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No. S245203

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent;

LANCE TOUCHSTONE,
Real Party in Interest.

After Published Opinion by the Court of Appeal, Fourth Appellate District, Division One, No. D072171; Superior Court of San Diego County, No. SCD268262, Hon. Kenneth So, Presiding Judge

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PETITIONER'S RESPONSE TO REAL PARTY IN INTEREST TOUCHSTONE'S SUPPLEMENTAL BRIEF ADDRESSING THE EFFECT OF *FACEBOOK, INC. V. SUPERIOR COURT (HUNTER)*

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I. INTRODUCTION

The Stored Communications Act ("SCA") is an important law that protects the privacy of all Americans' electronic communications, in part by requiring people to obtain such communications from *senders* and *recipients*—and not from service providers. Congress rationally concluded that people would distrust electronic communications if service providers could disclose those communications without safeguards—deterring the use of technology and innovation. The SCA is constitutional because it restricts only one *source* of one type of evidence, and no case has ever recognized a constitutional right to obtain evidence from the most convenient or preferred source.

Defendant Lance Touchstone asks this Court to gut the SCA by holding that it does not protect the billions of people who use Facebook. In an argument first raised in his Reply Brief, Touchstone claims that *all* Facebook users have consented to public disclosure of *all* their private messages simply by agreeing to Facebook's Terms of Service. But the Terms of Service emphasize privacy instead of waiving it. And the fact that account holders permit Facebook to collect and share non-personal data *about* their communications does not mean that they have consented to disclosure of their actual communications in a criminal proceeding.

Further, after repeatedly acknowledging that Facebook is covered by the SCA, Touchstone switches positions and argues for the first time that the SCA does not apply. Facebook plainly satisfies the definitions of a service provider covered by the SCA, and there is no authority for Touchstone's position that a company must *only* "store data" to

receive SCA protection. The SCA was enacted to safeguard electronic communications and promote innovative communications platforms. Eliminating privacy rights for billions of Facebook users would contravene those goals.[1]

II. ARGUMENT

A. Facebook's Terms of Service emphasize account holders' privacy rights

This Court held that when a social media user designates a communication as private, he "evinces an intent *not* to consent to disclosure by a provider." (*Facebook, Inc. v. Superior Court (Hunter)* (2018) 4 Cal.5th 1245, 1276–1277.) This is true regardless of whether "the communication was configured by the user to be accessible to a 'large group' of friends or followers." (*Ibid.*) Nonetheless, Touchstone argues that all Facebook account holders have waived their privacy rights and consented to disclosure of all of their private communications by agreeing to Facebook's Terms of Service. The argument relies on misrepresentations of Facebook's Terms of Service, ignores account holders' settled expectations, and would lead to harmful consequences beyond this case.

As an initial matter, the argument is waived. Touchstone did not address Facebook's Terms of Service in his Court of Appeal merits briefs or in his opening brief to this Court, and he added only a single sentence about them in his reply brief. Raising a new argument at this late date is improper, and the Court should not consider it. (Cal. Rule of Ct. 8.500(c)(1); *Flannery v. Prentice* (2001) 26 Cal.4th 572, 591 [declining to

[1] In addition to advancing brand new arguments, Touchstone's 4,112-word brief exceeds the 2,800 word limit. (Cal. Rule of Ct. 8.520(d)(2).)

decide issue not raised below as a matter of the Court's "ordinary policy"]; *Varjabedian v. Madera* (1977) 20 Cal.3d 285, 295 fn. 11.)

In any event, account holders have not waived their privacy rights by agreeing to Facebook's Terms of Service—which emphasize that their private communications remain private. Touchstone misrepresents the Terms of Service by claiming that account holders "consent to disclosure of their content to third parties." (Def's Suppl. Br. at 8.) In fact, Facebook's Terms of Service and related privacy guidelines say no such thing, and repeatedly make clear that account holders decide who sees their content:

- "When you share and communicate using our Products, you choose the audience for what you share."[2]
- "You can also choose to share publicly or with a specific group of people."[3]
- "Every time you post a status update, photo or video, you can choose who can see it."[4]
- "You own the content you create and share on Facebook. . . . You are free to share your content with anyone else, wherever you want."[5]

Account holders thus *expect* that their private communications will not be disclosed without their consent. The Court recognized as much in *Hunter*, when it held that "nothing of which we are aware in any of providers' policies or answers to FAQs suggests that users would have any reason to expect that, having configured a communication to be available not to the public but instead to a restricted group of

