SUPREME COURT
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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

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The real parties in interest (defendants below) argue that a state court adjudicating a criminal case may issue an order directing a third party to violate a federal statute. That argument is foreclosed by the supremacy clause of the United States Constitution. (U.S. Const., art. VI.) The Court of Appeal correctly held that defendants are not entitled to the relief they seek, and this Court should affirm its judgment.

Defendants have been charged with murder and attempted murder. They wish to examine the contents of electronic communications made by the victim and a witness using the services of Facebook, Instagram, and Twitter (collectively, "the Providers"). The trial court issued a subpoena directing the Providers to produce the requested content.

The Court of Appeal correctly granted a writ of mandate because disclosure of that material would violate the federal Stored Communications Act (SCA), 18 U.S.C. § 2701 et seq. Enacted by Congress to protect the privacy of persons using electronic communications services, the SCA generally prohibits providers from disclosing the contents of electronic communications. The statutory prohibition on disclosure is subject only to limited, narrow exceptions. While the SCA permits disclosure that is required by a search warrant, all parties agree that it does *not* permit disclosure under a subpoena issued at the behest of a criminal defendant.

Defendants argue that the SCA, as applied in this case, violates their rights under the Fifth and Sixth Amendments to the Constitution. That argument is misdirected because those constitutional provisions confer rights against the state, not against the Providers. If indeed the Constitution makes it impossible for the People to prosecute defendants without giving them access to the material they seek, then the appropriate remedy would be one directed at the People in the context of the criminal prosecution; it

would not be an order compelling the Providers to violate the SCA. If a state creates a constitutional difficulty by bringing a state-law prosecution, it may not resolve that difficulty by requiring a third party to engage in a violation of federal law.

In any event, defendants' constitutional arguments lack merit. This Court held nearly 20 years ago that there is no constitutional right to pretrial discovery. (*People v. Hammon* (1997) 15 Cal.4th 1117.) The Court has repeatedly reaffirmed that decision. It is controlling here, and defendants have shown no justification for overruling it.

Even if this Court were to consider the issue on a blank slate, it should reject defendants' constitutional arguments. The Constitution neither requires that criminal defendants have access to the same investigative tools as the government, nor does it create a right to pretrial discovery from third parties. Although defendants argue that the information they seek is necessary to their defense, they have not yet attempted to pursue the many available alternatives for obtaining the same information. Defendants also ignore the important privacy interests in electronic communications. Those interests have been recognized by the United States Supreme Court and the California Legislature, and they weigh heavily against recognizing the novel discovery right that defendants seek.

This Court should affirm the judgment of the Court of Appeal.

STATEMENT

On June 24, 2013, Joaquin Rice was killed and B.K., a minor, was wounded in a drive-by shooting in San Francisco. (*Facebook, Inc. v. Superior Court* (2015) 240 Cal.App.4th 203, 209.) Defendants, Derrick Hunter and Lee Sullivan, are charged with the murder of Rice and the attempted murder of B.K. (*Id.* at 210.)

A key witness at trial is likely to be Renasha Lee, Sullivan's former girlfriend. Shortly after the shooting, the police stopped the vehicle used in

the shooting and found that it was driven by Lee, who stated that defendants had borrowed her car before the shooting. (*Id.* at 209.) Defendants anticipate that the People will also present the testimony of a gang expert, who will use social-media statements to show that the case was gang related. (Defts.' Br. at pp. 8-9.)

Defendants wish to impeach Lee by showing that she is biased and was motivated by jealousy, and they also seek to impeach the anticipated testimony of the government's expert. (Defts.' Br. at pp. 4-5.) To that end, defendants issued pretrial subpoenas to the Providers seeking the content of electronic communications belonging to Rice and Lee. Specifically, Sullivan issued subpoenas to Facebook and Instagram seeking a variety of content including photographs, videos, messages, and other communications, without limitation by date. (1 Appendix of Exhibits ("AE") 12-18.)[1] Sullivan's subpoena to Twitter sought similar information, but only as to Lee. (1 AE 53-56.) Hunter subpoenaed only Twitter, and sought information including content associated with Lee's account from January 1, 2013 to the present. (1 AE 210-214.)

The Providers moved to quash the subpoenas, arguing that the SCA prohibited them from disclosing communications content. (1 AE 1-8; 1AE 42-49.) Defendants opposed the motions, arguing they have broad constitutional rights to pretrial discovery that should overcome the SCA. (1 AE 96-102.) The trial court denied the motions to quash, holding that the SCA's prohibitions on disclosure violated defendants' constitutional rights. The court ordered the Providers to produce all responsive records to the Court for *in camera* review. (1 AE 264-281.)

[1] The Appendix of Exhibits was submitted to the Court of Appeal, First Appellate District, in support of the Providers' Petition for Writ of Mandate.

The Providers petitioned for a writ of mandate in the Court of Appeal, First Appellate District. (*Facebook,* 240 Cal.App.4th at p. 211.) The Court of Appeal stayed the superior court's order and subsequently issued an order to show cause why the writ should not be granted. (*Id.*)

Thereafter, the Court of Appeal directed the trial court to vacate its prior order and enter a new order quashing the subpoenas. (*Id.* at 208.) In support of that order, the Court of Appeal recognized that the SCA prohibits the 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.) It further held that "[t]he consistent and clear teaching of both the United States Supreme Court and California Supreme Court jurisprudence is that a criminal defendant's right to *pretrial* discovery is limited, and lacks any solid constitutional foundation." (*Id.* at 225.)

In reaching its conclusion, the Court of Appeal 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.) 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 Defendants' contention that the compulsory process clause of the Sixth Amendment separately authorizes the trial court's order here." (*Id.* at 219.) As to defendants' due process argument, the court reiterated the United States Supreme Court's observation 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* (1973) 412 U.S. 470, 474]; see also *People v.*

Williams (2013) 58 Cal.4th 197, 259; *People v. Maciel*, (2013) 57 Cal.4th 482, 508; *People v. Valdez* (2012) 55 Cal.4th 82, 109-110.) 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 of Appeal rejected defendants' argument that *in camera* review of the records by the trial court provides adequate privacy protection. The court stated that such a "nonadversarial *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.) Indeed, "the court may not even be cognizant of objections to production, and the level of in camera scrutiny required," therefore "if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily." (*Id.* at 224.)

SUMMARY OF ARGUMENT

The Court of Appeal correctly granted a writ of mandate directing the trial court to quash the subpoenas.

