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 TO BRIEFS OF AMICUS CURIAE

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INTRODUCTION

The real parties in interest (defendants below) ask this Court to hold that a state court adjudicating a criminal case may direct a third party to violate the federal Stored Communications Act (SCA), 18 U.S.C. § 2701 et seq. The Court of Appeal correctly rejected that argument, which is foreclosed by the supremacy clause of the United States Constitution. Amici curiae San Francisco Public Defender's Office (SFPDO), California Attorneys for Criminal Justice, et al. (CACJ), and California Public Defenders Association, et al. (CPDA) now ask this Court to adopt defendants' position, but their briefs add nothing to the flawed arguments already presented by defendants.

The starting point in this case must be the SCA, which unambiguously prohibits the disclosure sought by defendants. Although amici attempt to demonstrate otherwise, their efforts founder on the statutory language. Additionally, their arguments fail to take into account the privacy interests underlying the SCA. Amici denigrate those interests, but the unmistakable trend in federal and state courts and legislatures is to *strengthen* privacy protections for communications, not weaken them.

The supremacy clause of the United States Constitution forbids a state court from ignoring a federal law such as the SCA. Like defendants, amici respond by arguing that the SCA is unconstitutional. That argument is misdirected. Any alleged constitutional violation in this case arises not from the SCA itself but from the state's decision to prosecute defendants. The available remedies for a constitutional violation resulting from that decision do not include ordering a third party to act in contravention of a federal statute.

In any event, amici's constitutional arguments lack merit. In *People v. Hammon* (1997) 15 Cal.4th 1117, this Court held that a criminal defendant does not have a constitutional right to pretrial discovery. Amici suggest

confining that decision to its facts, but their arguments are unpersuasive. And even apart from *Hammon*, no authority supports amici's interpretation of the Fifth and Sixth Amendments or suggests, as amici would have it, that defendants and the government must possess equal investigative capabilities. This Court should apply federal law and reject amici's novel constitutional theories.

ARGUMENT

A. The SCA prohibits the disclosures that defendants seek

The Court of Appeal correctly observed that "[i]t is undisputed that the materials defendants seek here are subject to the SCA's protections." (*Facebook, Inc. v. Superior Court* (2015) 240 Cal.App.4th 203, 213.) There is good reason for the parties' agreement on that issue. Some amici argue that the SCA's prohibition on the disclosure of the contents of communications should not apply here, but that argument lacks merit.

1. Section 2702 unambiguously prohibits the Providers from complying with defendants' subpoenas

The SCA 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's definition of "contents"—which includes "any information concerning the substance, purport, or meaning" of an electronic communication—encompasses the materials sought by defendants' subpoenas. (18 U.S.C. § 2510(8).) The SCA enumerates only a few, narrow exceptions to the prohibition on disclosing the contents of a communication, none of which includes responding to a subpoena issued at the behest of a criminal defendant.

Amicus CPDA suggests in passing that the SCA does not prohibit disclosure to a court because "a court conducting an in camera examination

of records is [not] a 'person or entity' within the meaning of the SCA." (CPDA Br. at p. 26; see also CACJ Br. at 5, 12; SFPDO Br. at 7-10). That is incorrect. Section 2702 refers to "*any* person or entity," indicating that the phrase is to be interpreted broadly. (*United States v. Gonzales* (1997) 520 U.S. 1, 5 ["Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"] [quoting *Webster's Third New International Dictionary* 97 (1976)]; see *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1445 [noting that the SCA seeks not only to "shield private electronic communications from government intrusion but also to encourage 'innovative forms' of communication by granting them protection against unwanted disclosure *to anyone*"] [emphasis in original].) And a court falls within the ordinary meaning of the word "entity." In any event, the only purpose of an in camera examination would be to facilitate further disclosure to defendants, who are unquestionably "person[s]" to whom the SCA prohibits disclosure.

Amicus CPDA also suggests that if the Providers are compelled to disclose the information at issue in response to a subpoena, they might have a defense to civil liability under the SCA. (CPDA Br. at pp. 19-20). While the statute does create a defense for good-faith reliance on a court order, courts have not evaluated the applicability of that defense in circumstances—such as those presented here—in which an order is contrary to the requirements of the statute. (18 U.S.C. § 2707(e).) More importantly, the potential availability of a defense to *liability* does not alter the statute's basic prohibition, and it provides no basis for ordering a violation of a statute. Rather, as the Court of Appeal observed in *O'Grady*, the SCA's safe harbor "is obviously intended to protect service providers who would otherwise find themselves between the Scylla of seemingly valid coercive process and the Charybdis of liability under the Act," and litigants cannot "invoke this

provision to compel disclosures otherwise prohibited by the Act." (139 Cal.App.4th at p. 1442.)

