IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO, Respondent. LANCE TOUCHSTONE, Real Party in Interest.	No. S245203

INTERVERNOR'S RESPONSIVE SUPPLEMENTAL BRIEF ADDRESSING FACEBOOK v. SUPERIOR COURT (*HUNTER*) (S230051)

Fourth Appellate District, Division One, Case No. D072171
San Diego County Superior Court, Case No. SCD268262
The Honorable Kenneth K. So, Judge

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INTRODUCTION

Facebook's supplemental brief addressing the effect of *Facebook, Inc. v. Superior Court (Hunter)* (2018) 4 Cal.5th 1245 (*Facebook I*) asks this court to hold that the Stored Communications Act (18 U.S.C. § 2701, et seq) (the "SCA") is constitutional. Facebook also asks this court to hold that the determination of whether a Facebook communication ("Facebook post" or "post") is public or private hinges on whether the user configured the post to be public or private at the time discovery of that communication is sought.

As outlined in the People's brief in intervention, the SCA does not apply to Facebook. This is because Facebook does not meet the requirements of either an electronic communication service provider or a remote computing service, as defined by the SCA. Therefore, the issue of whether the SCA is constitutional is moot.

Assuming, *arguendo*, that the SCA applies, it would nevertheless survive an as-applied challenge to its constitutionality by Touchstone. However, Facebook is incorrect when it argues that the court should impose adverse rulings to the People, i.e., compel the People to dismiss charges filed against Touchstone, should the People not provide the sought communication to Touchstone. Not only do the People lack the legal authority to obtain the victim's private Facebook posts, Touchstone does not have a right to them via pretrial discovery. For the court to use remedies (such as adverse rulings against the People) to enforce a power or right that Touchstone does not have over the sought communications would be tantamount to creating that power or right in the first instance, in violation of the separation of powers provision in the California Constitution.

Additionally, understanding why the SCA would survive an as-applied constitutional challenge illuminates why this court's ruling in *People v. Hammon* (1997) 15 Cal.4th 1117, 1127-1128 (*Hammon*) is

correct in holding that the Sixth Amendment does not compel pretrial disclosure of private/privileged communications.

Additionally, whether a user's or victim's subsequent change to content-privacy settings constitutes a revocation of consent to a Facebook post is a question of fact dependent upon how the user-setting function operates within Facebook's platform/website. Facebook has provided no facts regarding how the platform/website operates, or the various settings it provides users. The People's motion to augment the record is necessary for this court to have facts essential to this question.

Lastly, Touchstone argues in his supplemental brief addressing *Facebook I* that when users agree to Facebook's terms of service, it amounts to consent under the SCA. Since the SCA does not apply here, consent is irrelevant. However, the terms of service which Facebook users must accept are relevant to this Court's analysis of whether those terms might constitute a waiver of the user's or victim's right to refuse discovery under Marsy's Law. This is a threshold issue this Court must address: if the terms of service do not constitute waiver, then this Court must decide (1) whether the victim's right to refuse discovery to the defendant under Marsy's law conflicts with the trial court's power to enforce the subpoena and compel the sought communication for *in camera* review, and (2) whether any resulting disclosure after the victim testifies would constitute "discovery" to the defendant under Marsy's Law.

The issues raised in these supplemental briefs further support the People's motion to augment the record, since they hinge on questions of facts not supplied by either party. The People have filed a motion to augment the instant appellate record with CEO Mark Zuckerberg's testimony before Congress, as well as Facebook's terms of service and data policy. (Intervenor's Exh. B-E.) This court should permit the augmentation

of the record to not only address the issues raised in the People's brief in intervention, but also to address the issues raised in the supplemental briefs.

ARGUMENT

I.

ALTHOUGH THE SCA DOES NOT APPLY, IT WOULD NEVERTHELESS SURVIVE AN AS-APPLIED CONSTITUTIONAL CHALLENGE

While the SCA does not apply in this case, it is still useful to examine why the SCA does not deny Touchstone a Sixth Amendment pretrial due process right even if applicable. Review also shows why this court was correct in *Hammon*, in holding that a defendant's Sixth Amendment right to confrontation and cross-examination does not compel pretrial disclosure of privileged information. (*Hammon*, *supra*, 15 Cal.4th at p. 1128.