As the Court of Appeal recognized, the SCA prohibits the disclosure of the communications content that defendants seek to obtain. Specifically, the statute makes it unlawful for a provider of an electronic communication service to "divulge to any person or entity the contents of a communication while in electronic storage by that service." (18 U.S.C. § 2702(a)(1).) Although the SCA contains some exceptions, none of those exceptions would apply to a disclosure under the subpoenas sought by defendants. Here, as in the Court of Appeal, there is no dispute that enforcing the subpoena would require the Providers to violate the SCA.

Defendants instead ask this Court to declare the SCA unconstitutional as applied to this case. There is no basis for taking that drastic step, however, because the constitutional provisions on which defendants rely govern the conduct of the state, not the Providers. Whatever constitutional issues may arise as a result of the prosecution of defendants, the options for resolving those issues are left to the state in the first instance, and they do not include ordering a third party to violate a federal statute. That step is prohibited by the supremacy clause.

If this Court does consider defendants' constitutional arguments, it should reject them. This Court held in *People v. Hammon* (1997) 15 Cal.4th 1117 that there is no constitutional right to pretrial discovery. That case involved the psychotherapist-patient privilege, but the Court's reasoning was not limited to that context, and the Court has repeatedly reaffirmed *Hammon* and applied it in other contexts. Defendants have presented no justification for overruling *Hammon*.

Even setting aside *Hammon*, defendants' arguments fail because they rest on the erroneous premise that a criminal defendant must have the same tools for obtaining evidence as are available to the government. Neither the United States Supreme Court nor this Court have ever held that, and with good reason. The government may obtain search warrants to conduct physical searches and wiretaps, but that does not mean that criminal defendants must be able to do the same thing simply by issuing a subpoena. The policy reflected in the SCA is that searches of stored communications content should be treated the same way.

Defendants argue that access to the content they seek is necessary for their defense. However, that argument is undermined by their failure to pursue the many options available to them for obtaining the same content in a manner consistent with the SCA. They could, for example, seek to obtain the content from the parties to the communication or from the People.

Alternatively, they could seek non-content information from the Providers (invoking the provisions of the SCA that permit such information to be disclosed more readily than content), and they could use that information to develop additional evidence.

Defendants' claim of a due process entitlement to the communications content at issue is also unpersuasive because it gives short shrift to the important privacy interests that the SCA protects. The SCA allows disclosure if directed by a warrant, which requires a judicial finding of probable cause. A pretrial criminal defense subpoena, by contrast, often issues with no review at all. Defendants point out that social media has become an important means of communication, but as the United States Supreme Court has observed, the ubiquity of modern technology should not lessen the privacy protections afforded to such communications. (See *Riley v. California* (2014) 134 S.Ct. 2473.)

Finally, defendants invoke various other provisions of the Constitution. Their arguments are largely derivative of their flawed due process arguments, and they founder because no court has recognized a right to third-party discovery in these circumstances. This Court should not take that step for the first time where doing so would require invalidating an Act of Congress.

ARGUMENT

A. Federal law prohibits the Providers from complying with defendants' subpoenas

The SCA is a federal criminal statute that makes it unlawful for a provider of an electronic communication service to "divulge to any person or entity the contents of a communication while in electronic storage by that service." (18 U.S.C. § 2702(a)(1).) The statute defines "contents" to include "any information concerning the substance, purport, or meaning" of an electronic communication. (18 U.S.C. § 2510(8).) Depending on the

circumstances, that broad definition could encompass such materials as the text of an email, message, or tweet, or the images or audio in a photograph, video, or sound recording.

The SCA enumerates only a few, narrow exceptions to the prohibition on disclosing the contents of a communication. Some of the exceptions permit a provider to disclose content when doing so is necessary to providing the service. (See, e.g., 18 U.S.C. § 2702(b)(1), (5).) Others allow a provider to disclose content with the express consent of the user, or in the case of "an emergency involving danger of death or serious physical injury." (See, e.g., 18 U.S.C. § 2702(b)(3), (6).)

Significantly, the statutory exceptions do *not* include responding to a subpoena issued at the behest of a criminal defendant. Instead, compelled disclosure of communications content can take place only in response to a search warrant "issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using state warrant procedures)." (18 U.S.C. § 2703(a).) For certain categories of content, the statute permits a "governmental entity" to require disclosure under an administrative subpoena or court order obtained by the governmental entity. (18 U.S.C. § 2703(b)(1)(B).) Courts have held, however, that because customers enjoy a reasonable expectation of privacy in the content of their electronic communications, a warrant based on probable cause is required in that context as well. (See, e.g., *United States v. Warshak* (6th Cir. 2010) 631 F.3d 266, 288; accord *United States v. Hanna* (6th Cir. 2011) 661 F.3d 271, 287, fn.4; see also *United States v. Forrester* (9th Cir. 2007) 512 F.3d 500, 512 [likening email content to the contents of physical mail, and noting that "the contents [of email] may deserve Fourth Amendment protection"].) And in any event, a disclosure under a subpoena obtained by a criminal defendant is not a disclosure

required by a "governmental entity." (See 18 U.S.C. § 2711(4) [defining "governmental entity"].)

When the SCA prohibits a disclosure, it preempts any provision of state law that would require that disclosure. (U.S. Const., art. VI; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815 [explaining that a state law conflicts with federal law, and is therefore preempted, "where it is impossible for a private party to comply with both state and federal requirements"].) For that reason, "California's discovery laws cannot be enforced in a way that compels [a provider] to make disclosures violating the [SCA]." (*Negro v. Superior Court* (2015) 230 Cal.App.4th 879, 888-89; see *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1442 [holding that it would be an "unlawful act" for a service provider to comply with a subpoena seeking the content of a user's communications, even if required to do so by a court order].)

In the circumstances of this case, the SCA contains no exception that would permit the Providers to comply with the subpoenas by disclosing the contents of communications to defendants. Accordingly, as the Court of Appeal recognized, "[i]it is undisputed that the materials Defendants seek here are subject to the SCA's protections." (*Facebook*, 240 Cal.App.4th at p. 213.) In this Court, defendants do not take issue with that proposition. (Defts.' Br. at p. 10 [recognizing that the SCA does not provide "parallel access for criminal defendants" to "social media records"].)

