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.	No. S245203 Court of Appeal No. D072171 Superior Court No. SCD268262

REAL PARTY IN INTEREST TOUCHSTONE'S RESPONSE TO SAN DIEGO DISTRICT ATTORNEY INTERVENOR BRIEF

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ARGUMENT

1. Facebook does not fit the description of an electronic communication or remote computing service contemplated by the SCA.

Facebook does not conform to Congress or case law's notion of an electronic service provider prohibited from disclosures by the Stored Communications Act, 18 U.S.C. §2701 et seq. ("SCA"), because Facebook expansively uses and manipulates user content well beyond the provision of mere storage and delivery. Intervenor District Attorney correctly summarizes this position in their brief in intervention, adeptly analyzing the SCA and applicable caselaw.[1]

First, Facebook does not qualify as an electronic communication service provider because it does not provide temporary or intermediate storage of communication incidental to its transmission, nor does it store that communication merely for backup purposes. (18 U.S.C. §§ 2702(a)(1), 2510(17).) Rather, Facebook retains and utilizes user communication content for its own business purposes and to enhance services offered on the platform. (See Facebook, *Terms of Service* <https://www.facebook.com/legal/terms/plain_text_terms> and Facebook, *Data Policy* <https://www.facebook.com/full_data_use_policy> [as of August 7, 2018].)[2] This takes Facebook out of the realm of service providers contemplated by the SCA as "electronic communication service" providers. Second, Facebook does not qualify as a remote computing service under the SCA, because Facebook does not maintain their service "solely for the purpose of providing storage or computer processing services." (18 U.S.C. §2702(a)(2)(B).) Moreover, and contrary to the requirements of the SCA for

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[1] Touchstone argues similarly in his brief in response to the Court's opinion in *Hunter*; See Touchstone's Supplemental Brief Addressing the Effect of *Facebook v. Superior Court (Hunter)* at pp. 9-11.

[2] See also Touchstone's Supplemental Brief pp. 4-9 and Amici Brief by California Attorneys for Criminal Justice pp. 4-11.

remote computing services, Facebook is "authorized to access the contents of any such communications for purposes of providing... services other than storage or computer processing." (*Ibid.*) Thus Facebook is not a "remote computing service" that is prohibited by the SCA from disclosing user content.

The court in *Juror No. One* foretold of this conclusion in 2012, well before Facebook was subject to congressional inquiry or public scrutiny regarding their use of subscriber content. (*Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854.) The *Juror No. One* court found that, "if the service is authorized to access the customer's information for other purposes, such as to provide targeted advertising, SCA protection may be lost." (*Id.* at 862.) These are the circumstances today, having listened to congressional testimony from Facebook's founder and learned in tremendous detail the breadth and magnitude of the platform's use of communication content beyond the confines contemplated in the SCA. Finding that Facebook does not function as an electronic service provider subject to the prohibitions of the SCA, this Court can overturn the Court of Appeals reversal of Respondent Court's ruling that ordered the disclosure of these records. In doing so, Touchstone will receive both the records and fair trial that the Constitution guarantees him.

2. Intervenor District Attorney has discovery obligations to disclose these records pursuant to the California Penal Code, Rules of Professional Conduct, and Constitution.

Regardless of the Court's finding as to the application of the SCA on Facebook, the prosecution has separate and independent obligations to produce these records based on discovery requirements imposed upon them by the State of California. These requirements were recently expanded by Rule of Professional Conduct 5-110. (Cal. Rule of Prof. Conduct, rule 5-110,

Approved by the Supreme Court Nov. 2, 2017.)[3] Rule 5-110 requires that the prosecutor "[m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence" (*Id.*, subd. D), including but not limited to the disclosure of "impeachment evidence or information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely" (*Id.*, Discussion at 3). The discovery sought in this case falls squarely within this description. These Facebook records [1] are known and reasonably know to the prosecutor, [2] tend to negate the guilt of the accused and mitigate their defense, and [3] cast significant doubt on the credibility of the prosecution's key witness. Knowing that these material records exist, the willful suppression of that evidence constitutes a denial of a constitutional fair trial to Touchstone, as "[i]t is settled that the intentional suppression of material evidence denies a defendant a fair trial." (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, citing *Brady v. Maryland* (1963) 373 U.S. 83, 87.)