Ultimately, Touchstone (who assumes the SCA applies) is asking this court to hold that the *absence* of statutory law which could give him pretrial access to the private Facebook posts is unconstitutional. Not only is this contrary to the principles set out in *Kinsella v. U.S. ex rel. Singleton* (1960) 361 U.S. 234, 246 (*Kinsella*), it is an alibi for an absence of constitutional guarantees beyond those outlined in *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

A criminal defendant does not have a general constitutional right to discovery. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559; *Gray v. Netherland* (1996) 518 U.S. 152, 168; *People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1314 (*Barrett*).) *Brady* exculpatory evidence is the only substantive discovery mandated by the United States Constitution. Only if the People come into possession of the sought communications will Touchstone's constitutional due process right trigger the People's obligation to provide him materially exculpatory evidence contained within those communications.

It follows that a criminal defendant also does not have a constitutional right to pretrial discovery from third parties. "It is true that any defendant has the right to attempt to interview any witnesses he desires. It is also true that any witness has the right to refuse to be interviewed, if he so desires (and is not under or subject to legal process)." (*Byrnes v. United States* (9th Cir. 1964) 327 F.2d 825, 832.) Just as a victim can refuse to speak with the defendant pretrial, he or she can likewise refuse to give consent to the release of his or her communications which are protected by the SCA pursuant to Marsy's Law.

A court cannot, in the interest of due process, give either Touchstone or the People additional power to obtain the victim's private Facebook content. Due process simply ensures that existing powers are exercised in a fundamentally fair and just manner. "It deals neither with power nor with jurisdiction, but with their exercise." (*Kinsella*, *supra*, 361 U.S. at p. 246.) This is true even when balanced against "the sageguards" of the Sixth Amendment. (*Ibid.*) Only if Touchstone can establish that his Sixth Amendment right will be violated by non-disclosure can a court determine whether the SCA serves as an unconstitutional obstacle between him and the sought communications. However, pursuant to this court's holding in *Hammon*, this cannot be determined pretrial.

A comparison of *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 (*Ritchie*) with *Davis v. Alaska* (1974) 415 U.S. 308 (*Davis*), illustrate why this court's *Hammon* decision was correct. In *Ritchie*, the defendant sought access to Department of Children and Youth Services (CYS) records pertaining to his victim. Pennsylvania law provided that the records sought by the defendant shall remain confidential, unless one of 11 specific exceptions applied. (*Ritchie*, *supra*, 480 U.S. at p. 43.) One of the exceptions permitted disclosure to a court of competent jurisdiction, pursuant to court order. (*Id.* at pp. 43-44.) The issue in *Ritchie* was to what

extent due process required this statutory exception be exercised in balancing the guarantees of the Sixth Amendment. At a minimum, due process required that the trial court utilize the power granted to it by statute and order the production of the records to the court. (See *Id.* at pp. 57-58 ["Given that the Pennsylvania Legislature contemplated *some* use of CYS records in judicial proceedings, we cannot conclude that the statute prevents all disclosure in criminal prosecutions."].) Justices Powell, White, and O'Conner all believed that a trial court's *in camera* review for materially exculpatory evidence was the proper balance between the defendant's rights and the state's interest in confidentiality. (*Id.* at pp. 57, 61.) In contrast, Justices Brennan and Marshall believed that the defendant must be given access to the entire file, and not merely the portions that meet a materiality standard. (*Id.* at pp. 66-68.) Justices Brennan and Marshall feared that this restriction would be the functional equivalent of the trial court's unconstitutional restriction of cross-examination in *Davis*. (*Id.* at p. 70.)