B. Even if defendants' constitutional arguments were correct, the supremacy clause would prohibit enforcement of the subpoenas

Recognizing that the SCA prohibits the disclosures they seek, defendants argue that the Constitution entitles them to have the subpoenas enforced—in other words, that the SCA is unconstitutional as applied in this case. As explained below, defendants' constitutional arguments lack

merit. But even if those arguments were valid, they would not support the remedy defendants seek.[2]

The provisions of the Constitution on which defendants rely include the due process clause, the compulsory process clause, and other clauses of the Fifth and Sixth Amendments that govern the actions of the state in criminal prosecutions. Those provisions do not impose obligations on the providers, who are private parties. (*Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 924 [explaining that the Constitution "can be violated only by conduct that may be fairly characterized as 'state action'"].) The due process clause, for example, provides, "nor shall any *State* deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend., § 1 [emphasis added].) If defendants were correct that it would violate due process to subject them to criminal prosecution without affording them access to the records they seek, then the appropriate remedy would be to prevent the state from subjecting defendants to criminal prosecution in those circumstances—whether by setting aside the indictment, by limiting the evidence the People can present, or by developing another remedy within the framework of the criminal prosecution. It would not be to order the Providers to violate federal law. Under the supremacy clause, a state court lacks authority to issue such an order to the Providers. (See U.S. Const., art. VI.)

Defendants say that "California courts have routinely granted pretrial access to evidence to criminal defendants under the due process clause even in the face of conflicting statutes and constitutional

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[2] In their petition, defendants described the first issue presented for review as "whether criminal defendants are constitutionally entitled to *pretrial* access to social media records." (Petn. for Rev. at p. 2.) That issue necessarily encompasses the question whether ordering access to those records would be an appropriate remedy for any constitutional violation defendants have identified.

provisions." (Defts.' Br. at p. 18.) They rely on cases in which courts held that the state government was required to disclose information in its possession to a criminal defendant (e.g., *DMV v. Superior Court* (2002) 100 Cal.App.4th 363), or that a defendant's due process rights could limit a state-law evidentiary privilege (e.g., *Rubio v. Superior Court* (1988) 202 Cal.App.3d 1343). However, they cite no case in which a state court ordered a private party to violate a *federal* statute. So far as we are aware, none exists.

To illustrate the flaw in defendants' position, consider the predicament that the Providers would be in if the trial court enforced the subpoenas at issue here. If the Providers were to comply with the subpoenas, they would risk being claimed to have violated 18 U.S.C. § 2702(a) because, as explained above, that provision contains no exception permitting disclosure in response to a subpoena issued by a criminal defendant. Providers could therefore be required to defend against alleged liability under 18 U.S.C. § 2707(a) in a civil action brought by any person aggrieved by the disclosure. While the SCA creates a defense for good-faith reliance on a court order, courts have not ruled on the applicability of that defense in these circumstances, where the order does not comply with the requirements of the statute. (18 U.S.C. § 2707(e).) In short, the trial court would have created an insoluble dilemma. On the one hand, it would be the height of unfairness to allow the Providers to face potential liability under the SCA for complying with the court's order. On the other hand, the only alternative would be to say that a state court somehow has the authority to license a violation of a federal statute—a proposition that plainly contradicts the supremacy clause.

When a federal statute such as the SCA prohibits the disclosure of information, the appropriate course is that followed in the analogous context of cases involving classified information. Just as the SCA prohibits

the Providers from disclosing the content of the communications sought by the defendants in this case, federal statutes also prohibit those with access to classified information from disclosing it without appropriate authorization. (See, e.g., 18 U.S.C. § 793(d).) In this regard, the United States Supreme Court has held that, in a criminal case, "[i]f the Government refuses to provide state-secret information that the accused reasonably asserts is necessary to his defense, the prosecution must be dismissed." (*General Dynamics Corp. v. United States* (2011) 131 S.Ct. 1900, 1906; see *Jencks v. United States* (1957) 353 U.S. 657, 672.) Of course, in a federal prosecution, if the government deems the prosecution sufficiently important, it may choose to authorize the release of classified information. A state, however, does not have that option. If the disclosure of classified information is necessary to preserve a defendant's right to a fair trial in a state criminal case, a state court may not defy federal law and order the information released. Rather, it must set aside the indictment.

This Court recognized those principles in *People v. Farley* (2009) 46 Cal.4th 1053. In that case, Farley had been found guilty of first-degree murder, and at the penalty phase of his trial, he sought "access to data concerning his past employment" as a cryptologic technician in the Navy and as a defense contractor working on top-secret projects, which he intended to introduce as mitigating evidence. (*Id.* at p. 1077-79, 1124-27.) Among other things, Farley sought to introduce the testimony of Kent Wells, a Navy personnel security specialist. (*Id.* at 1126.) The trial court ruled, however, "that it could not order Wells to disclose classified information, because doing so could subject him to criminal prosecution." (*Ibid.*) Farley was sentenced to death. On appeal, Farley challenged the trial court's exclusion of classified evidence, but neither Farley nor this Court suggested that "there was error . . . in the trial court's rulings concerning the discovery of classified information," and neither Farley nor this Court

questioned the correctness of the trial court's determination that it could not compel Wells to disclose information protected by a federal statute. (*Ibid.*) Ultimately, the Court affirmed the sentence after determining that the information Farley sought to introduce was not relevant. (*Id.* at 1128-29.)

The approach employed in *Farley* is appropriate here. The Fifth and Sixth Amendments, as applied to the state through the Fourteenth Amendment, limit the authority of the state in the conduct of a criminal prosecution. They do not, however, empower a state court to disregard the supremacy of federal law by ordering the Providers to violate the SCA. Thus, even if the People's decision to prosecute defendants in these circumstances has given rise to a constitutional violation, the available remedies for that violation would not include enforcing the trial court's subpoenas (whether issued before trial or during trial). Because that is the only remedy defendants have sought, the Court of Appeal correctly rejected it and ordered the subpoenas quashed.

C. *Hammon* forecloses defendants' constitutional claims

Even if the trial court had authority to enforce the subpoenas against the Providers, it would be inappropriate for it to do so. Defendants' claim that the Constitution gives them a right to conduct pretrial discovery—a right that overrides a contrary statute—is flatly contrary to this Court's decision *People v. Hammon* (1997) 15 Cal.4th 1117. Defendants acknowledge as much but respond by asking this Court to confine *Hammon* to its facts or, failing that, to overrule the decision. This Court should decline the invitation.

