Case No. S230051

SUPREME COURT
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IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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Facebook, Inc., Instagram, LLC, and Twitter, Inc.,

Petitioners,

v.

Superior Court for the City and County of San Francisco,

Respondent.

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After Published Opinion by the Court of Appeal
First Appellate District, Division 5, Case No. A144315
Superior Court of the State of California, County of San Francisco
The Honorable Bruce Chan, Judge Presiding
Civil Case Nos. 13035657, 13035658

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# ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

The Court of Appeal correctly directed the trial court to quash subpoenas issued by Real Parties in Interest Derrick Hunter and Lee Sullivan ("Defendants") because the federal Stored Communications Act, 18 U.S.C. §§ 2701, et seq. ("SCA") does not allow Defendants to use a subpoena to compel disclosure of electronic communications content from Facebook, Inc., Instagram, LLC, and Twitter, Inc. ("Providers"), and Defendants' constitutional rights do not justify invalidating the SCA.

Defendants' Petition for Review ("Petition") fails to satisfy any of the review criteria in Rule of Court 8.500(b). Defendants suggest that review is necessary to secure uniformity of decisions or to settle an important question of law, but fail to identify any conflict or unsettled question. The Court of Appeal relied on and applied well-established legal principles regarding the SCA and criminal defendants' right to pretrial discovery, including principles repeatedly addressed and settled by this Court. Review is therefore neither "necessary" nor appropriate.

Appellate courts in California and throughout the country have uniformly held that the SCA prohibits use of a subpoena alone to compel Providers to disclose electronic communications content. Indeed, a governmental entity must obtain a search warrant to compel disclosure, because the SCA protects an individual's reasonable expectation of privacy in the contents of electronic communications maintained by service providers. The Court of Appeal correctly applied the SCA, and Defendants identify no authority to the contrary.

The Court of Appeal also correctly rejected Defendants' Constitutional arguments, because Defendants failed to carry their "heavy burden" to show that the SCA was "clearly" and "unmistakably" unconstitutional. The Court of Appeal rightly held that quashing the subpoenas in this case would offend neither the Confrontation nor the

Compulsory Process clauses of the Sixth Amendment. The U.S. Supreme Court has never held that criminal defendants have a constitutional right to pretrial discovery of evidence from third parties, and this Court has repeatedly and expressly declined to recognize such a right—not just in *People v. Hammon*, 15 Cal. 4th 1117 (1997), on which Defendants focus, but in multiple other cases over the past eighteen years. The constitutional cases Defendants cite are unpersuasive: the vast majority predate *Hammon* (and were presumably considered by this Court when it decided *Hammon*) and no subsequent cases address a criminal defendant's right to compel pretrial disclosure of protected records.

Defendants' due process arguments similarly present no unsettled issue for this Court to consider. Defendants argue that because the government can obtain a warrant for content but they cannot, the SCA violates the Due Process clause of the Fifth and Fourteenth Amendments. But the government has long had access to investigative tools unavailable to criminal defendants. The government can obtain physical search warrants, wiretap orders, and various other tools unavailable to criminal defendants. Defendants concede as much, but argue that once charges have been filed, they should have the same access to data as the government. However, Defendants cite no case, and there is none, that holds that a defendant can obtain a search warrant or other criminal investigative tools (like a wiretap order) once under indictment.

Additionally, Defendants' argument that they should be able to obtain with a mere subpoena the same information that the government can only obtain with a search warrant overlooks the privacy interests that the SCA and the Fourth Amendment seek to protect. Defendants' claim that a pretrial subpoena is somehow more privacy protective than a warrant is specious: a warrant requires a showing of probable cause before it can

issue; by contrast, a pretrial criminal defense subpoena can and often does issue with no review at all, as the Court of Appeal acknowledged.

Moreover, Defendants either already possess, or have alternate ways of accessing, the content they seek. Defendants submitted much of the witness's account content to the trial court in support of their subpoenas. Any remaining content can be sought by issuing a subpoena directly to the witness. Defendants can also obtain the victim's account content from the prosecution, which already obtained content by issuing search warrants to Facebook and Instagram.

Finally, Defendants ask this Court to overrule *Hammon*, or in the alternative, limit *Hammon* to the psychotherapist-patient privilege. But *Hammon* is not an outlier—rather, it is one case in a long line of authority (starting with *People v. Webb*) affirming the proposition that Sixth Amendment rights are trial rights, not pretrial rights. Nothing in that line of authority suggests that the rules espoused therein should be limited to a particular privilege, and indeed it has not been so limited. Defendants also fail to offer a compelling reason to reconsider this Court's analysis of the Sixth Amendment. As correctly recognized in *Hammon*, during the pretrial phase a court will not have sufficient context to determine the constitutional significance of a particular request. Indeed, disclosure may turn out to be unnecessary—a witness may decline to testify; the government may decline to offer certain evidence; the case may even settle or be dropped—in which case the user rights or statutory prohibitions (such as privileges or the SCA) would have been violated for no reason.

In short, the Court of Appeal correctly applied the law, and Defendants have neither identified a split in authority nor an unsettled issue of law that necessitates review. Defendants instead simply ask this Court to disregard established law and create a new constitutional right that will allow them to ignore a federal statute that is, itself, of constitutional

significance. Defendants argue that creating this new right is necessary because social media is a new and widely used form of communication. However, the increasing use of new methods of communication is not a reason to weaken the privacy rights associated with them. If anything, it is a reason to strengthen them. In sum, Defendants cannot meet the standard for extraordinary review, and Providers respectfully ask this Court to decline the Petition.