Davis is distinguishable from *Ritchie*. The defendant in *Davis* possessed information regarding the witness' probation status. It was the confidentiality statute which prohibited the defendant from questioning the witness about his probation status that denied the defendant his right to cross-examination. (*Davis*, *supra*, 415 U.S. at pp. 311, 320-321.) In contrast, the issue addressed in *Ritchie* was not whether the application of a statute denied the defendant a constitutional guarantee, but rather, to what extent the existing statute (which permitted disclosure to the court) must be applied. In other words, *Ritchie* focused on *how* a court's statutory power must be exercised fairly and consistently in balancing the defendant's Sixth Amendment right.

This Court in *Hammon* similarly distinguished *Ritchie* from *Davis*. This Court explained that because of the specific circumstances in *Ritchie*, due process required the trial court to review the agency records in camera

to determine whether disclosure was required.[1] (*Hammon*, *supra*, 15 Cal.4th at p. 1125.) However, this court rightfully refused to "extend the defendant's Sixth Amendment rights of confrontation and cross-examination to authorize pretrial disclosure of privileged information," beyond what *Davis* requires. (*Hammon*, *supra*, 15 Cal. 4th at p. 1128.) Based on this court's *Hammon* decision, Touchstone does not have a constitutional right to pretrial discovery of communications held by third-parties which are protected from disclosure by the SCA. An as-applied constitutional challenge to the SCA, based upon Touchstone's Sixth Amendment right, will not be ripe until the victim testifies at trial.

Furthermore, unlike *Ritchie*, there is no statutory mechanism for Touchstone, the People, or the trial court to obtain and disclose the victim's Facebook records pretrial. The victim has not consented to communication

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[1] A *Brady* violation occurs when the prosecution suppresses materially favorable evidence from the accused. (*Brady*, *supra*, 373 U.S. at p. 87.)

This Court noted that *Ritchie* relied on the principles of *Brady* to conclude that due process required that the court review the CYS records *in camera*, since CYS is a government agency. (*Hammon*, *supra*, 15 Cal.4th at p. 1125.)

Since neither the victim nor Facebook are members of the prosecution team (as explained in the People's brief in intervention), *Brady* is inapplicable here. However, the conclusion in *Ritchie* that *Brady* was implicated was made without any analysis as to whether CYS was a member of the prosecution team, and if so, whether the prosecution was prohibited by statute from obtaining the records.

If the Pennsylvania confidentiality statutes in *Ritchie* prohibited the prosecution from obtaining the records, then the prosecutor could not have suppressed them. Likewise, even assuming the victim or Facebook were part of the prosecution team in this case, the People could not be found to have suppressed the sought electronic communications here; both state and federal law prohibit the People from obtaining them. It is the People's position that if due process compelled the trial court to obtain and review the records in *Ritchie,* it was because the trial court had the power to do so by statute.

being disclosed and state warrant procedures do not grant the People authority to compel the victim to reveal the communication. (See Evid. Code, § 1524 et seq. [limiting the issuance of a search warrant to evidence of a crime].)

But the lack of a statutory mechanism that would permit Touchstone to obtain the victim's private Facebook communications pretrial, either on his own or through the People, does not deprive him of any state or federal constitutional right to cross-examine the victim or his right to due process. Neither *Davis*, *Ritchie,* nor *Hammon* lead to such a result. As explained by this Court in *People v. Webb* (1993) 6 Cal.4th 494, 518, a defendant has no constitutional right to examine records which the People neither possess, nor have any greater access to than the defendant. Furthermore, Touchstone cannot argue that due process requires that either he or the People be granted additional power to obtain the victim's private Facebook content, in the absence of any statutory authority to do so. (*Kinsella*, *supra*, 361 U.S. at p. 246.)