In *Hammon*, this Court considered whether a defendant accused of committing lewd acts on a minor could compel the victim's psychotherapists to disclose records about the victim. The defendant claimed that access to the records was necessary to allow him to cross-examine the victim, but the trial court quashed a subpoena on the basis of

the psychotherapist-patient privilege, and it declined to review the records *in camera*. This Court affirmed. After surveying United States Supreme Court cases applying the due process clause and the Sixth Amendment, the Court rejected the defendant's claim of "a right to discover privileged psychiatric information before trial," adding that it saw no "adequate justification for taking such a long step in a direction the United States Supreme Court has not gone." (*Hammon*, *supra*, 15 Cal.4th at p. 1127.) The Court identified "a persuasive reason" not to recognize such a right, namely, that "[w]hen a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon . . . to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve." (*Ibid.*) But "[b]efore trial," the Court explained, "the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily." (*Ibid.*)

As the Court of Appeals correctly held, *Hammon* is controlling here. (*Facebook*, *supra,* 240 Cal.App.4th at p. 216.) Defendants issued pretrial subpoenas to Providers, and federal law prohibits Providers from fully complying with those subpoenas. Defendants ask this Court to invalidate the SCA based on constitutional rights arising under the Fifth and Sixth Amendments, presupposing that those provisions create a constitutional right to pretrial discovery. *Hammon* establishes that they do not. And absent a constitutional right to pretrial discovery, there is no constitutional violation here.

Defendants observe that the SCA is a statute, not "a traditional evidentiary privilege" like that at issue in *Hammon*. (Defts.' Br. at p. 43.) That is true, but it does not help defendants' argument. Many privileges—including the psychotherapist-patient privilege at issue in *Hammon*—are

themselves the product of statutes. (Evid. Code, § 1010 et seq.) Moreover, unlike a state-law evidentiary privilege that this Court has authority to interpret and limit, the SCA is a federal statute, and this Court may not recognize exceptions to it. In addition, the SCA's privacy protection is far broader than that of any limited privilege—it covers *all* communications content, including communications that may be independently privileged or immune from discovery for reasons unknowable to the court or the parties without the subscriber's involvement. Defendants correctly point out that the SCA is not an absolute bar to the disclosure of communications content, as content can be obtained from the parties to the communication. (Defts.' Br. at p. 43.) As explained in more detail below, while that observation is correct, defendants fail to draw the appropriate conclusion from it: requests for content should be directed to the subscriber, not the providers, and the parties, the subscriber, and the court can then resolve any privilege, privacy, or relevance issues.

Defendants suggest that *Hammon* should be confined to the specific context of the psychotherapist-patient privilege. (Defts.' Br. at pp. 41-43.) But nothing in *Hammon* suggests that the rule adopted by the Court was intended to be limited to a particular type of privilege or even to privileges in general. Rather, the Court's focus was on the threshold question whether a pretrial right to discovery exists *at all*. Defendants seize on the Court's statement in *Hammon* that it was "concerned exclusively with the records requested from the psychologist." (Defts.' Brief at p. 41 [quoting *Hammon, supra*, 15 Cal.4th at p. 1122].) Read in context, that language merely clarified that of the various subpoenas issued in the case—for high-school records, juvenile-court records, and psychotherapist records—only the subpoena for psychotherapist records remained in dispute. It did not limit *Hammon*'s holding, which turned on an interpretation of the United States Constitution, not an assessment of the particular records at issue.

Defendants' argument overlooks the many subsequent cases in which this Court has applied *Hammon* in circumstances not involving the psychotherapist-patient privilege. (See, e.g., *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1135 [holding that the Confrontation Clause does not require pretrial disclosure of witness identities]; *People v. Clark* (2011) 52 Cal.4th 856, 983 [holding that there is no Sixth Amendment violation where the prosecution does not disclose a witness's criminal conviction before trial]; *People v. Martinez* (2009) 47 Cal.4th 399, 454, fn.13 [holding the Sixth Amendment does not require granting a pretrial discovery motion for juvenile records]; *People v. Prince* (2007) 40 Cal.4th 1179, 1234, fn.10 [to the extent defendant's claim to pretrial discovery of an FBI database was based on the Sixth Amendment, it was on "weak footing"]; cf. *People v. Gurule* (2002) 28 Cal.4th 557, 592-594 [affirming that defendant did not have a pretrial right to discover records protected by both the psychotherapist-patient and attorney-client privileges].) Those cases confirm that *Hammon* cannot be limited in the manner defendants suggest.

Defendants argue that this Court should overrule *Hammon*, but they offer no persuasive reason for doing so. (Defts.' Br. at pp. 37-41.) For example, defendants do not point to any subsequent decision of the United States Supreme Court that has, in any way, undermined *Hammon*'s reasoning. Instead, they simply repeat arguments considered and rejected in *Hammon* itself. In particular, in arguing that pretrial disclosure would offer practical benefits, they ignore this Court's warning that "if pretrial disclosure is permitted, a serious risk arises" that information "will be disclosed unnecessarily." (*Hammon, supra*, 15 Cal.4th at p. 1127.) Indeed, the facts of *Hammon* itself "illustrate the risk inherent in entertaining such pretrial requests." (*Ibid.*) There, the defendant's admission at trial "largely invalidat[ed] the theory on which he had attempted to justify pretrial disclosure of privileged information." (*Ibid.*) In other words, while the

pretrial judge may be informed about the facts and circumstances of the discovery period, he or she cannot predict how the trial will proceed: a witness may choose not to testify, the case may settle, or testimony may proceed in a fashion that obviates the need for communications content.

Defendants' arguments thus cannot overcome the principles of *stare decisis*, which counsels in favor of adhering to *Hammon* and the many subsequent cases that have followed it. As this Court has recognized, "a court usually should follow prior judicial precedent even if the current court might have decided the issue differently if it had been the first to consider it." (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 327.) In other words, "a court should be reluctant to overrule precedent and should do so only for good reason." (*Ibid.*) That rule applies with even greater force where, as here, "'the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 504 [quoting *Hilton v. South Carolina Public Railways Comm'n* (1991) 502 U.S. 197, 202]; *see also Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296 ["This policy . . . is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law."] [internal quotation marks and citations omitted].) Here, for example, the Providers have stated that, consistent with federal law, they will produce content only in response to a valid search warrant based on

probable cause.[3] Overruling *Hammon* and requiring the Providers to disclose communications content in response to a mere subpoena would disrupt these settled practices and expose people's communications to unanticipated third parties.