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[2] https://www.facebook.com/about/privacy/update [underscore in original].
[3] https://www.facebook.com/about/basics/manage-your-privacy/posts#4.
[4] https://www.facebook.com/about/basics/manage-your-privacy/posts#1.
[5] https://www.facebook.com/terms.php.

friends or followers, the user nevertheless has made a *public* communication—and hence has impliedly consented to disclosure by a service provider." (*Hunter*, *supra*, at p. 1281.) Certainly nothing in Facebook's Terms of Service notifies people that, should they become victims or witnesses of a crime, Facebook will share their private content with the alleged perpetrator.

Touchstone misleadingly uses ellipses to omit relevant parts of Facebook's Data Policy, stringing together sentences from different paragraphs to make it appear that Facebook shares "content" with third parties. (Def's Suppl. Br. at 7.) But the omitted language states that Facebook shares only *non-identifying* information—such as aggregated statistics and reports about the kinds of people who view certain ads and how they respond to those ads.[6] Facebook does not "share information that personally identifies you . . . unless you give us permission."[7]

Further, the fact that Facebook itself collects data cannot constitute consent to public disclosure. (Def's Suppl. Br. at 6–7.) Facebook could not operate its services unless Facebook itself retained that content on its servers. The Data Policy explains the limited ways in which Facebook uses content,[8] and none of those ways involves sharing personally-identifying content with any third parties, let alone the general public.

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[6] See also https://newsroom.fb.com/news/2018/04/data-and-advertising/.

[7] https://www.facebook.com/policy.php.

[8] Facebook uses data to "[p]rovide, personalize and improve our Products"; to "help advertisers and other partners measure the effectiveness and distribution of their ads"—which, as explained above, does *not* involve disclosing identifying information; to "[p]romote safety, integrity and security"; to "[c]ommunicate with you"; and to "[r]esearch and innovate for social good," such as by analyzing "information we have

The fundamental flaw in Touchstone's argument is his assumption that consent for one purpose means consent for all purposes. Because privacy rights are so important, courts interpret privacy waivers and statements of consent narrowly, and do not interpret consent to one type of disclosure as consent to other types of disclosure. (See *Stoner v. Cal.* (1964) 376 U.S. 483, 489; *People v. Brown* (1979) 88 Cal.App.3d 283, 290 ["[A]lthough by checking himself into a hospital, a patient may well waive his right of privacy as to hospital personnel, it is obvious that he has not turned 'his' room into a public thoroughfare."].) Here, the fact that account holders permit Facebook to use their information for limited purposes or allow advertisers to see non-identifying aggregated information does not mean that they consented to disclosure of the content of their private communications to third parties.

Touchstone also misrepresents Facebook's policy for responding to subpoenas. (Def's Suppl. Br. at 8–9.) Facebook's policy states that it will produce information in those cases only "if we have a good faith belief that the law *requires* us to do so."[9] As this Court held, the SCA *precludes* Facebook from disclosing content unless one of the limited exceptions in section 18 U.S.C. § 2702 applies. (*Hunter*, *supra*, at p. 1265.) The fact that account holders expect Facebook to comply with the law hardly means they have consented to public disclosure of their private communications.

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about migration patterns during crises to aid relief efforts." (https://www.facebook.com/policy.php.)

[9] https://www.facebook.com/policy.php.

Even if Facebook's Terms of Service could be interpreted expansively to constitute a broad privacy waiver—and they cannot—the Court should decline that invitation because it would have unintended consequences reaching far beyond this case. Touchstone claims that there is no risk of opening the floodgates to all litigants seeking content, because he seeks a ruling limited to criminal defendants. (Def's Suppl. Br. at 9, fn. 8.) But that is incorrect: under *Hunter*, if account holders have consented to disclosure, the SCA's protections completely fall away. (*Hunter*, *supra*, at p. 1284.) Thus, reading a broad privacy waiver into Facebook's Terms of Service would mean there are no restrictions on anyone—including "law enforcement"—to access those communications. (*Id.* at p. 747.) Surely, the criminal-defense bar does not wish for the government to have unfettered access to all Facebook content, but that is the natural consequence of their position.