Additionally, Touchstone's challenge to the SCA's constitutionality is not ripe at this stage of the proceedings. This Court does not have sufficient facts to address such an as-applied challenge in a pretrial discovery proceeding. As stated in *People v. Hammon*, *supra,* 15 Cal.4th at p. 1127, "Before trial, 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." Moreover, as this Court similarly held in an earlier case, an as-applied challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

There are simply too many possibilities in how this trial could progress to confidently predict, in a pretrial discovery hearing, whether non-disclosure of a victim's private communication would infringe upon Touchstone's Sixth Amendment right to confrontation and cross-examination. The victim's testimony could be completely consistent or inconsistent with the undisclosed communications. The testimony could fall somewhere in between these two extremes. The victim could fail to appear at trial, and never take the witness stand. If a conviction was then obtained without the use of any of the victim's statements, the issue would be moot. But the fact that the content of the victim's communications is unknown to the court or the parties does not, by itself, deny Touchstone a constitutional right. (See, e.g., *People v. Von Villas* (1992) 10 Cal.App.4th 201, 241, citing *United States v. Agurs* (1976) 427 U.S. 97, 109-110 [" . . . . The mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome the of trial does not establish its materiality in a constitutional sense. [Citations.]"].)

Furthermore, Touchstone is unwilling to share with the People information he believes would compel this court to overrule *Hammon* and hold that pretrial disclosure in this case is necessary because a Sixth Amendment violation is unavoidable. Counsel for Touchstone obtained an order from the Superior Court, sealing portions of counsel's declaration which presumably contain facts supporting the need for disclosure. If Touchstone is arguing that the unique facts of this case support an as-applied challenge to the SCA, then he should not be allowed to make such a challenge without revealing those facts to the People.

Consistent with *Davis*, Touchstone may cross-examine the victim regarding the victim's Facebook activity subject to the limitations of Evidence Code section 352. But if a pretrial application of the SCA poses a constitutional infringement at a trial which has not yet occurred (calling

into question the holding in *Hammon*), Touchstone has certainly not provided any evidence to suggest such an outcome.

While the SCA does not apply here, the above analysis is not completely academic. Because a criminal defendant does not have a constitutional right to pretrial discovery of the sought communications, the remedies suggested by Facebook would be tantamount to a trial court improperly creating the right in the first instance, as outlined below.

II.

IF A COURT WERE TO EMPLOY REMEDIES TO ENFORCE A STATUTORY RIGHT NOT ENACTED BY THE LEGISLATURE, IT WOULD BE TANTAMOUNT TO THE COURT CREATING THE RIGHT ON ITS OWN, IN VIOLATION OF SEPARATION OF POWERS

Facebook argues in its July 25, 2018 supplemental brief that ". . . if the communications are material for the defense, it can ask the court to put the *prosecution* to the choice of obtaining the records from providers (which is permitted under the SCA) or facing appropriate evidentiary limitations, adverse instructions, or even dismissal of the action." (Facebook Supplemental Brief filed July 25, 2018, S245203, [FB Supp. Brief] at p. 6.) This statement is flawed for several reasons.[2]

First, one cannot determine the materiality of the records without first reviewing them and after the victim has testified. Second, the SCA does not permit the People to obtain the records because the SCA yields to state law, and applicable state law prohibits a People's warrant to issue in this circumstance. (18 U.S.C. §§ 2701(a), (d); Pen. Code, § 1524 et seq.

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[2] This statement is also flawed to the extent that Facebook is referring to remedies used by courts to resolve pretrial discovery disputes in civil cases. This is because "it has long been held that civil discovery procedure has no relevance to criminal prosecutions." (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536 (*Pitchess*).)

[search warrant; issuance; grounds]). Third, and most importantly, the above statement suggests that the trial court should adopt various remedies, including ones not provided for by statute, to protect a non-existent pretrial right to discover electronic communications covered by the SCA.

Touchstone has no constitutional right to discovery beyond what *Brady* guarantees. Nor does Touchstone have a statutory right or mechanism to obtain the communications pretrial, either on his own or through the People, unlike the controlling statute in *Ritchie.* For a trial court to employ such remedies to protect a right that can only be created by statute would be tantamount to the court granting the statutory right in the first instance. This would violate the separation of powers provision found in section 3 of article III of the California Constitution: it would not only take over a core power of the legislature to pass laws, but it would also control that branch's discretion in whether to afford such a statutory right at all.