## II. PROCEDURAL HISTORY

Defendants issued subpoenas to Providers seeking account content belonging to the victim and witness of an alleged murder. The subpoena to Facebook sought "[a]ny and all public and private content," including, but "not limited to user information, associated email addresses, photographs, videos, private messages, activity logs, posts, status updates, location data, and comments including information deleted by the account holder." (1 AE 12-18.) Similarly, the subpoena to Instagram sought "any and all public and private content," including "but [] not limited to user information, associated email addresses, photographs, videos, private messages, activity logs, posts, location data, and comments," as well as "data deleted by the account holder" associated with multiple purported Instagram accounts belonging, respectively, to the alleged victim and witness. (1 AE 12-18.) The subpoenas to Twitter sought similar information, but only as to the alleged witness. (1 AE 53-56; 1 AE 210-214.)

Providers filed timely motions to quash the subpoenas because the SCA prohibits Providers from disclosing communications content to Defendants. (1 AE 1-8; 1AE 42-49.) Providers noted that Defendants could seek the communications directly from the account holders without implicating the SCA. (*Id.*) Defendants opposed the motions, arguing they have broad constitutional rights to pretrial discovery that should overcome the SCA. (1 AE 96-102.) After two hearings, the Superior Court denied

Providers' motions to quash, finding that the SCA's prohibitions on disclosure violated Defendants' constitutional rights, and ordered Providers to produce all responsive records to the Court for *in camera* review. (1 AE 264-281.)

Providers timely filed a petition for writ of mandate in the Court of Appeal, First Appellate District, on the grounds that the trial court abused its discretion in denying the motions to quash and ordering Providers to produce the requested records in violation of the SCA, and requested an immediate stay of the trial court's order. *Facebook, Inc. v. Superior Court*, 240 Cal. App. 4th 203, 211 (2015). On February 26, the Court of Appeal granted the request for stay, and on March 30, issued an order to show cause why the writ petition should not be granted. *Id.*

On September 8, 2015, following full briefing and oral argument, the Court of Appeal issued a published opinion directing the trial court to vacate its prior order and enter a new order quashing the subpoenas. *Id.* at 208.[1] The Court of Appeal recognized that the SCA prohibits Providers from disclosing communications content to Defendants in response to a subpoena, and that it is "undisputed that the materials Defendants seek here are subject to the SCA's protections." *Id.* at 213. With respect to Defendants' claim that the SCA is unconstitutional to the extent it precludes them from accessing information that may be material to their defense, the Court found that "[t]he consistent and clear teaching of both the United States Supreme Court and California Supreme Court

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[1] Defendants incorrectly contend that the Court of Appeal "ruled that a criminal defendant's constitutional right to a fair trial may require disclosure of social media records at trial notwithstanding the federal Stored Communications Act's provision prohibiting disclosure of electronic records except to law enforcement." (Petition at 6.) The Court of Appeal held no such thing, instead merely "emphasiz[ing]" that its "ruling is limited to the pretrial context in which the trial court's order was made." *Facebook*, 240 Cal. App 4th at 225.

jurisprudence is that a criminal defendant's right to *pretrial* discovery is limited, and lacks any solid constitutional foundation." *Id.* at 225.

In reaching its conclusion, the Court carefully analyzed each constitutional right asserted by Defendants. As to the Sixth Amendment, the Court recognized that this Court "has repeatedly declined to recognize a Sixth Amendment right to defense pretrial discovery of otherwise privileged or confidential information." *Id.* at 217. After reviewing the relevant authorities, the Court concluded that "there is little, if any, support for Defendants' claim that the confrontation clause of the Sixth Amendment mandates disclosure of otherwise privileged information for purposes of a defendant's pretrial investigation . . . [and] even less support for Defendant's contention that the compulsory process clause of the Sixth Amendment separately authorizes the trial court's order here." *Id.* at 219. As to the Due Process argument, the Court reiterated the United States Supreme Court's observation, which has been often repeated by this Court, that "[t]he Due Process clause has little to say regarding the amount of discovery which the parties must be afforded . . . .'" *Id.* at 220-21 (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)). The court also recognized that Defendants could seek the information from other sources, including the government, and rejected Defendants' argument that the SCA was unconstitutionally one-sided because "a variety of investigative and evidence collection procedures are routinely available to governmental agencies that are not provided to a criminal defendant." *Id.* at 221-22.

Finally, the Court rejected Defendants' argument that *in camera* review of the records by the trial court provides adequate privacy protection. The Court stated that such a "non-adversarial *ex parte* process is ill-suited to adjudication of contested issues of privilege," because the trial court likely would not "have any context to make a meaningful evaluation

pretrial, and in most instances would not have the benefit of an adversarial response." *Id.* at 223-24.

Defendants did not seek rehearing in the Court of Appeal, but filed a Petition for Review in this Court on October 19, 2015.

## III. ARGUMENT

### A. Standard of Review

Defendants fail to meet the standard for review. A Court of Appeal decision is reviewable by this Court "[w]hen *necessary* to secure uniformity of decision or to settle an important question of law." Cal. R. Court 8.500(b) (emphasis added). Review should be denied where the Court of Appeal "correctly declares the conclusions . . . that have been reached" by this Court. *Bohn v. Better Biscuits, Inc.*, 26 Cal. App. 2d 61, 72 (1938). As Defendants have filed no petition for rehearing and have failed to call the Court of Appeal's attention to any alleged omission or misstatement, this Court must accept the facts as set forth by the Court of Appeal. Cal. R. Court 8.500(c)(2); *People v. Correa*, 54 Cal. 4th 331, 334, n. 3 (2012).

The Court of Appeal applied the SCA in a manner consistent with prior California decisions as well as the decisions of federal and state 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. Cal. R. Court 8.500(b)(1). Defendants have failed to carry their burden for review and their Petition should be denied.