B. The "very nature" of social media does not cause it to fall outside the SCA's protections

Touchstone advances several arguments for why social media does not deserve the SCA's protections, but the Court rejected each of the arguments in *Hunter* and should do so again here.

First, Touchstone argues that social media falls outside the scope of the SCA, because anything that is "social" is necessarily "public." (Def's Suppl. Br. at 11.) But as this Court explained, Facebook permits people to *restrict* the number of people who may view a particular communication—the very definition of *non-public*. (*Hunter*, *supra*, at p. 1278.)

Second, Touchstone is wrong that Facebook communications look nothing like email or private bulletin boards. (Def's Suppl. Br. at 11.) Companies, clubs, small groups of friends, and even families set up private Facebook webpages to communicate exclusively with each other.[10] People also use Facebook to send private messages to an individual person (just like a traditional email), or initiate person-to-person voice calls, or send photographs or documents. None of those activities appear as "posts" on anyone's public or private Facebook's page, and they can be accessed only by the sender and recipient.[11]

Third, *Hunter* rejected Touchstone's argument that all social media is "public" because recipients can theoretically forward messages to other people. (Def's Suppl. Br. at 12.) That same risks exists with almost any type of communication, including letters. Communications do not lose SCA protection simply because recipients can share them with unintended recipients. (*Hunter*, *supra*, at p. 1278.)

C. Facebook is a provider under the SCA

Touchstone argues for the first time that the SCA does not apply to Facebook because Facebook does not "just store user data." (Def's Suppl. Br. at 10.) Touchstone did not make this argument to the trial court, did not raise it in the Court of Appeal, and

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[10] (See https://www.facebook.com/help/community/question/?id=438862402946007 [explaining how to set up a Facebook page that is accessible to family members only].)

[11] (See https://www.facebook.com/help/1117039378334299/?helpref=hc_fnav ["Only you and the people you're messaging can view your conversation."]; https://www.dummies.com/social-media/facebook/how-to-send-private-messages-to-facebook-friends/ ["Facebook has a feature that enables you to send private messages to your friends. **Think of it like Facebook e-mail**."].)

did raise it in his briefs to this Court. Indeed, Touchstone affirmatively conceded that the SCA applies to Facebook throughout this appeal. (See, e.g., Def's Opening Br. at 19 ["*providers such as Facebook* 'may' produce communications with consent of the user"], italics added; *id.* at 34–35 [arguing that prosecutors can obtain Facebook records under the SCA]; *ibid.* [arguing that Facebook records "are plainly unavailable to the defense pursuant to the [SCA]"]; Def's Pet'n for Rev. at 3 ["based on the limiting language of the [SCA], access to [social-media] records is prohibited to the criminally accused"].) The Court should not permit Touchstone to switch his position at this stage in the appeal, and should not entertain this new argument. (See *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1520 [noting "well-established tenet of appellate jurisprudence that a litigant may not pursue one line of legal argument in the trial court, and having failed in that approach, pursue a different, and indeed, contradictory line of argument on appeal, thus depriving the trial court of the opportunity to consider what the appellant contends on appeal is the real dispute"].)

Touchstone's new argument is also incorrect. He does not analyze the SCA's definitions of an "electronic communication service" ("ECS") or "remote communications service" ("RCS"), even though both services are covered by the SCA. (18 U.S.C. § 2702(a).) Facebook easily satisfies both definitions because it indisputably offers "the ability to send or receive wire or electronic communications" (§ 2510(15)) and "computer storage and processing services by means of an electronic communications system" (§ 2711(2)).

In *Hunter*, this Court recognized that "[p]rior decisions have found that Facebook and Twitter qualify as either an ECS or RCS provider," and found "no reason to question this threshold determination." (*Hunter*, *supra*, at p. 1268.) Indeed, *every* court to consider the issue has concluded that Facebook and other social media providers qualify as either an ECS or RCS provider. (See Facebook's Response to S.D. District Attorney's Br. at 8.)

Touchstone argues without any support that a company must *only* "store data" to receive SCA protection. (Def's Suppl. Br. at 10.) The ECS and RCS definitions apply to any company that provides sending/receiving services *or* "storage and *processing* services." Indeed, the House Report that Touchstone cites discusses the "array of services" that early ECS and RCS providers offered, including "electronic bulletin boards, electronic data bases, [and] videotext services," and noted that "many of these services also record the nature of the transactions." (H.R.Rep. No. 99–647, p. 22 (1986).) Congress recognized that providers were not only passive bailees, but also interacted with their customers' data. (*Id.* at p. 23.) The fact that Facebook processes and analyzes data so that it can provide a free and safe social media platform does not place it outside the SCA's protections.