2. Allowing disclosure in these circumstances would frustrate the SCA's purposes

Like defendants, amici fail to appreciate the importance of the privacy interests that the SCA protects. The SCA's "fundamental purpose" was 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). Stored copies of communications exist only because services like those of the Providers exist. More traditional forms of communication are generally not subject to "any comparable possibility of discovery." (*Id.* at p. 1445) A letter, for example, would be "in the sole possession and control of the recipient or, if the sender retained a copy, the parties." (*Ibid.*) Likewise, a phone call is "as ephemeral as a conversation on a street corner; no facsimile of it existed unless a party recorded it—itself an illegal act in some jurisdictions, including California." (*Ibid.*) Congress enacted the SCA to afford electronic communications the same privacy protections that apply to other communications media.

Amici point out that *O'Grady* and many of the other cases discussing section 2702 involved civil litigation, not criminal cases. (CACJ Br. at p. 11.) But nothing in the SCA suggests that the statute should be interpreted differently in the context of a criminal case. To the contrary, the SCA is part of the federal criminal code and was "drafted in such a manner that clearly anticipates the criminal context." (*FTC v. Netscape Commc'ns Corp.* (N.D. Cal. 2000), 196 F.R.D. 559, 560.) And the legislative history makes clear that the SCA was not intended to be limited to civil litigation. (See U.S. S. Rep. No. 99-541 (1986) at 3 [the SCA was intended to curtail surveillance by "overzealous law enforcement agencies, industrial spies, and private parties."].) Amici cite no contrary authority.

Amici contend that the subpoena duces tecum procedure set forth in Penal Code section 1326 is equivalent to the warrant procedure contemplated by the SCA. (See, e.g., SFPDO Br. at 7-10.) This is incorrect. The subpoena procedure of section 1326 does not provide privacy protections equivalent to those of a warrant. Before obtaining a warrant, the government must make an ex ante showing of probable cause. (U.S. Const. amend. IV; Cal. Pen. Code § 1524.) By contrast, section 1326 does not require any judicial review before a subpoena is issued. Moreover, even if amici were correct that the procedures provide equivalent privacy protections, that still would not be a basis for disregarding the plain terms of the statute.

Although the issuance of a subpoena is merely a "ministerial act," *Kling v. Superior Court*, 50 Cal.4th 1068, 1076 (2010), in that it does not entitle defendants to receive the records until a judicial determination is made, trial courts often lack sufficient information to adequately balance privacy interests. Certainly, they do not have a sworn declaration establishing probable cause, as in the case of a warrant. Moreover, as the Court of Appeal noted, the individual whose records are subpoenaed may not even receive notice of the subpoena. (*Facebook*, 240 Cal.App.4th at p. 223.) Thus, absent objection by providers, the trial court may not be aware of the privacy interests at stake or the level of scrutiny required. (*Id.* at p. 224.) "Such a nonadversarial ex parte process is ill-suited to adjudication of contested issues of privilege." (*Id.* at p. 223-24.) In addition, requiring providers to produce records to the court for in camera review before any determination of relevancy or need imposes a significant burden on providers, which the SCA seeks to avoid. As the Court of Appeal recognized, a primary goal of the SCA is to reduce the "severe administrative burdens" on providers that would arise if they were "required to respond to (and object to) routine pretrial subpoenas" issued by criminal defendants. (*Id.* at p. 225, fn. 15; see also *O'Grady*, *supra*, 139 Cal.App.4th at pp. 1446-47 [responding

to "routine subpoenas would indeed be likely to impose a substantial new burden on service providers"].)

Amici CACJ observes that the SCA was enacted 30 years ago, "when no one even knew or could really contemplate how huge the social media way of life would become," and it disparages the communications content protected by the statute as little more than "cute kittens videos." (CACJ Br. at pp. 10, 13.) To the extent CACJ is arguing that technological developments require that the statute be amended, that argument is appropriately directed to Congress, not to this Court. In any event, courts and legislatures have recognized that the increasing importance of electronic communications is a reason to strengthen, not weaken, privacy protection for communication contents. As explained in the Providers' answer brief on the merits (at pp. 28-30), the United States Supreme Court has recognized that modern communications technologies enjoy protection from disclosure to the government under the Fourth Amendment. For example, in holding that individuals can have a reasonable expectation of privacy in the information stored in a smartphone, the Court emphasized that smartphones can contain "the privacies of life," something that can equally be true of social media accounts. (*Riley v. California* (2014) 134 S.Ct. 2473, 2494-95.) In addition, the recent enactment of the California Electronic Communications Privacy Act, Penal Code section 1546 et seq., demonstrates the Legislature's view that robust privacy protection for electronic communications information is even more important now than in the past.[1]