D. The SCA's disclosure prohibition does not violate defendants' due process rights

Even if defendants' due process arguments could provide a basis for enforcing a court order directing the Providers to violate a federal statute, and even if this Court had not already rejected defendants' constitutional theories in *Hammon*, this Court should still reject the proposition that the due process clause entitles a criminal defendant to discovery of stored communications content.

1. The due process clause does not require that criminal defendants have access to the same investigatory resources as the government

Defendants argue that due process requires "reciprocity between the prosecution and the defense in pretrial discovery." (Defts.' Br. at p. 22.) They rely on *Wardius v. Oregon* (1973) 412 U.S. 470 and cases following it, but those cases are inapplicable here. In *Wardius*, the United States Supreme Court invalidated a state statute that required a defendant to disclose the names of alibi witnesses but did not require the prosecution to disclose the names of its witnesses. The Court held that "in the absence of a

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[3] See, e.g., Facebook, *Information for Law Enforcement Authorities*, www.facebook.com/safety/groups/law/guidelines [explaining that a warrant issued "upon a showing of probable cause is required to compel the disclosure of the stored contents of any account"]; Instagram, *Information for Law Enforcement*, available at help.instagram.com/494561080557017 [same]; Twitter, *Guidelines for law enforcement*, support.twitter.com/articles/41949 ["Requests for the contents of communications (e.g., Tweets, Direct Messages, photos) require a valid search warrant or equivalent from an agency with proper jurisdiction over Twitter."].

strong showing of state interests to the contrary, discovery must be a two-way street." (*Id.* at p. 475.) But the "discovery" contemplated in *Wardius* and the other cases cited by defendants involved only the disclosure of information already in the possession of the government. The Court did not hold that defendants must have the same investigatory powers for obtaining evidence that the government does.

Contrary to the defendants' argument, the due process clause does not give defendants a right to investigatory powers equal to those of the government. Rather, criminal investigations are necessarily asymmetrical. (See *United States v. Turkish* (2d Cir. 1980) 623 F.2d 769, 774; *People v. Sutter* (1982) 134 Cal.App.3d 806, 834-35 ["[A] criminal proceeding is not 'symmetrical' as the prosecution and defense have different rules, powers and rights."].) To take 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 is true whether the search in question is a physical search, a wiretap, or a search of stored communications content, and the disparity between the tools available to the government and those available to defendants "does not offend the Constitution." (*United States v. Tucker* (S.D.N.Y. 2008) 249 F.R.D. 58, 63.)

Of course, there is good reason why searches may be conducted only under a warrant, and not under a subpoena issued by a criminal defendant: the warrant requirement offers important protections for individual privacy. Before obtaining a warrant, the government must demonstrate to a neutral magistrate that probable cause exists. (U.S. Const., 4th Amend.; Pen. Code, §§ 1524, 1546.1(d).) The warrant must state with particularity the place to be searched and the property to be seized. (Pen. Code, § 1546.1(d)(1).) 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. (Pen. Code, § 1546.1(d)(1)-(3).) Those requirements provide significantly more protection than a pretrial subpoena.

Defendants therefore err when they say that "[d]efense pretrial subpoenas of confidential records are subject to even stricter judicial control than search warrants." (Defts.' Br. at p. 27.) A criminal defendant can issue a pretrial subpoena without any initial showing; a "good cause" review only occurs if there is an objection to the subpoena. As the Court of Appeal correctly explained, if the provider does not act conscientiously to protect the privacy interests of its subscribers, there will be no privacy review at all. (*Facebook*, *supra*, 240 Cal.App.4th at p. 224.) Defendants' position would lead to the "anomalous result" that law enforcement must seek a warrant for content, but defendants could 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." (*Ibid.*)

Defendants implicitly concede that the procedure they envision would not require a showing of probable cause. Noting that 95 percent of criminal cases are resolved before trial, defendants argue that they have a constitutional right to obtain all content "that will shed light on a case" in order to evaluate their position and negotiate effectively. (Defts.' Br. at p. 32-34.) In other words, they contemplate a procedure through which they could obtain any information about a communications subscriber that might be used to give them leverage in negotiations with the prosecution. As testimony would have yet to occur, the court would have no context through which to evaluate the constitutional significance of the request against the subscriber's privacy interest, particularly if the subscriber were not given a meaningful opportunity to participate. (*Facebook*, *supra*, 240

Cal.App.4th at p. 225.) Defendants' own arguments show just how thin "good cause" protection would be.

If the Court were to accept defendants' position, criminal defendants could routinely issue subpoenas to service providers to obtain the communications content of victims, witnesses, confidential informants, and law enforcement officers, because all of that information could potentially increase their leverage in plea negotiations. Parties armed with access to private information could easily use it for improper purposes, at great cost to individual privacy and the integrity of the judicial system. (See, e.g., *Dendrite Int'l, Inc v Doe* (N.J.Super.Ct.App.Div. 2001) 775 A.2d 756, 771 [noting that discovery of communications subscriber information could be used to "harass, intimidate, or silence" individuals].)

2. The due process clause does not provide a right of discovery to the content of electronic communications

The United States Supreme Court has held that a procedural rule in a criminal case is "not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Medina v. California* (1992) 505 U.S. 437, 445 [quoting *Patterson v. New York* (1977) 432 U.S. 197, 201-02].) That standard, the Court has explained, is "far less intrusive" than the balancing test of *Mathews v. Eldridge* (1976) 424 U.S. 319. (*Medina, supra*, 505 U.S. at p. 446.) Defendants have not established that denying them right of access to third-party social media records in a criminal case offends such a principle of fundamental justice. It manifestly does not, any more than the due process clause condemns the statutes and rules that deny criminal defendants the authority to conduct physical searches of third parties in order to obtain evidence for their defense.

Indeed, defendants cannot satisfy even the less demanding test of *Mathews*, which requires a court to balance "[f]irst, the private interest that

will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Mathews*, *supra*, 424 U.S. at p. 335.) While the private interest at issue here is significant, the other factors weigh heavily against recognizing the right the defendants seek.

a. Defendants have not shown that discovery from the Providers is necessary to protect their interests

The value to defendants of enforcement of the subpoenas is limited because defendants have various options through which to obtain the content they seek from sources other than the Providers. None of those options has been exhausted or even seriously attempted. The existence of those alternatives demonstrates that defendants' due process claim is premature at best.