The California Constitution provides that "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) This provision "vest[s] each branch with certain 'core' [citation] or 'essential' [citation] functions that may not be usurped by another branch." (*People v. Bunn* (2002) 27 Cal.4th 1, 14.) "The doctrine, however, recognizes that the three branches of government are interdependent, and it permits actions of one branch that may "significantly affect those of another branch. [Citation.]" (*Carmel Valley Fire Prot. Dist. v. State* (2001) 25 Cal.4th 287, 298 (*Carmel Valley*).) One branch of government may perform an act or exercise a function affecting another branch provided it does not "defeat or materially impair" the exercise of a power of the other branch. (*Id.* at p. 305; *In re M.C.* (2011) 199 Cal.App.4th 784, 804.)

A court can exercise any necessary inherent power within the limits of separation of powers. As explained by this court in *Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267, "We have often recognized the 'inherent powers of the court . . . to insure the orderly administration of justice.' [Citations.] Although some of these powers are set out by statute [citation] it is established that the inherent powers of the courts are derived from the Constitution [citations] and are not confined by or dependent on statute [Citations]."

Criminal discovery is an inherent power of the court only in the absence of legislation. (*Pitchess*, *supra*, 11 Cal.3d at p. 536, superseded by statute.) However, there is express legislation which governs criminal discovery and electronic communications.

Criminal discovery in California is governed by statute. Penal Code Section 1054 et seq. applies to disclosure of materials only between the prosecutor and the defendant and/or his or her counsel. (*Barrett*, *supra*, 80 Cal.App.4th at p. 1315). These statutory provisions are not a strict codification of any constitutional right. In fact, the current discovery chapter enacted by Proposition 115 survived a constitutional challenge, when this court held that the new provisions do not limit the due process rights of criminal defendants. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.)

Penal Code section 1546.1 et seq. is express legislation governing a litigant's access to electronic communications held by third-parties. The People cannot obtain the victim's private Facebook posts without a warrant supported by probable cause of a crime, pursuant to Penal Code section 1546.1, subdivision (b)(1). Additionally, Penal Code section 1546.1, subdivision (b)(4) prohibits the People from obtaining electronic communications via subpoena for a criminal case, or if otherwise prohibited by the SCA. If the SCA applied in this case, a trial court could

not use inherent power to compel pretrial discovery of the sought electronic communications since it would be expressly prohibited by statute.

Additionally, the mere fact that Touchstone has statutory authority to subpoena records from third-parties does not create a right to the records themselves. The issuance of a subpoena duces tecum pursuant to Penal Code section 1326 is purely a ministerial act and does not constitute legal process in the sense that it entitles the subpoenaing party access to the records. (*Kling v. Superior Court*, 50 Cal.4th 1068, 1074.) The right of an accused to obtain discovery via a subpoena duces tecum is not absolute, even upon a showing of good cause to obtain records. In *Pitchess*, *supra*, 11 Cal.3d at p. 538, this court held that good cause supporting subpoena duces tecum of peace officer internal investigation records does not create an absolute right to the records and that competing governmental interests must be balanced. To the extent that Touchstone has any right to obtain the sought communications, it is not in a pretrial setting pursuant to criminal discovery statutes. Certainly, the protections found in the SCA (if it applies), Penal Code section 1546.1 et seq., and Marsy's Law require that, if disclosure is necessary to safeguard Touchstone's Sixth Amendment right, it must await a showing at trial, pursuant to *Hammon.*

If a court employed remedies to ensure a pretrial right to discovery that does not exist by guarantee of the constitution or by statute, it would be tantamount to creating that right in the first instance. This would defeat a core power of the legislature. This is because "[t]he core functions of the legislative branch include passing laws. . ." (*Carmel Valley*, *supra*, 25 Cal.4th at p. 299, citing Cal. Const., art. IV, §§ 1, 8, subd. (b), 10, 12.) For a court to exercise inherent power under these circumstances would not be in furtherance of the orderly administration of justice — it would be to grant a substantive statutory right which the legislature has yet to create.