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[1] Congress is currently considering strengthening the SCA. While the statute permits a "governmental entity" to obtain certain categories of content under an administrative subpoena or court order, the Sixth Circuit has held that a warrant based on probable cause is required. (18 U.S.C. § 2703(b)(1)(B); *United States v. Warshak* (6th Cir. 2010) 631 F.3d 266, 288.) Last month, the House of Representatives unanimously passed the Email Privacy Act, which would amend the SCA to codify *Warshak.* (H.R. No. 699, 114th Cong., 2d

B. A state court may not direct the Providers to violate the SCA

As the Providers have explained, enforcing the SCA according to its terms would not violate defendants' rights under the due process clause or any other provision of the Constitution. (Answer Br. on the Merits at pp. 18-35.) But as the case comes to this Court, the Court need not consider defendants' constitutional arguments because the constitutional provisions on which defendants rely do not authorize a state court to disregard the supremacy of federal law by ordering the Providers to violate an Act of Congress. Thus, even if the People's decision to prosecute defendants in these circumstances has given rise to a constitutional violation, which it has not, the available remedies for any such violation do not include enforcing the trial court's subpoenas (whether issued before trial or during trial).

Defendants and amici cite *Marbury v. Madison* (1803) 1 Cranch 137, and observe that this Court has authority to evaluate the constitutionality of the SCA. (CACJ Br. at pp. 9-10; CPDA Br. at p. 27.) But neither defendants nor amici have identified any constitutional infirmity in the SCA itself, nor could they plausibly do so, as none of the constitutional provisions on which they rely can be read to create a freestanding right to disclosure of information. Rather, those provisions create a right of access to information (if at all) only in the context of a criminal prosecution. In other words, if there is a constitutional problem in this case, it arises only from the interaction of three things: (1) an alleged constitutional requirement that criminal defendants have access to certain information *in the context of a criminal prosecution*, (2) the SCA's prohibition on disclosure of such information, and (3) the state's decision to bring a criminal prosecution in this case. Any constitutional problem thus arises from the state's actions. But a state may

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Sess., § 3, pp. 4-9 (2016).) The bill is now before the Senate, where 27 Senators have sponsored a companion bill. (Sen. No. 356. 114th Cong., 1st Sess., § 3, pp. 3-5 (2015).)

not bring a state-law prosecution that infringes on constitutional requirements and then resolve that problem by forcing a third party to violate a federal statute. It is the state's actions that must yield to the Constitution and an Act of Congress, not the other way around.

As the Providers explained in their answer brief on the merits (at pp. 11-13), that principle is well established when the prohibition on disclosure arises from 18 U.S.C. § 793, which prohibits the disclosure of classified information. Tellingly, defendants and amici make little effort to address that analogous scenario. Defendants observe that social media content may differ from national-security information in various ways, but that is beside the point. (Reply Br. at pp. 9-10.) Defendants apparently consider the Espionage Act more important than the SCA, but even if that is correct, a state court may not pick and choose which federal statutes it will enforce. When classified information is at issue in a criminal proceeding, a state court must find some way to proceed that is consistent with federal law. The same is true when a case involves information protected by the SCA.

C. In the circumstances of this case, defendants lack a constitutional entitlement to disclosure of the communications content at issue

1. *Hammon* forecloses defendants' constitutional claims

In *People v. Hammon, supra,* 15 Cal.4th 1117, this Court rejected the proposition that a criminal defendant has a constitutional right to pretrial discovery. That decision forecloses the constitutional arguments that defendants and amici now advance.

Like defendants, amici seek to confine *Hammon*'s holding to the facts of that case, which involved the pretrial disclosure of psychotherapist-patient privileged evidence. (SFPDO Br. at pp. 3; CACJ Br. at p. 15.) But the Court's reasoning was not limited to the psychotherapist-patient privilege, or even to privileges in general. Instead, the Court examined United States Supreme Court cases applying the due process clause and the Sixth

Amendment, and it observed that those cases did not address pretrial discovery: "By its terms, the decision in [*Davis v. Alaska* (1974) 415 U.S. 308] involved a defendant's *trial rights* only." (*Hammon, supra*, 15 Cal.4th at p. 1124. (emphasis in original)) As for the suggestion "that a defendant might obtain before trial any information he would be able under *Davis* to obtain at trial," the Court explained that "[t]hat assumption . . . is called into question in light of the United States Supreme Court's decision in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39." (*Ibid.*) This Court declined to "tak[e] such a long step in a direction the United States Supreme Court has not gone." (*Id.* at p. 1127.)