(i) Defendants already have much of Lee's communications content, and they can obtain additional content directly from Lee

Defendants claim they require additional communications content to impeach Lee by showing that she is violent, angry, or jealous. (Defts.' Br. at p. 4.) But a review of the record shows that defendants already have ample information that would serve that purpose. (See, e.g., 1 AE 15-18, 56, 161-174, 176-180.) Defendants do not explain what additional content they expect to find, or why it would add anything new to the case. (See *United States v. Pierce* (2d Cir. 2015) 785 F.3d 832, 841-842 [declining to consider a criminal defendant's constitutional challenge to the SCA where defendant had access to some Facebook records and could only speculate

that additional exculpatory or relevant material might have been in the account].)

Nevertheless, if defendants desire additional content related to Lee's accounts, they can issue a subpoena directly to her. Lee is not inhibited by the SCA; she has custody and control over the contents of her Facebook, Instagram, and Twitter accounts; and she is in the best position to respond to a request for such content, including by asserting her constitutional and privacy rights if she so chooses. (See *Juror No. One v. Superior Court* (2012) 206 Cal.App.4th 854, 864 [noting that the SCA's protection would apply "only as to attempts by the court or real parties in interest to compel Facebook to disclose the requested information"].) 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*, *supra*, 139 Cal.App.4th at 1447.) Upon receipt of the subpoena, Lee could use tools such as Facebook's Download Your Information tool or Twitter's Download Your Archive tool to collect her communications. (1 AE 20-23, 58-59.) Those tools provide a user-friendly and reliable way to gather account information, and they would allow Lee to produce the content that the Providers are prohibited from producing under the SCA.

Defendants claim that this solution is unworkable because they are unable to locate Lee to serve her with a subpoena. (Defts.' Br. at p. 4.) But there is no indication that defendants have exhausted their efforts. (1 AE 107). More importantly, given defendants' description of Lee as the "sole witness who implicates Mr. Sullivan in the incident," it is reasonable to infer that the People have been or will be in contact with her to make arrangements for her appearance and testimony at trial. (Defts.' Br. at p. 3.) Thus, the court could simply direct the People to assist in serving the subpoena on defendants' behalf.

If Lee ignores the subpoena or refuses to comply, defendants can seek an order from the trial court compelling her to comply. (See *Juror Number One*, *supra*, 206 Cal.App.4th at p. 864 ["If the court can compel Juror Number One to produce the information, it can likewise compel Juror Number One to consent to disclosure by Facebook."]; *Negro*, *supra*, 230 Cal.App.4th at p. 889 [court may order consent on pain of discovery sanctions for failure to comply].) If Lee ignores the trial court's order, the court can hold her in contempt, and enforce the order when she appears to testify. (See Pen. Code, § 1331.) And of course, if she does not appear to testify, defendants will have no need for evidence with which to impeach her.

Additionally, defendants do not need content from the Providers for authentication purposes. Instead, they can authenticate content by the testimony of the person who obtained it, such as an investigator. (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435; see also Evid. Code, § 1410 [No restriction on "the means by which a writing may be authenticated"]; Evid. Code, § 1421 [Writing can be authenticated by its contents].) In any event, defendants do not appear to want the Providers to authenticate Lee's records; they want the Providers to authenticate the identity of the person who authored Lee's content in case she refuses to do so. However, Lee's refusal would not render the records inadmissible. (*Valdez*, *supra*, 201 Cal.App.4th at p. 1435 ["The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility"].)

Moreover, the Providers are not parties to communications between subscribers, and they do not know who actually authored such communications. The Providers operate online services and create accounts based on the information provided by the person signing up for those services. Thus, if a person opens and operates an account as "John Doe," or

some other pseudonym, that is the information that will be associated with the account. And of course, the Providers have no way of knowing the identity of the person that authored any particular content in the account: all they know is that a person logged into and used the account. Obtaining evidence directly from the Providers would therefore do nothing to authenticate the identity of the person responsible for creating the records.

(ii) Defendants can obtain Rice's information from the People

As the Court of Appeal recognized, defendants can obtain information about Rice from the People, who issued search warrants to Facebook and Instagram for content associated with Rice's Facebook and Instagram accounts.[4] (*Facebook*, *supra*, 240 Cal.App.4th at p. 221.) The People must produce any relevant or exculpatory evidence in their possession. (Pen. Code, § 1054.1(c), (e) ["The prosecuting attorney shall disclose to the defendant or his attorney . . . [a]ll relevant real evidence seized as part of the investigation of the offenses charged" and "[a]ny exculpatory evidence"]; *People v. Lucas* (2014) 60 Cal.4th 153, 221 ["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."]; *Brady v. Maryland* (1963) 373 U.S. 83.) Indeed, the People have an obligation "to learn of any favorable evidence known to the others acting on the government's behalf" and to disclose that evidence to the defendant. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042 [quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 438].) Thus, defendants could have asked the trial court to compel the People to disclose the victim's communications consistent with California and federal law, if the People had not already done so.

[4] Defendants did not issue a subpoena to Twitter seeking content associated with any accounts purportedly belonging to Rice.

Defendants argue that obtaining discovery from the People would be insufficient, noting that the People have "procure[d] some, but not all, of Mr. Rice's social media records." (Defts.' Br. at p. 26.) But defendants have not explained what, if any, relevant evidence is missing. And the due process clause does not give criminal defendants an unconstrained right to third-party discovery without regard to relevance. (See *United States v. Nixon*, (1974) 418 U.S. 683, 699-700 [a criminal defendant seeking to subpoena documents must show, among other things, that the documents are relevant, "that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence," and that the defendant "cannot properly prepare for trial" without them].) There is no constitutional right to obtain records when a defendant cannot show why they are necessary, or when the records are otherwise available by exercise of due diligence. (See *Pierce, supra*, 785 F.3d at pp. 841-842.)

Additionally, the California Constitution supports the proposition that defendants should direct discovery requests to the People, who are in a position to protect the interests of the victim. (Cal. Const., art. 1, § 28, subd. (b), pars. (1), (4); *Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1080.) Seeking communications directly from the victim or from the prosecution—rather than from a third party—is the best way to ensure protection of the victim's constitutionally guaranteed privacy rights, as well as the rights of those with whom the victim may have communicated.

