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