### B. The Court of Appeal Correctly Held That The Stored Communications Act Prohibits The Disclosure Defendants Seek.

The Court of Appeal correctly held that the Stored Communications Act ("SCA") prohibits disclosure of the information Defendants seek. The

SCA is a federal criminal law that states Providers "*shall not knowingly divulge to any person or entity* the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1) (emphasis added). The Petition does not argue that review of the SCA is necessary to secure uniformity of decision or to settle an important question of law, because defendants concede that federal and California courts agree that the SCA prohibits disclosure of content to private parties.

Federal courts broadly construe this restriction on disclosure—it applies to prevent a service provider's knowing disclosure of the content of communications, even if the communications are unavailable from another source. *See In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012) (quashing application for subpoena to Facebook seeking the content of a deceased user's Facebook account even though the communications were not available from the user); *Optiver Australia Pty. Ltd. & Anor. V. Tibra Trading Pty. Ltd. & Ors.*, 2013 WL 256771 at *2 (N.D. Cal. Jan. 23, 2013) ("[T]he SCA prohibits any knowing disclosure by service providers of the content of electronic communications, no matter how insignificant."). The SCA is part of the federal criminal code and "clearly anticipates the criminal context." *FTC v. Netscape Commc'ns Corp.*, 196 F.R.D. 559, 560 (N.D. Cal. 2000) (quashing FTC subpoena to Netscape). Federal courts have also uniformly held that the SCA's disclosure prohibition applies to Providers' services, rejected any implied exception for subpoenas, and declined prior requests from criminal defendants to invalidate the SCA's prohibition on disclosure as unconstitutional. *See, e.g., United States v. Pierce*, 785 F.3d 832, 842 (2d Cir. 2015).

California state court authority is in accord with federal courts. In *O'Grady*, the Court of Appeal held that a service provider's compliance with a subpoena seeking the content of a user's communications, even if accompanied by a court order, would be an "unlawful act." *O'Grady v.*

*Superior Court*, 139 Cal. App. 4th 1423, 1442 (2006). More recently, in *Negro*, the Court of Appeal reiterated that an order directing Google to disclose the content of email violated the SCA, explaining that "California's discovery laws cannot be enforced in a way that compels [a provider] to make disclosures violating the [SCA]." *Negro v. Superior Court*, 230 Cal. App. 4th 879, 888-89 (2015).

Multiple courts have held that under the Fourth Amendment, individuals have a reasonable expectation of privacy in electronic communications content and similarly sensitive information maintained by providers. *See United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010); *see also United States v. Graham*, 796 F.3d 332 (4th Cir. 2015) (holding that under the Fourth Amendment the government must obtain a search warrant based on probable cause to compel a provider to disclose location information). In *Warshak*, the Sixth Circuit Court of Appeals held that "a subscriber enjoys a reasonable expectation of privacy in the contents of emails 'that are stored with, or sent or received through, a commercial ISP,'' and that "government agents violated the Fourth Amendment" by obtaining email content without a warrant. 631 F.3d at 288; *see also Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 907-08 (9th Cir. 2008) (holding that users have a reasonable expectation of privacy in text messages, despite warnings that the messages could be read), *rev'd on other grounds*, 560 U.S. 746, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010); *U.S. v. Forrester*, 512 F.3d 500, 512 (9th Cir. 2007) (likening email content to the contents of physical mail, noting that "the contents [of email] may deserve Fourth Amendment protection").

Other courts have followed the warrant requirement adopted in *Warshak*. *See, e.g., U.S. v. Hanna*, 661 F.3d 271, 287, n.4 (6th Cir. 2011) (discussing the SCA and *Warshak*, stating that "emails can only be acquired by a warrant."); *U.S. v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011) ("'We

recognize individuals have a reasonable expectation of privacy in the content of emails stored, sent, or received through a commercial internet service provider.'"); *U.S. v. Shah*, No. 5:13–CR–328–FL, 2015 WL 72118 at *10 (E.D.N.C. Jan. 6, 2015) (recognizing that a warrant is required to obtain communications content); *U.S. v. DiTomasso*, 56 F. Supp. 3d 584, 592 (S.D.N.Y. 2014) (agreeing with the Sixth and Ninth Circuits that individuals have a reasonable expectation of privacy in communications content); *U.S. v. Ali*, 870 F. Supp. 2d 10, 39 n.39 (D.D.C. 2012) (individuals have a reasonable expectation of privacy in content); *In re Application for Search Warrants for Information Associated with Target Email Address*, Nos. 12-MJ-8119-DJW, 12-MJ-8191-DJW, 2012 WL 4383917, *5 (D. Kan. Sept. 21, 2012) (finding *Warshak* persuasive and holding "that an individual has a reasonable expectation of privacy in emails or faxes stored with, sent to, or received through an electronic communications service provider."); *see also State ex rel. Two Unnamed Petitioners v. Peterson*, 363 Wis.2d 1, 139 (Wis. 2015) ("It is inconceivable that a public official . . . would not subjectively expect a reasonable degree of privacy in his private emails.") (citing *Warshak*). Thus, when the government seeks to compel a communications service provider to disclose the content of electronic communications, the government must obtain a valid warrant based on probable cause.

Defendants here do not seek routine discovery. Instead, they are asking for the right to use third party "discovery" to obtain communications prohibited from production under the SCA and that have been repeatedly found to be afforded heightened Fourth Amendment protections. Indeed, the Court of Appeal noted that Defendant's desire to create a new exception to the SCA would lead to an "anomalous result" where criminal defendants could use a mere subpoena to do what the government can only do after meeting the heightened warrant requirement. *Facebook, Inc.*, 192 Cal. App.