(iii) Defendants can subpoena non-content information and use the results to identify additional sources of evidence

Defendants could also issue subpoenas to the Providers seeking non-content information associated with the accounts of Lee and Rice. The SCA provides that the government may obtain non-content information with a

subpoena or court order.[5] It also *allows* service providers to disclose non-content information "to any person other than a governmental entity" and providers can therefore also provide non-content information to defendants with either a subpoena or court order. (18 U.S.C. § 2702(c)(6).)

For example, the SCA would not prohibit Defendants from obtaining a court order for non-content information associated with Rice's accounts. Defendants might use that information to identify communications or other witnesses of interest, and issue subpoenas for content directly to the parties of those communications.[6] If those witnesses refused to comply, the defendants could ask the court to compel compliance or order them to consent to disclosure from the Providers. (See, e.g., *Juror Number One*, *supra*, 206 Cal.App.4th at p. 864.)

Litigants regularly employ such procedures to allow discovery to proceed within the confines of the SCA. (See, e.g., *Liberty Media Holdings, LLC v. Letyagin* (D.Nev. Aug. 1, 2012, No. 2:12-cv-00923-LRH-GWF) 2012 WL 3135671, at p. *4, fn. 3 [granting discovery request to identify the subscriber associated with an IP address]; *Braun v. Primary Distributor Doe No. 1* (N.D.Cal. Dec. 6, 2012, No. C 12-586 MEJ) 2012 WL 6087179 [granting request to conduct early discovery by issuing subpoenas to multiple ISPs for subscriber information of certain IP addresses].) Here,

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[5] In order for the government to compel disclosure of "records or other information," such as "header" information or activity logs, it must obtain a court order based on a showing of "specific and articulable facts" that the records sought are "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(c),(d). For basic subscriber information (e.g., a person's name, address, subscriber identification number, IP logs, services used, length of service, and similar registration data), the government must issue a grand jury, trial, or administrative subpoena authorized by statute. 18 U.S.C. § 2703(c)(2).

[6] If necessary to locate or identify the parties, defendants could also issue additional subpoenas to the relevant Internet service provider associated with the IP addresses of any sought-after communications.

however, defendants have not pursued those procedures, which could eliminate the claimed need to obtain content information from the Providers.

b. Defendants overlook the important privacy interests that the SCA protects

Defendants largely ignore the "fundamental purpose" of the SCA, which is to "lessen the disparities between the protections given to established modes of private communication and those accorded new communications media." (*O'Grady*, *supra*, 139 Cal.App.4th at p. 1444; see also Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It* (2004) 72 Geo.Wash. L.Rev. 1208, 1210 [noting that the SCA was intended to fill a "gap" that left electronic communications unprotected by the Fourth Amendment].) Congress recognized that more established methods of communication, such as mail and telephone, had long enjoyed a variety of legal protections that were not afforded to electronic communications. (*O'Grady*, *supra*, 139 Cal.App.4th at p. 1445.) Unlike with letters and telephone calls, the provider of an electronic communications service "may technically have access to the contents of [a] message and may retain copies of transmission." (H.R.Rep. No. 99-647, 2d Sess., p. 22 (1986); see also *O'Grady*, *supra*, 139 Cal.App.4th at p. 1445 ["It bears emphasis that the discovery sought here is theoretically possible only because of the ease with which digital data is replicated, stored, and left behind on various servers during its delivery . . . [t]raditional communications rarely afforded any comparable possibility of discovery"].) Concerned that electronic communications could therefore be open to "'possible wrongful use and public disclosure by law enforcement authorities as well as unauthorized private parties,'" Congress enacted the SCA in order to "protect the privacy of stored electronic communications except where legitimate law enforcement needs justify its infringement."

(*O'Grady*, *supra*, 139 Cal.App.4th at p. 1444 [quoting Sen.Rep. No. 99-541, 2d Sess., p. 3 (1986)] [emphasis omitted].) Consistent with its stated purpose, the SCA prohibits providers from disclosing certain communications data while providing a framework that allows law enforcement to compel disclosure based on an increasingly demanding showing, depending on the sensitivity of the information sought.

The United States Supreme Court recently affirmed that modern communications technologies deserve protection under the Fourth Amendment. In *Riley v. California* (2014) 134 S.Ct. 2473, the Court held that individuals have a reasonable expectation of privacy in the information maintained on a smartphone. Central to the Court's holding was the fact that smartphones—just like social media accounts—can contain "the privacies of life." (*Id.* at p. 2495 [quoting *Boyd v. United States* (1886) 116 U.S. 616, 625].) The data on a smartphone—like the data maintained in a social media account—can reveal "an individual's private interests or concerns" and "where a person has been," which in turn "'reflects a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations.'" (*Id.* at p. 2490 [quoting *United States v. Jones* (2012) 132 S.Ct. 945, 955 [Sotomayor, J., concurring].) For that reason, the Court held that law enforcement must first obtain a warrant before accessing personal data stored in cell phones. (*Id.* at p. 2494.) The rationale underlying *Riley* applies equally to communications content of the kind maintained by providers. Indeed, as Defendants concede, social media is for many people "the hub of their world, the primary vehicle by which opinions are expressed, friends are made, and news is shared." (Defts.' Br. at p. 15).

Additionally, the recently enacted California Electronic Communications Privacy Act (CalECPA), Penal Code section 1546 et seq., demonstrates California's interest in reinforcing and enhancing the privacy

protections afforded by laws like the SCA. CalECPA broadly prohibits California governmental entities in criminal matters from obtaining any "electronic communications information" from a provider except with a warrant or wiretap order based on probable cause. (Pen. Code, § 1546.1(a), (b).) Under CalECPA, "electronic communications information" is defined more broadly than any of the categories of information under the SCA—it includes all content, all records or other information, and even some basic subscriber information (such as IP logs or billing information). (Pen. Code, § 1546(d).) In other words, the California Legislature has responded to advances in communications technology by enacting a law that is both broader and more privacy-protective than the SCA and the Fourth Amendment. For present purposes, CalECPA is significant because it demonstrates that the Legislature's judgment is directly contrary to that of defendants, who appear to view the SCA's disclosure prohibition as a relic unsuitable for the era of modern technology. (Defts.' Br. at p. 11 [stating that "previous state and federal courts could not predict the ubiquitousness of social media evidence in criminal courts"].)

In short, the communications content that defendants seek to obtain is material that courts have held are subject to the Fourth Amendment, and that both Congress and the California Legislature have expressly sought to protect. There is no support in the law for a right to obtain such information, and there is no reason for the Court to recognize such a right now.