To apply the suggested remedies would be unlawful. The inability to obtain electronic communications of a witness is not grounds to disqualify that witness from testifying. (Evid. Code, § 701.) Disqualifying a witness prior to their testimony would also be misplaced, since it could not yet be known if (and to what extent) a Sixth Amendment violation occurred, per *Hammon.* A court's dismissal pursuant to Penal Code section 1385 because Touchstone did not obtain the electronic communications pretrial would not be in the interests of justice: Touchstone does not have a constitutional or statutory right to obtain the communications pretrial. An adverse discovery instruction or other discovery sanction imposed on the People would be misplaced as well, since non-disclosure would neither violate *Brady* nor Penal Code section 1054.1. Finally, a court ordered search warrant to obtain the materials would in-and-of-itself violate the separation powers provision of the California Constitution, since such an order would require a trial court to legislate additional subdivisions to Penal Code section 1524 to include impeachment and exculpatory evidence.

Again, the SCA does not apply in this case. However, assuming it does apply here for argument sake, these remedies only serve to ensure Touchstone receives pretrial discovery, of which he is not entitled, from a third-party who has a statutory right against disclosure. Touchtone has no such guarantee under the state or federal constitution, or any such right granted by statute.

III.

WHETHER THE SCA PROTECTS FACEBOOK CONTENT WHICH THE USER RECONFIGURES TO BE PRIVATE IS A QUESTION OF FACT CLOSELY RELATED TO THE QUESTION OF WHETHER THE SCA APPLIES TO FACEBOOK AT ALL; AUGMENTATION OF THE RECORD IS NECESSARY

Facebook asks this Court to hold that the SCA protects all electronic communications that are configured as private at the time of production.

(FB Supp. Brief at p. 10.) For this Court to reach this conclusion, the SCA must first apply to Facebook. Since Facebook has made no showing in their motion to quash that the SCA applies to Facebook, it has not provided this court with any information about: (1) how its platform fits within the ambit of SCA; or (2) how data reconfigured as "private" fits within the ambit of the SCA.

As described in the People's intervenor brief, Facebook is not an Electronic Service Provider since the user content it holds is not in "electronic storage" as defined by the SCA. Additionally, it enjoys the authority to access user content far beyond what is necessary to provide services to end-users (as opposed to advertisers or application developers), which disqualifies it from the SCA under the definition of a remote computing service provider. If data reconfigured as "private" by a user somehow falls within the strict definitions of the SCA, then Facebook has provided no facts for this Court to so rule. The only facts offered thus far are from the People in their motion to augment the record. Augmentation of the record is necessary for this court to address Facebook's request.

IV.

CONSENT UNDER THE SCA IS IRRELEVANT SINCE THE SCA DOES NOT APPLY; AUGMENTATION OF THE RECORD IS NECESSARY TO ADDRESS WHETHER MARSY'S LAW PROHIBITS A *HAMMON* HEARING

Touchstone argues that Facebook's terms of service, which requires a license over user content, constitutes consent under the SCA. (Touchstone Supplemental Brief filed July 25, 2018, S245203, at p. 10.) Because the SCA does not apply here, the issue of consent is irrelevant.

The victim, however, formally objected to the discovery of his private Facebook content, citing Marsy's Law. (Cal. Const., art 1, § 28, subd. (b); Intervenor's Exh. A, F, G.) If this Court finds that the SCA does not apply to Facebook, and that the victim's objection under Marsy's Law

covers third-party subpoenas in which the victim is the subject, this court will need to determine whether a *Hammon* hearing can be conducted at all, that is, whether the court can conduct an *in camera* review of the confidential records after the victim has testified.

The threshold issue this Court must address is whether the victim has waived his right, under Marsy's Law, to refuse discovery of his Facebook content *as a result of* the terms of service.[3] As this Court stated in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 374, "While 'waiver' generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. [Citations.]" Touchstone will be precluded from arguing whether the terms of service constitute a waiver unless the record includes Facebook's terms of service, data policy, and Mr. Zuckerberg's testimony before Congress.[4] Augmentation of the record at this stage would

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[3] The California Constitution entitles a victim "[t]o refuse an interview, deposition, or *discovery request* by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents." (Cal. Const., art 1, § 28, subd. (b)(5), italics added.)