4th at 224. There is no support in the law for such a right, and there is no reason for the Court to support violation of federal law by recognizing such a right.

The language of the SCA is clear. Defendants have 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.

### C. The Court of Appeal Correctly Applied Settled Law in Holding That Defendants Have No Pretrial Constitutional Right to Discovery.

The Court should also decline review of the Court of Appeal's correct holding that Defendants have no pretrial constitutional right to discovery, because Defendants have not established any important question or split in authority in need of resolution. As the Court of Appeal recognized, the Constitution does not entitle criminal defendants to broad pretrial discovery, and it provides no basis for invaliding the SCA's disclosure prohibition. Defendants brush off the lack of support for their position by characterizing their arguments as "axiomatic." They are not. Neither the U.S. Supreme Court nor this Court have recognized the virtually limitless discovery rights that Defendants advance, and indeed this Court has repeatedly declined to recognize such rights.

#### 1. The Court of Appeal Correctly Held That The SCA Comports With The Due Process Clause.

Defendants "must carry a heavy burden" to establish that a statute violates due process. *Facebook, Inc.*, 240 Cal. App. 4th at 220. Defendants have not met their burden.

Defendants complain that the SCA denies them access to information that is accessible by the government, but the Due Process Clause does not provide Defendants with a right to investigatory powers equal to the government. Indeed, criminal investigations are inherently

asymmetrical. *United States v. Turkish*, 623 F.2d 769, 774 (2d Cir. 1980); *see also People v. Sutter*, 134 Cal. App. 3d 806, 834-35 (1982) ("[A] criminal proceeding is not 'symmetrical' as the prosecution and defense have different rules, powers and rights."). As just one example, a search warrant is an investigative tool to which defendants have never had access. *See, e.g.*, Fed. R. Crim. P. 41(b) (permitting a judge to issue a warrant "at the request of a federal law enforcement officer or an attorney for the government."). That the prosecution can obtain a digital search warrant, and Defendants cannot, likewise "does not offend the Constitution." *United States v. Tucker*, 249 F.R.D. 58, 63 (S.D.N.Y. 2008) ("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."). Defendants cannot point to any case holding that criminal defendants have a constitutional right to obtain the equivalent of a search warrant.

Defendants concede that law enforcement may use investigative techniques not available to the defense, but argue that under *Wardius v. Oregon*, 412 U.S. 470, 476 (1973), any disparities must give way once a defendant is charged with a crime. (Petition at 15.) *Wardius* held that when a state rule grants certain discovery rights to the prosecution, it must grant reciprocal rights to defendants. *Id.* However, the SCA is a federal criminal law that does not provide the government with a right to issue a pretrial "discovery" subpoena, which is what Defendants seek here. *See, e.g., F.T.C. v. Netscape Comm'ns Corp.*, 196 F.R.D. 559, 561 (N.D. Cal. 2000) (SCA authorizes the government to issue administrative, grand jury, and trial subpoenas, not discovery subpoenas). Moreover, the government may not use *any* type of subpoena to compel disclosure of communications content from a provider; it must obtain a search warrant. *Warshak*, 631 F.3d at 288. And Defendants do not explain why it is unconstitutional that only

the government has the power to obtain a search warrant. Indeed, Defendants do not appear to question the constitutionality of the government's power to obtain a warrant to conduct a physical search, or an order to conduct a wiretap, despite the fact that Defendants could not obtain either. If there is any disparity at all here, it concerns the investigatory powers granted to the government, which long predates the SCA and electronic communications generally.

Additionally, Defendants' contention that a pretrial subpoena is more privacy protective than a search warrant issued by a neutral magistrate on a showing of probable cause, is incorrect. (Petition, 17-19.) Before obtaining a warrant, the government must make an *ex ante* showing of probable cause. U.S. Const. amend. IV; Cal. Penal Code § 1524. The warrant must state with particularity the place to be searched and the property to be seized. Courts may also impose *ex ante* search restrictions, require *in camera* review, or appoint special masters to review responsive records before disclosure to the government. *In re Search of Google Email Accounts*, __ F. Supp. 3d ___, 2015 WL 1650879 at *3 (D. Alaska 2015) (granting motion to amend and placing *ex ante* search restrictions on search warrant). These requirements, alone, provide significantly more protection, including privacy protection, than a pretrial subpoena.[2]

By contrast, Cal. Penal Code §1326 offers no comparable level of review. A criminal defendant can issue a pretrial subpoena without any initial showing; as Defendants concede, a "good cause" review only occurs if there is an objection to the subpoena. (Petition, 18.) As the Court of Appeal correctly explained, without an aggressive provider there will be no

[2] Moreover, starting on January 1, 2016, California governmental entities must obtain a warrant or probable cause order before compelling a provider to disclose any "electronic communications information," which broadly includes content and non-content metadata. Cal. Penal Code §1546.1 (effective Jan. 1, 2016).

privacy review at all. *Facebook*, 240 Cal. App. 4th at 224. Moreover, "accepting Defendants' argument would lead to an anomalous result." *Id.* While law enforcement must obtain a warrant for content, Defendants ask that they be able to obtain the same data "simply by serving an ex parte subpoena duces tecum with no required notice to the subscriber or prosecuting authority—and which may, or may not, be subject to meaningful judicial review." *Id.* Defendants provide no authority for the proposition that this should be the case. There is none.

There is no dispute that Defendants do not have access to the same investigatory tools as the government; accordingly, there is no issue of law that this Court needs to resolve with respect to the scope of Defendants' pretrial discovery rights.