E. Defendants' other constitutional arguments lack merit

Defendants also attempt to locate a right to pretrial discovery of stored communications content in various other provisions of the Fifth and Sixth Amendments. Their efforts are unavailing.

1. The compulsory process clause

The Sixth Amendment provides that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." (U.S. Const., 6th Amend.) That clause does not allow defendants to obtain an order compelling a private party to turn over information the disclosure of which would violate federal law.

Defendants concede that the United States Supreme Court has never held that the Constitution creates a right to pretrial access to evidence maintained by a third party. (Defts.' Br. at p. 13.) Defendants further concede that "[t]here is no general constitutional right to discovery in a criminal case." (*Id.* at p. 12; see *Weatherford v. Bursey* (1977) 429 U.S. 545, 559 [no Sixth Amendment violation where the prosecution failed to reveal before trial the names of undercover witnesses who may testify against a defendant].) And 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* (2011) 52 Cal.4th 856, 983 [declining "to recognize a Sixth Amendment violation when a defendant is denied discovery that results in a significant impairment of his ability to investigate and cross-examine a witness."]; *People v. Prince* (2007) 40 Cal.4th 1179, 1234, fn.10 ["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, supra*, 15 Cal.4th at 1117.) Defendants fail to show how, in light of this authority, they have a Sixth Amendment right to compel Providers to disclose communications content in this case.

The compulsory process clause guarantees "the right to the government's assistance in compelling the attendance of favorable *witnesses* at trial." (*Pennsylvania v. Ritchie* (1986) 480 U.S. 39, 56 [plurality opinion] [emphasis added].) But the United States 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*, *supra*, 480 U.S. at p. 56 [emphasis added].) In *Ritchie*, a criminal defendant sought pretrial access to records in the possession of a Pennsylvania government agency. (*Ibid.*) The government refused to disclose them, citing Pennsylvania law requiring the records to be kept confidential. (*Ibid.*) The United States Supreme Court noted that it had never extended the compulsory process clause to require the government to produce exculpatory evidence. (*Ibid.*) And if the clause does not require the production of evidence by the government—a *party* to whom it expressly applies—then it cannot extend to require *non-parties* to produce evidence in the face of a federal statute barring that production. (*People v. Webb* (1993) 6 Cal.4th 494, 518 [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].)

Candidly acknowledging the lack of authority for their position, defendants "urge[] this Court to take the lead in the nation" and independently recognize a constitutional right to pretrial discovery of "social media records" under the compulsory process clause. (Defts.' Br. at p. 14.) But this Court has repeatedly addressed *Ritchie* and declined to recognize such a right. (See, e.g., *Clark*, *supra*, 52 Cal.4th at p. 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*, *supra*, 40 Cal.4th at p. 1234, fn. 10; *Hammon*, *supra*, 15 Cal.4th at p. 1117; *Webb*, *supra*, 6 Cal.4th at p. 518.) Moreover, 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 when a court sanctions a criminal defendant for failing to disclose a witness by preventing the defendant from calling that witness at trial. (*Taylor v. Illinois* (1988) 484 U.S. 400.) 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* (10th Cir. 1984) 738 F.2d 1087, 1089–90 [attorney-client privilege]; *United States v. Lea* (7th Cir. 2001) 249 F.3d 632, 642–43 [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*." (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 873 [emphasis added].) There is no constitutional violation where, as here, 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. (*Ibid.*)

Finally, defendants invoke the right to present a meaningful defense, which they locate in the compulsory process clause and in the due process clause. (Defts.' Br. at p. 15-16.) But they cite no case holding that the right to present a complete defense includes a right to pretrial discovery, especially where such discovery would require a private party to violate federal law. Indeed it does not: it instead prevents arbitrary rule interpretation that prohibits a defendant from offering evidence that is already available. (See, e.g, *Holmes v South Carolina* (2006) 547 U.S. 319, 326 [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"].) It does not create

an absolute right to introduce evidence, much less to obtain it from third parties. (*Ibid.*; see also *United States v. Scheffer* (1998) 523 U.S. 303, 308 [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"].)

2. The confrontation clause

The Sixth Amendment's confrontation clause provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) That clause 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* (1985) 474 U.S. 15, 20 [no confrontation clause violation where prosecution witness has a lapse in memory impeding defense questioning].) As the plurality in *Ritchie* noted, the clause is satisfied so long as "defense counsel receives wide latitude at trial to question witnesses." (*Ritchie*, *supra*, 480 U.S. at p. 53.) It does not give a defendant the power to require the pretrial disclosure of any information that might be useful for impeachment. (*Ibid.*) Indeed, "nothing in the case law supports" interpreting the confrontation clause as "a constitutionally compelled rule of pretrial discovery." (*Ibid.*)

Defendants cite no contrary authority. Instead, they rely on *Davis v. Alaska* (1974) 415 U.S. 308, but the Court in that case examined a defendant's right under the confrontation clause to pursue a line of questioning during witness testimony at trial. (Defts.' Br. at p. 35.) The Court did not consider a defendant's right to pretrial discovery of evidence maintained by a third party. (See *Hammon*, *supra*, 15 Cal.4th at p. 1124.) Nor did it consider whether a defendant could compel a third party to risk committing a violation of federal law.

3. The right to counsel

The Sixth Amendment also provides that "the accused shall enjoy the right . . . to the Assistance of Counsel for his defense." (U.S. Const., 6th Amend.) That clause guarantees the assistance of counsel at all critical stages of the criminal process. (See, e.g., *Montejo v. Louisiana* (2006) 556 U.S. 778, 786.) Defendants argue that plea negotiations are a critical stage in many criminal cases. (Defts.' Br. at pp. 32-34.) That may be true, but defendants cite no authority to suggest that effective assistance requires the ability to compel the disclosure of evidence from a third party.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

DATED: February 16, 2016

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WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rule 8.520(c), counsel of record hereby certifies that the foregoing Answer Brief on the Merits consists of 10,559 words, including footnotes, as counted by the Microsoft Word program used to prepare this brief.

DATED: February 16, 2016

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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 February 16, 2016, I caused the following document(s) to be served on the following parties by the manner specified below:

ANSWER BRIEF ON THE MERITS

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 of San Francisco 850 Bryant Street San Francisco, CA 94103	*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 February 16, 2016 at San Francisco, California.

Lisa DeCosta