Rule 5-110 does not narrow the prosecutor's obligation to produce those records only within its direct or physical possession. Rather, Rule 5-110 explicitly expands the discovery obligations of the prosecutor beyond those materials defined in *Brady v. Maryland* (1963) 373 U.S. 83. (Cal. Rule of Prof. Conduct, rule 5-110, Discussion at 3: "The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* [citation omitted] and its progeny.") Thus, the limitations that apply in a *Brady* inquiry do not apply to this Rule, and the prosecutor can be held to a wider range of discovery obligations beyond

[3] Note that Rule 5-110 was approved after Touchstone's motion to compel the discovery from the prosecution was heard on March 10, 2017; See Exhibit A to Real Party in Interest Touchstone's Answer filed on May 30, 2017, in the Court of Appeal 4th Dist. 1st Div. Case No. D072171 (Motion to Compel).

those materials in their immediate or direct possession.[4]

The prosecution's obligation to produce these records is also grounded in due process. "Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, [citation], it does speak to the balance of forces between the accused and his accuser." (*Wardius v. Oregon* (1973) 412 U.S. 470, 474.) This Court has interpreted the United States Supreme Court's due process discussion in *Wardius* to permit a criminal defendant to request a lineup, having shown to the trial court that such a lineup is material to the defense. (*Evans, supra,* 11 Cal.3d 617). This court in *Evans* concluded that "[b]ecause the People are in a position to compel a lineup and utilize what favorable evidence is derived therefrom, fairness requires that the accused be given a reciprocal right to discover and utilize contrary evidence." (*Id.* at p. 623; see also *People v. Mena* (2012) 54 Cal.4th 146, 159-60).

The factual scenario in the instant case mirrors that in *Evans*: the prosecution is able to readily obtain the sought records. In fact and practice, the prosecution obtains Facebook records in the regular course of business while prosecuting defendants. The prosecution routinely obtains Facebook records to "utilize what favorable evidence is derived therefrom." (*Evans, supra*, 11 Cal.3d at p. 623.) However, based on the current interpretation of the SCA, the defense is unable to access reciprocal rights to the same discovery in order to "utilize contrary evidence." (*Ibid.*) Because the prosecution is in a position to obtain Facebook records and utilize what favorable evidence is derived from it, "fairness requires that" the defense be given a reciprocal right to discover and utilize contrary evidence from that

[4] In any event, the prosecution is in constructive possession of the sought Facebook records by virtue of their exclusive access to them at this time, as argued in Touchstone's Opening Brief on the Merits at IV. B. This triggers the prosecutor's discovery obligations under the Penal Code to discover all exculpatory evidence, including "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial." (Cal. Penal Code § 1054.1 subd. (e), (f).

same source. (*Ibid.*)

3. Probable cause exists for a search warrant to issue for this user's Facebook records.

The penal code permits search warrants to issue "[w]hen the... things to be seized... constitute evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony." (Cal. Pen. Code §1524(a)(4).) Whether or not a person acted in self-defense is highly material to the determination of what felony, if any, has occurred. Whether or not the user in this case made threats to family members of Touchstone, possessed firearms, spoke about the case on Facebook, or committed additional crimes of violence is wholly relevant and material to a factual determination as to whether or not Touchstone committed a felony when he assaulted the user on August 8, 2016.

The factual history of this case, declarations made by defense counsel based upon publicly-available Facebook records, and the user's subsequent arrest for possession of firearms (conduct that was directly referenced in his public Facebook posts)[5], give the prosecution ample probable cause to support a search warrant for the sought records. The prosecution has been aware of the relevant and material nature of this user's public Facebook records since the motion to compel was filed for those records in March 2017.[6] Probable cause was further established as this litigation proceeded through the Court of Appeal, during which time the user's Facebook records were still publicly available.

The prosecution has ample knowledge of these records and the probable cause justifying their disclosure. It is not unreasonable for the

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[5] Jeffrey Renteria is currently charged with eight felony violations in San Diego Superior Court Case No. CD277450, including four charges of unlawful possession of a firearm as a convicted felon and four charges of unlawful possession of ammunition.

[6] See Exhibit A to Real Party in Interest Touchstone's Answer filed on May 30, 2017, in the Court of Appeal 4th Dist. 1st Div. Case No. D072171 (Motion to Compel); content and relevance of sought Facebook posts are discussed therein at pp. 2-3.

prosecution to seek these records in their investigation of this case; rather it is unreasonable for them to refuse this obligation. A ruling in this case should allow for the trial court to order the production of such records as a matter of the prosecutor's discovery obligations, as the suppression of this evidence denies touchstone a fair trial. (*Evans, supra,* 11 Cal.3d at p. 625.)