**2. The Court of Appeal Correctly Interpreted The Sixth Amendment.**

Defendants also fail to show that the law is unsettled with respect to their rights under the Sixth Amendment, or that there is a split in authority that requires resolution. Indeed, Defendants concede that the Supreme Court has never held that the U.S. Constitution creates a right to pretrial access to evidence maintained by a third party. (Petition at 9.). Thus, Defendants necessarily cannot carry their "heavy burden" to show that the SCA is "unmistakably" unconstitutional. To the contrary, Defendants concede that "[t]here is no general constitutional right to discovery in a criminal case." (Petition at 8); *Weatherford*, 429 U.S. at 559 (no Sixth Amendment violation where the prosecution failed to reveal before trial the names of undercover witnesses who may testify against a defendant).

This Court has repeatedly declined to recognize a constitutional right to pretrial discovery of evidence under the Sixth Amendment. *See, e.g., People v. Clark*, 52 Cal. 4th 856, 983 (2011) (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*, 40 Cal. 4th 1179, 1234, n.10 (2007) ("To 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."); *Hammon*, 15 Cal. 4th at 1117 (holding there is no constitutional right to compel pretrial disclosure of privileged information). Defendants fail to show how, in light of this authority, review is proper here.

The Compulsory Process Clause guarantees "the right to the government's assistance in compelling the attendance of favorable witnesses at trial." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1986). But its text refers to process for "obtain[ing] witnesses," not obtaining disclosure of evidence, and it does not provide a right to *discovery* of evidence from private parties. *See, e.g., Taylor v. Illinois*, 484 U.S. 400, 413-14 (1988), 484 U.S. at 413-14 (holding there is no automatic Sixth Amendment violation where defendant is precluded from compelling *testimony* from undisclosed witness); *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982) (holding that the Compulsory Process violation occurs only where defendant shows that testimony would be "material and favorable to his defense, in ways not merely cumulative to the *testimony* of available witnesses.") (emphasis added).

The U.S. Supreme Court "has never squarely held that the Compulsory Process Clause guarantees the right to discover the *identity* of a witness, or to require *the government* to produce exculpatory evidence." *Ritchie*, 480 U.S. at 56 (emphasis added). In *Ritchie*, a criminal defendant sought pretrial access to records in the possession of a Pennsylvania government agency. *Id.* The government refused to disclose them, citing Pennsylvania law requiring the records to be kept confidential, while the defendant argued that he had a right to the records under the Compulsory

Process Clause. *Id.* The U.S. Supreme Court noted that it had never extended the Compulsory Process Clause to require the government to produce exculpatory evidence. *Id* at 56. And if the Compulsory Process Clause does not require the government—a *party* to whom the clause expressly applies—to produce exculpatory evidence, it cannot extend to require *non-parties* to produce evidence in the face of a federal statute barring that production. *See People v. Webb*, 6 Cal. 4th 494, 518 (1993) (declining to hold that defendant has a pretrial constitutional right to examine psychiatric records, noting in particular that unlike the records in *Ritchie*, the records in *Webb* were not in the possession of the government).

Defendants argue that because *Ritchie* was a plurality opinion, this Court should independently recognize a constitutional right to pretrial discovery of "social media records" under the Compulsory Process Clause. Of course, this Court has repeatedly addressed *Ritchie* and declined to recognize a constitutional right to pretrial discovery. *See, e.g., Clark*, 52 Cal. 4th at 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."); *Prince*, 40 Cal. 4th at 1234, n.10 ("To 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."); *Hammon*, 15 Cal. 4th at 1117 (holding there is no constitutional right to compel pretrial disclosure of privileged information); *Webb*, 6 Cal. 4th at 518.

Further, the Compulsory Process Clause does not automatically trump statutory law, statutory and common-law privacy privileges, or rules of evidence. For example, there is no automatic Sixth Amendment violation where a criminal defendant is precluded from compelling testimony from an undisclosed witness. *Taylor*, 484 U.S. at 413-14 (holding that trial court's decision to preclude testimony of undisclosed witness did not

violate Compulsory Process Clause). Nor is there a Sixth Amendment violation where a defendant is unable to compel testimony from an unavailable witness, absent a showing that the testimony sought would be material and non-cumulative. *Valenzuela-Bernal*, 458 U.S. at 873 (holding that the government's deportation of defense witness did not violate the Compulsory Process Clause). Other restrictions, such as the attorney-client privilege and the marital-communications privilege, may similarly preclude testimony without running afoul of the Compulsory Process Clause. *See, e.g., Valdez v. Winans*, 738 F.2d 1087, 1089–90 (10th Cir. 1984) (holding that the Compulsory Process Clause did not override the attorney-client privilege); *United States v. Lea*, 249 F.3d 632, 642–43 (7th Cir. 2001) (holding that the Compulsory Process Clause did not override the marital-communications privilege).

In addition, the Compulsory Process Clause is violated only "if the criminal defendant makes a plausible showing that the testimony . . . would have been material and favorable to his defense, in ways *not merely cumulative to the testimony of available witnesses*." *Valenzuela-Bernal*, 458 U.S. at 873 (emphasis added). There is no Compulsory Process Clause violation when a defendant is unable to present testimony that he or she merely speculates may be relevant, particularly if similar testimony is available from other witnesses. *Id.* Here, Defendants have already submitted some of the communications they obtained, which they are free to present to the jury to support their theories and arguments on credibility. (*See, e.g.*, 1 AE 53-56, 161-180.) Defendants do not explain what they expect to find in other communications that may (or may not) exist.

