricted content should be considered public with the sole exception being if a user "send[s] person-to-person communications." (SFPD Supp'l Br. at p. 4; see also CPDA Supp'l Br. at p. 9 ["Other than the private or direct messages, persons posting on social media are consenting to release their content into the public domain."]. The CACJ take this a step further and claim that the "'private' settings distinction falls away when 'private' electronic communications recipients and/or their friends or friends of friends can do whatever they want with the posts . . . ." (CACJ Supp'l Br. at p. 3.)

Amici ignore the plain language of the SCA, which contains no exception to the prohibition of provider disclosure for content posted on social media or for non-public content shared with groups of people. (Petitioners' Response to Supp'l Br. at pp. 6-11.) The protections afforded

by the SCA do not depend on the number of people with whom a communication is shared. (See also Petitioners' Response to Supp'l Br. at pp. 9-10.) Amici's contrary position would require courts to draw arbitrary lines to determine how many "friends" or "followers" is too many to be entitled to the SCA's privacy protections. Unsurprisingly, courts have declined to undertake this inquiry. (See *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 v. Christian Audigier, Inc.* (C.D. Cal. 2010) 717 F.Supp.2d 965, 990 ["[B]asing a rule on the number of users who can access information would result in arbitrary line drawing . . . ."].)

Nor are amici correct when they argue that a user lacks an expectation of privacy in a communication that can be further disseminated by the recipient. That theory sweeps so broadly that it would effectively eliminate expectations of privacy in *all* communications. As Providers previously noted, even "[a] letter written on paper and sent in the mail carries 'no restriction on its subsequent dissemination,'" yet it still falls within "the general class of effects in which the public at large has a legitimate expectation of privacy." (Petitioners' Response to Supp'l Br. at 7 [quoting *United States v. Jacobsen* (1984) 466 U.S. 109, 114].) Amici's construction of the law, like defendants', "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." (*Id.* at p. 11.) This result "would undermine the privacy rights of all users, including those of criminal suspects and defendants," and would allow "anyone, including the government and private parties, [to] compel disclosure of electronic communications without any judicial oversight whatsoever." (*Ibid.*)

Thus, Amici's position that only direct "person-to-person" communications are protected by the SCA is unsupported by the SCA's plain language and existing case law. It would also eviscerate user expectations of privacy and create a regime that would require arbitrary line drawing to exclude some communications from the SCA's protections. There is no reason for this court to depart from the decisions of other courts that have addressed this issue, and the Court should reject amici's arguments.

Amici attempt to obscure the distinction between public and non-public content, but the two kinds of content are not difficult to distinguish. "Public" means "exposed to general view." (Merriam-Webster's Collegiate Dict. (10th ed. 2000) p. 941.). A social media post that is "public" accordingly is "exposed to general view" and thus could be obtained by defendants without compelling Providers to disclose that content. (See Petitioners' Response to Supp'l Br. at 6, 9-10 & fn.2.) In contrast, when a user takes "certain steps to restrict access" to content, that content is not readily accessible to the public—even if it is accessible by a large group of people. (See *Konop v. Hawaiian Airlines, Inc.* (9th Cir. 2002) 302 F.3d 868, 875; see also *United States v. Meregildo* (S.D.N.Y. 2012) 883 F.Supp.2d 523, 525 ["[P]ostings using more secure privacy settings reflect the user's intent to preserve information as private and may be constitutionally protected."].) In the context of this case, the analysis is simple. Defendants are members of the public, and they concede that they will be "deprived" of access to certain communications unless Providers are compelled to disclose them. (Defs.' Reply Br. at pp. 18-20; see also Supp'l Br. for the Petitioners at pp. 2-4.) By definition, those communications must be non-public.

Finally, the cases cited by amici do not support their positon because those cases address actions and requests of social media *users*, not

providers. (See *Meregildo*, *supra*, at pp. 525-26 [considering Facebook user's disclosure of information to law enforcement]; *Fawcett v. Altieri* (App. Div. 2013) 960 N.Y.S.2d 592, 597-98 [considering request for discovery of plaintiffs' restricted social media accounts from plaintiff himself]; *Chaney v. Fayette Cty. Pub. Sch.* (N.D. Ga. 2013) 977 F.Supp.2d 1308, 1312-13 [considering privacy implications of a school district employee obtaining a picture of the plaintiff, which she had shared with "'friends' and 'friends of friends'" including the school district employee].) That the *recipient* of a communication might choose to share, or be compelled to disclose, the content of a communication does not mean the SCA authorizes the *provider*, an intermediary to the communication, to produce that content. Indeed, Providers have repeatedly suggested that defendants obtain the communications they seek from the users or any recipient, and the cases cited by amici confirm that this is the appropriate path. The plain text of the SCA and every case to address the question establish that a provider is prohibited from disclosing such communications unless appropriate legal process is obtained or an exception applies. (See Petitioners' Response to Supp'l Br. at 7-9.)

C. Amici's constitutional arguments are outside the scope of the Court's supplemental briefing order

Amici's remaining arguments reiterate the positions in their principal briefs and pertain to issues that are outside the scope of the Court's order for supplemental briefing. Providers do not respond to these improper arguments here, but instead refer the Court to their principal briefs. Specifically:

- In response to CACJ's argument that the Court should decide the constitutional issues raised in this appeal (pages 5-11 of its Supplemental Brief), see Providers' Answer Brief on the Merits,

at pages 9-13, and Providers' Answer to Briefs of Amicus Curiae, at pages 7-8;

- In response to SFPD's argument that the SCA must yield to the constitutional rights of criminal defendants (pages 5-9 of its Supplemental Brief), see Providers' Answer Brief on the Merits, at pages 13-35, and Providers' Answer to Briefs of Amicus Curiae, at pages 8-14; and
- In response to CPDA's arguments that the Court should construe the SCA in conjunction with criminal defendants' constitutional rights and without reliance on legislative history (pages 11-13 of their Supplemental Brief), see Providers' Answer Brief on the Merits, at pages and 13-35, and Providers' Answer to Briefs of Amicus Curiae, at pages 4-6.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

DATED: March 24, 2017

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PROOF OF SERVICE
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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 March 24, 2017, I caused the following document(s) to be served on the following parties by the manner specified below:

PETITIONERS' RESPONSE TO AMICI'S SUPPLEMENTAL BRIEFS

☒ (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
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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 March 24, 2017, 2017 at Palo Alto, California.

Marla J. Heap