4. An alleged victim's refusal to cooperate with discovery production does not trump an accused person's constitutional rights to a fair trial.

An alleged victim's rights under Marcy's Law are not without exception. In fact, these rights are subject to judicial scrutiny that balances any competing interests in the matter. Marcy's Law itself states that the rights of an alleged victim are not exclusive, but shared with the all citizens. Specifically, Marcy's Law emphasizes the universal "Right to Truth-in-Evidence," stating that "relevant evidence shall not be excluded in any criminal proceeding," and that "[n]othing in this section shall affect... Evidence Code Section... 1103." (Cal. Const., art. I, § 28(f)(2).) Evidence Code Section 1103 permits Touchstone to admit evidence of the alleged victim's character for violence, which was readily demonstrated on the public record of his personal Facebook account. (Cal. Evid. Code §1103(a).) Thus nothing in Marcy's Law shall affect the criminally accused's rights to have all relevant evidence included in their proceedings and to obtain and present defense evidence pursuant to Evidence Code Section 1103.

Touchstone seeks this user's Facebook records because they are highly relevant and material to the determination of guilt or innocence in this matter. The records also constitute admissible evidence under Evidence Code Section 1103. This user has objected through the prosecutor's office to the release of the records, but the Court should note that this is not the first objection lodged by this user; he also objected to the release of his medical records. (See Defense Declaration in Opposition to Motion to Quash,

Intervenor Exhibit L at p. 128.) The superior court ordered the records released over the objection, finding that the records were patently relevant and necessary to the criminal proceedings.

Just as the Constitution grants an alleged victim the right "to prevent the disclosure of confidential information or records to the defendant... which disclose confidential communications made in the course of medical or counseling treatment," the Constitution also permits an alleged victim "to refuse [a] discovery request by the defendant." (Cal. Const., art. I, § 28(b)(4).) Thus, this user is allowed to object to the release of his Facebook records just as he was allowed to object to the release of his medical records. However, the court is required to balance competing interests in the sought records and consider that "relevant evidence [such as evidence admissible pursuant to Evidence Code Section 1103] shall not be excluded in any criminal proceeding," in deciding to release the records over objection by the alleged victim. (Cal. Const., art. I, § 28(f)(2).) When this user objected to the release of his medical records, the court heard the objection and weighed it against Touchstone's constitutional right to a fair trial that includes relevant and material evidence. This same balance of interests should occur with the alleged victim's Facebook records. Such balancing is legally proper and consistent with the constitutional demands of Marcy's Law. There is no irreparable conflict with the victim rights of Marcy's Law and the constitutional rights of the criminally accused.

CONCLUSION

It is uniquely precarious that defense counsel can obtain confidential medical records over the alleged victim's objection, while the same person's social media records are mystically beyond reach. What is more, the prosecution also disclosed this user's cell phone records as part of routine discovery in the case. Defense counsel also utilized a court-ordered subpoena and subsequent *in camera* review to obtain this user's psychiatric

records... How is it that defense counsel may readily and righteously obtain confidential medical, cell phone, and psychiatric records of a complaining witness, while their social media records are entirely unobtainable under the law? This is not the system of justice envisioned by Congress when they enacted the Stored Communications Act, and it is not the system of justice this Court should enforce.

Touchstone urges the Court to find that the SCA does not apply to Facebook and that the sought records can be produced without conflict with federal law. In addition, Touchstone urges the Court to find that the prosecution has an independent obligation to produce these records to the defense pursuant to the rules governing discovery in the State of California.

Dated: August 8, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, KATE TESCH, hereby certify that, based on the software in the Microsoft Word program used to prepare this document, the word count for this brief is 2,397 words. I swear under the penalty of perjury that the foregoing is true and correct.

Dated: August 8, 2018

Respectfully submitted,

/s Kate Tesch
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PROOF OF SERVICE

I, undersigned declarant, state that I am a citizen of the United States and a resident of the County of San Diego, State of California. I am over the age of 18 years and not a party to the action herein. My office address is 450 "B" Street, Suite 1200, San Diego, California 92101.

On August 8, 2018, I personally served the attached **RESPONSE TO SAN DIEGO DISTRICT ATTORNEY INTERVENOR BRIEF)** to the following parties via U.S. Postal Service:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 8, 2018, in San Diego, California.

Signed: _____

Printed: _____
DECLARANT