Invalidating the SCA would therefore not only be a drastic expansion of Defendants' rights, but may also be unnecessary to vindicate any purported interest. *See Hammon*, 15 Cal. 4th at 1128. ("Pretrial disclosure under these circumstances, therefore, would have represented not

only a serious, but an unnecessary, invasion of the patient's statutory privilege and constitutional right of privacy."). Indeed, a court may not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Wash. State Grange*, 552 U.S. at 451.

The SCA similarly does not implicate the Confrontation Clause, which provides a trial right that guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (no Confrontation Clause violation where prosecution witness has a lapse in memory impeding defense questioning). As the plurality in *Ritchie* noted, the right is guaranteed if "defense counsel receives wide latitude at trial to question witnesses." 480 U.S. at 53. It does not include the power to require the pretrial disclosure of any information that might be useful for impeachment. *Id.* Indeed, "nothing in the case law supports" interpreting the Confrontation Clause as "a constitutionally compelled rule of pretrial discovery." *Id.* Defendants point to *Davis v. Alaska*, 415 U.S. 308 (1974), but *Davis* examined a defendant's right under the Confrontation Clause to pursue a line of questioning during witness testimony at trial. As this Court has held, *Davis* is inapposite to the question of a *pretrial* right to discovery of evidence maintained by a third party. *Hammon*, 15 Cal. 4th at 1124.

Similarly, Defendants cite no case holding that the right to present a complete defense includes a right to pretrial discovery. Indeed it does not: it instead prevents an arbitrary interpretation of rules that prohibit a defendant from offering evidence that is already available. *Holmes v South Carolina,* 547 U.S. 319, 326 (2006) (the right to present a complete defense "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges

to exclude evidence if its probative value is outweighed by certain other factors[.]") This is not an absolute right, as a court may exclude evidence for a number of reasons. *Id.; see also United States v. Scheffer*, 523 U.S. 303, 308 (1998) (permitting a court to exclude polygraph evidence, and holding that "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions . . . [and] we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused."). The SCA does not prevent Defendants from presenting to the jury evidence already available to them and does not implicate the right to a complete defense.

**D. Defendants Have Not Met Their "Heavy Burden" To Show That The SCA Is Unconstitutional.**

Defendants not only fail to demonstrate grounds for review, but they also fail to meet their "heavy burden" to show that the SCA is unconstitutional. "Courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity." *People v. Falsetta*, 21 Cal.4th 903, 912-13 (1999). To overcome this presumption, a defendant "must carry a heavy burden." *Id.* Defendants argue that the SCA is unconstitutional to the extent it deprives them of a pretrial right to obtain "social media records" via subpoena. But Defendants can obtain much, if not all, of the information they seek from sources other than Providers, and they have provided no explanation as to why those alternative means are insufficient. Accordingly, even if Defendants could establish such a right as a general matter, which they cannot, they fail to "carry [their] heavy burden" to show that the SCA is "clearly, positively, and unmistakably" unconstitutional. *Facebook*, 240 Cal. App. 4th at 220 (citing *Falsetta*, 21 Cal. 4th at 912-13).

First, Defendants can issue a subpoena to the alleged witness, who is not bound by the SCA, has custody and control over the contents of her Facebook, Instagram, and Twitter accounts, and is in the best position to respond to the production request, including by asserting her constitutional and privacy rights. *See also Juror No. One v. Superior Court*, 206 Cal. App. 4th 854 (2012) (stating that SCA protection would apply "only as to attempts by the court or real parties in interest to compel Facebook to disclose the requested information"). Indeed, the proper way to obtain communications content is to seek discovery from "the owner of the data, not the bailee to whom it was entrusted." *O'Grady*, 139 Cal. App. 4th at 1447.

Because the SCA's prohibitions apply only to Providers, Defendants can issue a subpoena requiring the witness to collect and disclose her communications in response to a subpoena. (1 AE 20-23, 58-59.) The witness could use tools such as Facebook's Download Your Information tool and Activity Log, or Twitter's Download Your Archive to collect her communications. (*Id.*) These tools provide a user-friendly way to gather responsive information. Providers informed Defendants of these alternatives, but Defendants nevertheless elected not to pursue a subpoena to the alleged witness, or to subpoena any other party to any of the allegedly relevant communications. (*Id.*)

Second, Defendants already have access to at least some of the content associated with the victim's and witness's Facebook, Instagram, and Twitter accounts. Indeed, Defendant Sullivan attached copies of various Twitter posts to his subpoenas to Providers, and included Facebook and Twitter posts in his various filings in the Superior Court. (1 AE 53-56, 161-180.)

Third, Defendants can obtain information associated with victim's Facebook and Instagram accounts directly from the prosecution. The

prosecution has obtained the content of several of the victim's accounts in response to search warrants directed to Facebook and Instagram. *Facebook*, 240 Cal. App. 4th at 221. As the Court of Appeal correctly noted, California law requires the prosecution to produce relevant or exculpatory evidence in its possession to Defendants, while the U.S. Constitution permits Defendants access to favorable evidence obtained by the prosecution. Cal. Penal Code § 1054.1(c), (e); *People v. Lucas*, 60 Cal. 4th 153, 221 (2014) ("The constitutional due process rights of a defendant may be implicated when he or she is denied access to favorable evidence in the prosecution's possession.") (*citing Brady v. Maryland*, 373 U.S. 83 (1963)). Thus, rather than asking Respondent Court to ignore the SCA, Defendants could have asked Respondent Court to compel the People to disclose the victim's communications consistent with California law. Defendants do not explain why this procedure is unavailable to them. Instead, they argue that § 1054.1(c) only applies to the prosecution and does not permit Defendants to compel information from Providers. However, that is exactly the point: while Defendants cannot obtain content from Providers, they *can* obtain information from the People.

