Case No. S230051

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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

Petitioners,

v.

Superior Court for the City and County of San Francisco,

Respondent.

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

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

II. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT

A. Standard of Review

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

The Court of Appeal applied the SCA in a manner consistent with prior California decisions as well as the decisions of federal and state courts throughout the country. The Court of Appeal also correctly analyzed the Fifth and Sixth Amendments to the U.S. Constitution as repeatedly and consistently applied by this Court. Thus, review is not "necessary" to "secure uniformity of decisions" or to "settle" any issue of law. Cal. R. Court 8.500(b)(1). Defendants have failed to carry their burden for review and their Petition should be denied.

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

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

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

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

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

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

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

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

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

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

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

The language of the SCA is clear. Defendants have failed to show that review of the Court of Appeal's decision is necessary to secure uniformity of decision or settle any question regarding the SCA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This Court has repeatedly declined to recognize a constitutional right to pretrial discovery of evidence under the Sixth Amendment. *See, e.g., People v. Clark*, 52 Cal. 4th 856, 983 (2011) (declining "to recognize a Sixth Amendment violation when a defendant is denied discovery that