It would also defy the purpose of the SCA to hold that it does not cover one of the world's largest holders of stored communications. The point of the SCA is to protect people's electronic communications (wherever they reside), reduce legal uncertainty about electronic privacy rights, and promote innovation and development of new communications technologies and platforms. (See *Hunter*, *supra*, at pp. 1262–1263.)

The billions of people who use Facebook have settled expectations about the privacy of their communications. Suddenly declaring for the first time that the SCA does not apply to Facebook would create legal uncertainty and thwart innovation in communications platforms—precisely what the SCA was designed to avoid.

D. The SCA is a constitutional restriction on a single *source* of evidence

Touchstone argues that the SCA is unconstitutional because, under it, he lacks "any means" to obtain "the full records necessary for his fair trial." (Def's Suppl. Br. at 13.) This ignores the many ways that Touchstone can obtain communications under the SCA. Indeed, the record here shows that Touchstone made virtually no effort to obtain communications from senders or recipients—including his own sister. (See Pet'n for Rev., Ex. A at 24 [holding that Touchstone did not exhaust other ways to obtain records].)[12]

What Touchstone seeks is a "one stop shop" for social media communications. But he has never cited any authority for a constitutional right to obtain evidence from his preferred source. Congress is plainly allowed to restrict one *source* of evidence, or one *means* for obtaining it—as it did with the SCA. Congress rationally concluded that people should seek electronic communications in the same way they obtained analog communications for over a century—from senders and receivers—and that innovation would be hindered and privacy rights eroded if third parties could obtain communications

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[12] Further, the California Attorneys for Criminal Justice's supplemental brief describes numerous ways that the trial court and prosecution can assist criminal defendants in obtaining electronic records without violating the SCA.

from service providers. Touchstone has never contended that Congress lacked compelling reasons for enacting the SCA's disclosure prohibitions, dooming his constitutional challenge.

Laws that restrict evidentiary sources are constitutional even if they sometimes place material evidence outside the defendant's reach. For example, a defendant cannot subpoena an attorney to divulge attorney-client communications. This evidence could be highly exculpatory—such as a third-party's confession to his attorney that he committed the crime with which defendant was charged—but that does not permit a defendant to obtain the evidence from that particular source. (See *People v. Gurule* (2002) 28 Cal.4th 557, 594.)

Moreover, because the SCA does not violate any constitutional rights, the Court should not rewrite it to provide for in-camera reviews. (Def's Suppl. Br. at 9, fn. 8.) A defendant is not entitled to in-camera review of evidence he obtained by unlawful wiretap to determine its exculpatory value. And like the law against private wiretaps, the SCA's disclosure prohibition makes no exception for in-camera review, as this Court has already explained. (*Hunter*, *supra*, at p. 747, fn. 32.)

In sum, the SCA is a reasonable restriction on evidence gathering that serves many vital interests. This Court should put to rest Touchstone's misguided notion that the SCA is unconstitutional.

III. CONCLUSION

This Court should affirm the Court of Appeal and uphold the SCA.

DATED: August 8, 2018

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CERTIFICATE OF WORD COUNT

I, Joshua Lipshutz, certify that, according to the software used to prepare this brief, the word count of this brief is 2,799 words, which is fewer than the 2,800 words allowed for Supplemental Briefs under California Rule of Court 8.520(d)(2). I swear under penalty of perjury that the foregoing is true and correct.

DATED: August 8, 2018

Joshua S. Lipshutz
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Case Name: Facebook, Inc. v. Superior Court of San Diego
Case No: S245203

PROOF OF SERVICE

I, Teresa Motichka, declare as follows:

I am a citizen of the United States and employed in San Francisco County, California; I am over the age of eighteen years, and not a party to the within action; my business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105-0921. On August 8, 2018, I served the within documents:

PETITIONER'S RESPONSE TO REAL PARTY IN INTEREST TOUCHSTONE'S SUPPLEMENTAL BRIEF ADDRESSING THE EFFECT OF *FACEBOOK, INC. V. SUPERIOR COURT (HUNTER)*

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Executed on August 8, 2018, at San Francisco, California.

Teresa Motichka

Teresa Motichka

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