Directing discovery to the People as the representative of the alleged victim is also consistent with the victim's constitutional rights. *See* U.S. Const. amend. IV, V; Cal. Const. art. 1, § 28(b)(1), (4). The importance of this process was not lost on this Court when it held that "a victim's right to notice of a third party subpoena would be consistent with the presumption that court proceedings are open and with the prosecution's right to due process." *Kling v. Superior Court*, 50 Cal. 4th 1068, 1080 (2010). Therefore, seeking communications from the victim or the prosecution is not only permissible under the SCA, but the best course to ensure protection of the victim's constitutional rights, as well as the rights of those with whom the victim may have communicated.

Moreover, the U.S. Constitution does not imbue Defendants with an unbridled right to criminal discovery. The U.S. Supreme Court has instead held that before defendants can obtain discovery, they must establish: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" *U.S. v. Nixon*, 418 U.S. 683, 699-700 (1974) (emphasis added).[3]

Where, as here, Defendants can seek information from other sources, Defendants have not met their "heavy burden" to show that the SCA is unconstitutional, and the Court of Appeal correctly declined to find it so. *See, e.g., Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 451 (2008) (Courts must not "anticipate a question of constitutional law in advance of the necessity of deciding it.")

### E. Defendants Concede That *Hammon* Is Controlling Authority And Fail to Demonstrate A Compelling Need For This Court to Overrule *Hammon*.

Far from showing that this Court's review is "necessary to secure uniformity of decision or to settle an important question of law," Rule of Court 8.500(b)(1), Defendants request that this Court overrule eighteen years of precedent in which this Court has reiterated time and time again that the U.S. Constitution provides no pretrial right to discovery. *Hammon*,

[3] While California law may provide broader pretrial discovery rights to criminal defendants than those set out in *Nixon*, these *state* statutory rights must give way to a federal statute such as the SCA. *Negro*, 230 Cal. App. 4th at 888-89. In *Nixon*, the Supreme Court placed limits on the use of criminal subpoenas, and thus there is necessarily no *constitutional* right to use a subpoena in violation of the very rules set out by the Supreme Court.

15 Cal. 4th at 1117; *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1135 (2000) (citing *Hammon* and holding that the Confrontation Clause did not require pretrial disclosure of witness identities); *People v. Gurule*, 28 Cal. 4th 557, 592-594 (2002) (citing *Hammon* and affirming that defendant did not have a pretrial right to discover records protected by psychotherapist-patient and attorney-client privileges); *People v. Clark*, 52 Cal. 4th 856, 983 (2011) (citing *Hammon* and holding that there is no Sixth Amendment violation where the prosecution does not disclose a witness's criminal conviction before trial); *People v. Martinez*, 47 Cal. 4th 399, 454 n.13 (2009) (citing *Hammon* to conclude that the Sixth Amendment does not require granting a pretrial discovery motion for juvenile records); *People v. Prince*, 40 Cal.4th 1179, 1234 n.10 (2007) (citing *Hammon* and holding that to the extent defendant's claim to pretrial discovery of FBI's database was based on the Sixth Amendment, it was on "weak footing"); *People v. Anderson*, 25 Cal. 4th 543, 577 n. 11 (2001) (stating "the high court has never held that the confrontation clause requires more than the opportunity to ask the witness questions pertinent to his or her credibility" and citing *Hammon* with approval). The Court of Appeal correctly applied this line of authority: the subpoena at issue was a pretrial subpoena, and Defendants ask to invalidate a federal law based on a purported pretrial constitutional right to discovery. There is accordingly no issue for this Court to settle; it has been settled for nearly two decades and reiterated in at least seven decisions by this Court.

Moreover, Defendants do not provide any compelling reason to overrule this line of controlling precedent. Instead, they erroneously assert that *Hammon* "gave undue weight to the plurality opinion in *Pennsylvania v. Ritchie*." (Petition at 24.) But the plain language of *Hammon* demonstrates that the Court gave *Ritchie* the weight it was due. After *Ritchie*, "it is not at all clear whether or to what extent the confrontation or

compulsory process clauses of the Sixth Amendment grant pretrial discovery rights to the accused." *Hammon*, 15 Cal.4th at 1125. The Court accordingly held that there was no "adequate justification for taking such a long step in a direction the United States Supreme Court has not gone." *Id.* at 1127. And this Court has repeated this holding many times, in many contexts.

Just as an adequate justification did not exist in *Hammon*, Defendants fail to provide an "adequate justification" now. Indeed, the same reason for declining to "tak[e] such a long step" applies with equal force today. *See id.* at 1127. Because there is insufficient information at the pretrial stage, disclosure at that time creates a serious risk that privileged and protected material will be disclosed unnecessarily. *Id.* Indeed, the facts in *Hammon* "illustrate the risk inherent in entertaining such pretrial requests." *Id.* There, the defendant's admission at trial "largely invalidat[ed] the theory on which he had attempted to justify pretrial disclosure of privileged information." *Id.*

Other events may make disclosure unnecessary: the case may settle, the witness may not testify or may change his or her testimony; defense counsel may elicit satisfactory testimony in cross examination; and the government may not offer any evidence that implicates any rights. All of this would undercut any basis for invalidating the law in the first place. Indeed, as discussed above, Defendants in this case already have much of the information they purport to seek. Their request for review therefore seeks to *unnecessarily* invalidate the SCA and impinge on the privacy rights protected therein.