The United States Supreme Court's Fifth and Sixth Amendment cases, which this Court surveyed in *Hammon*, were not confined to the psychotherapist-patient privilege, and neither was this Court's reasoning. As the Court observed, "[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." (*Hammon, supra*, 15 Cal.4th at p. 1127.) 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.*) Although the Court mentioned privileges, its reasoning is equally applicable to any policy prohibiting disclosure: pretrial disclosure risks undermining that policy unnecessarily because the information may turn out not to be necessary at trial.

If there were any doubt on the correct interpretation of *Hammon*, it would be resolved by this Court's repeated reaffirmation of that decision in a variety of contexts not involving the psychotherapist-patient privilege. (Answer Br. on the Merits, p. 16 [listing cases].) Amici have little to say

about those cases, but their suggestion that *Hammon* be confined to its facts would require overruling them.

Noting that the subpoena at issue here was issued one day before trial was to begin, amici suggest that *Hammon*'s distinction between pretrial subpoenas and trial subpoenas is artificial. (CPDA Br. at p. 15.) But the line drawn in *Hammon* is a reasonable one. The beginning of trial is a constitutionally significant event not only because jeopardy has attached but also because before trial, the court cannot know what evidence or testimony will be proffered, or even whether the case will proceed to trial. (See Answer Br. on the Merits, pp. 16-17.) These factors are central to determining the existence of a constitutional concern: should no concern arise, any pretrial disclosure would have been unnecessary. (*Hammon*, *supra*, 15 Cal.4th at p. 1127.)

Finally, neither amici nor defendants address *stare decisis*. Even if this Court "might have decided the issue differently if it had been the first to consider it," it should not overrule its precedent without a "good reason" for doing so. (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 327.) No such reason exists. *Hammon* establishes a clear, workable rule, and no subsequent decision of the United States Supreme Court has cast doubt upon its holding. Moreover, because federal and state law require a search warrant to compel a provider to disclose content, overturning *Hammon* would "dislodge settled rights and expectations" regarding the privacy protections that are in place for the contents of electronic communications. (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 504 [quoting *Hilton v. South Carolina Public Rys. Comm'n* (1991) 502 U.S. 197, 202].) This Court should adhere to *Hammon*.

2. Applying The SCA Would Not Violate Defendants' Constitutional Rights

a. Defendants Have Other Methods To Obtain The Evidence They Seek

Even if amici's constitutional arguments were not foreclosed by *Hammon*, they would lack merit. As an initial matter, the arguments advanced by amici are predicated on the assumption that disclosure is necessary for defendants to present a defense, but in fact, defendants may have multiple alternatives to obtain the information they seek: they can obtain content from the witness, the government, or from other parties to the communications. (Answer Br. On the Merits, 23-28). In light of these alternatives, the correct approach to follow is that of *United States v. Pierce* (2d. Cir. 2015) 785 F.3d 832, 841-842, which rejected a constitutional challenge to the SCA because the defendant in that case had obtained some of the content he sought and could obtain any additional content by other means.

Amici incorrectly suggest that this Court must defer to the trial court's anticipatory determination that defendants have no alternative mechanisms to obtain the evidence they seek. (CPDA Br. at p. 26.) But this Court reviews questions of law de novo. (*People v. Rells*, (2000) 22 Cal.4th 860, 870; see also *In re J.H.* (2007) 158 Cal.App.4th 174, 183 ["[c]onstitutional issues are reviewed de novo."].) This Court, like the Court of Appeal, can independently assess the facts to determine whether, as a matter of law, the existence of alternative discovery mechanisms renders any assessment of constitutional violations premature.

Defendants and amici contend that there is no dispute that the records sought are relevant. (Reply Br. at p. 21) But the mere fact that the records may meet the minimal standard of relevance for issuance of a subpoena does not mean that the records are necessary or that they would not be duplicative

of other evidence. Defendants have already placed ample information in the record to support the arguments they wish to make about Lee, and they fail to describe what else they expect to find, if anything, in any communications they do not already have. Defendants and amici also neglect to explain why any allegedly necessary information could not be obtained from Lee, through requests for non-content data directed to the Providers, or from the People.