[4] The subpoena duces tecum procedure itself implicitly recognizes an expectation of privacy on the part of the person whose records are subpoenaed. (*People v. Blair* (1979) 25 Cal.3d 640, 651; *Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, 1296.) The United States Supreme Court recently held in *Carpenter v. United States* (2018) 138 S. Ct. 2206 (*Carpenter*) that a person does not relinquish a right to privacy over their location information, simply because a cell phone service provider also has access to it. ". . . the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." (*Carpenter*, *supra*, 138 S.Ct. at p. 2217.)

This court will not be able to apply the above principles to Facebook's terms of service without the evidence to do so. Augmentation of the record is necessary in this regard.

be necessary and justified, since the victim had not yet formally objected until after this Court granted review.

Should Facebook's terms of service not constitute the victim's waiver, this Court will then need to determine whether (1) the victim's constitutional right to refuse discovery to the defendant (Touchstone) will be implicated if a trial court compels Facebook to produce the sought communications for an *in camera* review before any disclosure, and (2) whether any court-ordered disclosure after an *in camera* review and after the victim testifies pursuant to *Hammon* would constitute discovery to the defendant, as defined by Marsy's Law.

These appear to be issues of first impression regarding Marsy's Law and the scope of a victim's right to refuse requests for discovery. As it relates to the issue of waiver, augmentation of the record is necessary for Touchstone to make the argument that the victim waived his right to refuse discovery, and for this court to meaningfully address the issue. This is yet another compelling reason supporting the People's motion to augment the record. Thus, Facebook should not succeed in arguing that augmentation should be denied if this Court finds that Facebook did not meet their initial burden to prove that the SCA applies. Nor should Facebook be permitted to concede the issue to unilaterally block augmentation.

CONCLUSION

The People respectfully request this Court hold that, although the SCA does not apply here, it would nonetheless survive constitutional scrutiny as applied to the facts of this case. The People also request this Court hold that the remedies suggested by Facebook would be an improper exercise of a trial court's powers. Lastly, the People request this Court find that the People's motion to augment the record to add intervenor's exhibits A though M is both necessary and appropriate, not only to address the issues raised in the merits briefs, but also to the issues raised in the supplemental briefs regarding the effect of *Facebook I.*

Dated: August 7, 2018

Respectfully Submitted,

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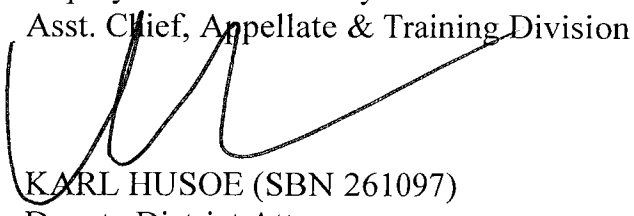

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CERTIFICATE OF WORD COUNT

I certify that this INTERVENOR'S RESPONSIVE SUPPLEMENTAL BRIEF ADDRESSING FACEBOOK v. SUPERIOR COURT (*HUNTER*) (S230051) including footnotes, and excluding tables and this certificate, contains 5,150 words according to the computer program used to prepare it.

KARL HUSOE
Deputy District Attorney

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, Respondent.	For Court Use Only
LANCE TOUCHSTONE, Real Party In Interest.	Supreme Court No.: S245203 Court of Appeal No.: D072171 Superior Court No.: SCD268262

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On August 7, 2018, a member of our office served a copy of the within Letter of **INTERVENOR'S RESPONSIVE SUPPLEMENTAL BRIEF ADDRESSING FACEBOOK v. SUPERIOR COURT (*HUNTER*) (S230051)** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid in the United States Mail, addressed as follows:

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I electronically served the same referenced above document to the following entities:

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I also served the following parties electronically via www.truefiling.com:

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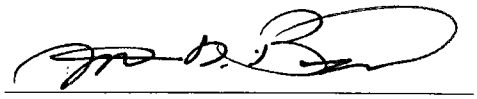
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 7, 2018 at 330 West Broadway, San Diego, CA 92101.



Marites D. Balagtas