Defendants also argue, without any support, that trial courts often ignore *Hammon* for the sake of efficiency and regularly permit pretrial disclosure of records. (Petition at 26-27.) But pretrial disclosure of records in those cases is done in accord with California statutes. *See* Cal. Penal

Code §§ 1326, 1327. As a general matter, *Hammon*, its progeny, and the Court of Appeal opinion in this case do not impact those rights except to the extent the discovery sought implicates another statutory or constitutional prohibition on disclosure, such as a doctor-patient privilege or the constitutional right to privacy the SCA protects. *See Hammon*, 15 Cal.4th at 1129. Where that happens, California's statutory pretrial discovery right "provides no basis for overriding a statutory and constitutional privilege." *Id.*

In the alternative, Defendants ask that the "Court clarify whether *People v. Hammon* [. . .] is limited to records subjected to the psychotherapist-patient privilege." (Petition at 28.) But there is no language in *Hammon* to suggest this Court intended to limit its holding to the psychotherapist-patient privilege. Indeed, in overturning a line of intermediate court decisions that had improperly extended the U.S. Supreme Court's *Davis* decision to require ***pretrial*** *in camera* review of privileged materials under the Sixth Amendment, *Hammon* thoroughly examined the *Davis* and *Ritchie* decisions. 15 Cal. 4th at 1123-25. *Davis* involved disclosure of juvenile offenses and *Ritchie* involved records kept by Pennsylvania's children and youth services agency, but neither *Davis* nor *Ritchie* implicated the psychotherapist-patient privilege. *Id.* at 1124.

Moreover, since *Hammon,* this Court has consistently held over and again that the Sixth Amendment does not provide pretrial discovery rights, regardless of the type of privilege implicated. *Alvarado*, 23 Cal. 4th at 1135 (declining to recognize a pretrial constitutional right to obtain witness identities); *Clark*, 52 Cal. 4th at 983 (declining to recognize a pretrial constitutional right to obtain information regarding a witness's criminal conviction); *Martinez*, 47 Cal. 4th at 454 n.13 (declining to recognize a pretrial constitutional right to obtain juvenile records); *Prince*, 40 Cal.4th at

1234 n.10 (declining to recognize a pretrial constitutional right to obtain information from the FBI's database).

Defendants attempt to support their position by asserting that, for some people, social media is the "epicenter of their world, the primary vehicle by which opinions are expressed, friends are made, and news is shared." (Petition, 11.) But, even if this is true, it does not mean that such communications should be afforded less privacy. To the contrary, the United States Supreme Court, has recently affirmed the privacy rights at stake in information stored on cell phones. *Riley v. California*, 134 S. Ct. 2473, 2484, 189 L. Ed. 2d 430 (2014). Social media, like cell phones, contains "the privacies of life." *See id.* at 2495(citing *Boyd v. United States*, 116 U.S. 616, 625 (1886)). Their data reveals "an individual's private interests or concerns" and "where a person has been." *Id.* at 2490. Where a person has been "reflects a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *Id.* (citing *United States v. Jones*, 132 S.Ct. 945, 955 (2012) (Sotomayor, J., concurring)). Accordingly, the Supreme Court held that law enforcement must first obtain a warrant before it accesses personal data stored in cell phones. *Id.* at 2494. Many other courts have held the same with respect to the content of electronic communications. *See, e.g., Warshak*, 631 F.3d at 288. And state legislatures, including the California legislature, have increasingly passed laws protecting privacy and requiring the government to obtain a warrant in order to compel a provider to disclose any "electronic communications information" – whether it is content or non-content. *See, e.g.*, California Electronic Communications Privacy Act, Cal. Penal Code § 1546, *et seq.* (effective Jan. 1, 2016).

Thus, the notion that social media is the "epicenter" of the world is no reason to erode a person's rights to privacy. It is a reason to uphold those rights.

## IV. CONCLUSION

For the foregoing reasons, Providers respectfully request that this Court deny Defendants' Petition and decline review.

DATED: November 9, 2015

**PERKINS COIE LLP**

By:
James G. Snell

Attorneys for Petitioners
Facebook, Inc., Instagram, LLC, and
Twitter, Inc.

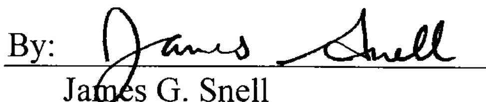
**WORD COUNT CERTIFICATION**

Pursuant to California Rules of Court, Rule 8.204(c), counsel of record hereby certifies that the foregoing Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief consists of 8,111 words, including footnotes, as counted by the Microsoft Word program used to prepare this Petition.

DATED: November 9, 2015

Respectfully submitted,

**PERKINS COIE LLP**

By: 
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Facebook, Inc., Instagram, LLC,
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**PROOF OF SERVICE**

***Facebook, Inc., et al. v. Superior Court of San Francisco***

**Case No. S230051**

I, Lisa DeCosta, declare:

I am a citizen of the United States and employed in the County of San Francisco, 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, 505 Howard Street, Suite 1000, San Francisco, CA 94105. I am personally familiar with the business practice of Perkins Coie LLP. On November 9, 2015, I caused the following document(s) to be served on the following parties by the manner specified below:

**ANSWER TO PETITION FOR REVIEW**

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

| | |
|---|---|
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Superior Court of the City and County
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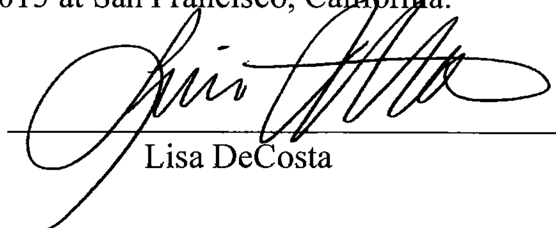
*Respondent SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO*

Clerk of the Court
Court of Appeal, First District, Div. 5
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 9, 2015 at San Francisco, California.



Lisa DeCosta