Amici contend that social media records must be produced by providers to overcome an authentication objection when the witness to whom the records pertain is uncooperative. (CPDA Br. at p. 28.) That is incorrect. The Providers cannot identify who authored content on their services, and therefore they cannot authenticate such records. (See *United States v. Shah* (E.D.N.C. 2015) 125 F.Supp.3d 570, 575 [stating that testimony from Google was insufficient to authenticate statements contained in emails produced to the government, noting that "[t]he statements at issue are not Google's business records, as that term is defined under Rule 803(6), because they fail the 'knowledge' requirement"].) Put another way, the Providers do not know who was at the other end of a computer or phone and cannot testify as to whether Lee, Rice, or some other person authored the communications at issue. This Court's decision in *Packer v. Superior Court*, (2014), 60 Cal.4th 695, cited by CPDA, does not establish otherwise. (CPDA Br. at p. 11.) There, the prosecutor objected to the admissibility of a Twitter message on the grounds that there had been no showing that the message in a person's Twitter account could be attributed to that person. (*Id.* at p. 709.) But nothing in the opinion suggests that the relevant message could be authenticated by Twitter, which cannot determine whether the person who posted the message was the accountholder or someone else. Because social media content cannot be authenticated by providers, requests for production and authentication are better directed to the parties to those communications.

b. Section 2702 Of The SCA Is Consistent With The Fifth, Sixth, and Fourteenth Amendments To The U.S. Constitution

The Court of Appeal held that the SCA prohibits the disclosure of the contents of communications in response to a pretrial subpoena, while expressly declining to hold anything at all with respect to trial rights. (*Facebook*, *supra*, 240 Cal.App.4th at p. 225 [emphasizing that "our ruling is limited to the pretrial context in which the trial court's order was made"].) The Court of Appeal did not "conclud[e] that criminal defendants possess federal constitutional rights to social media's information regardless of the SCA's statutory prohibition," as amicus CACJ erroneously suggests. (CACJ Br., p. 11.)

In any event, neither defendants nor amici have identified any authority establishing that they have a right to disclosure of the contents of stored communications, whether pretrial or during trial. Amici place principal reliance on the due process clause, suggesting that it is unfair for defendants to lack access to the contents of communications when the government can obtain it with a search warrant. However, the Constitution does not require the defense and prosecution to have equivalent investigative tools. (See *People v. Sutter* (1982) 134 Cal.App.3d 806, 816 ["(A) criminal proceeding is not 'symmetrical' as the prosecution and defense have different rules, powers, and rights."].) The government has many types of investigative tools, such as wiretaps and physical searches, which are unavailable to defendants. (*Pierce*, *supra*, 785 F.3d at p. 842, fn. 2 [noting that "the search warrant provisions of Fed.R.Crim.P. 41(b) and the wiretap application provisions of 18 U.S.C. § 2516(1) both provide a means for the government to obtain evidence without a mechanism for defendants to do so"].) Contrary to defendants' claim that wiretaps are "irrelevant because the defense does not need those investigative tools to prepare for trial" (see

Reply Br. at p. 23), it is easy to imagine a case in which the defense might assert the need for a wiretap. For example, the defense might want to record communications between witnesses believed to be colluding to present false testimony, or communications of a person suspected of hiding exculpatory evidence. Nevertheless, amici do not dispute that the Wiretap Act (or the California Invasion of Privacy Act) remain constitutional even though wiretap orders are available only to the government.[2]

Likewise, the Court of Appeal correctly rejected defendants' arguments that applying the SCA in this case would violate their rights to confrontation, to compulsory process, to present a complete defense and to a fair trial. As the Providers have already explained, none of the cited constitutional provisions creates a right to seek discovery from private parties. (Answer Br. on the Merits at pp. 30-35.) Aside from general exhortations about the importance of constitutional rights, amici provide no authority to the contrary.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

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[2] In a footnote, the Court of Appeal suggested that if § 2703(b)(1)(B) allowed the government to obtain content older than 180 days with a trial subpoena, it would raise Fourth Amendment concerns. (*Facebook*, 240 Cal.App.4th at p. 225, n. 17.) But *Warshak* removed the government's authority to use subpoenas for older content by holding that the Fourth Amendment requires a warrant for such content. (*Warshak, supra,* 631 F.3d at 288.) Moreover, the SCA requires state governmental agencies to comply with state law. (18 U.S.C. § 2703(a), (b) [requiring state legal process to be "issued using State warrant procedures" or authorized by "State statute"].) In California, the government must obtain a warrant for all electronic communications information. (Cal. Pen. Code § 1546.1(a), (b)(1)-(4).)

DATED: May 12, 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 to Briefs of Amicus Curiae consists of 4,379 words, including footnotes, as counted by the Microsoft Word program used to prepare this brief.

DATED: May 12, 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 May 12, 2016, I caused the following document(s) to be served on the following parties by the manner specified below:

ANSWER TO BRIEFS OF AMICUS CURIAE

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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