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SUPREME COURT COPY

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September 4, 2019

VIA COURIER

Chief Justice Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
Room 1295
San Francisco, CA 94102-4797

Re: ***Facebook, Inc. v. Superior Court of San Diego County* ("*Touchstone*")**, Case No. S245203 (Fourth District Court of Appeal Case No. D072171)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to this Court's order of August 14, 2019, Petitioner Facebook, Inc. ("Facebook") submits this letter brief to address: "(A) whether the underlying subpoena is supported by good cause, and (B) whether the trial court's denial of the motion to quash the subpoena should be vacated and the matter remanded to the Court of Appeal with directions to remand to the trial court for further proceedings regarding the motion to quash." (Aug. 14, 2019 Order ("Order") at p. 1.) Facebook addresses these questions in reverse order.

I. Regardless of Whether Good Cause Exists, this Court Should Affirm the Court of Appeal's Determination that the SCA Bars Defendant's Subpoena

As an initial matter, this Court should not remand this case for further proceedings on whether good cause supports Defendant's subpoena, because *regardless* of whether good cause exists, the subpoena is barred by the Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.* ("SCA"). Because the Court of Appeal already issued a ruling on that basis, this Court should simply affirm that decision, instead of remanding for a renewed good cause analysis that—regardless of the outcome—would not change the result under the SCA.

In the proceedings below, the Court of Appeal correctly determined that the SCA broadly prohibits providers like Facebook from divulging the contents of communications in response to a criminal defendant's subpoena absent an applicable exception. (*Facebook, Inc. v. Superior Court* ("*Touchstone*") (2017) 15 Cal.App.5th 729, 748.) That principle has since been reiterated by a number of courts, including this one. (See *Facebook, Inc. v. Superior Court* (2018) 4 Cal.5th 1245, 1250 ["[T]he Court of Appeal was correct to the extent it found

The Court's August 14 Order requests that the parties address four specific factors relevant to the good cause analysis.[1] (Order at pp. 1-2.) Each of those factors supports Facebook's contention that Defendant's subpoena is not supported by good cause because it is backed only by unfounded speculation and seeks materials to which Defendant already has access.

A. Defendant lacks "plausible justification" because his subpoena rests on speculation and unsupported conclusions.

Defendant's subpoena is not supported by a "plausible justification" for the discovery he seeks. Rather, Defendant supported his request for "all records associated with" Jeffrey Renteria's Facebook account from inception to the date of the subpoena with nothing more than pure speculation.

"The party seeking the issuance of a subpoena for the production of documents 'must first show the materiality of the desired evidence and cannot obtain permission to search through all (his [victim's]) papers and records merely in the hope or expectation that the investigation will disclose favorable information.'" (*Johnson v. Superior Court* (1968) 258 Cal.App.2d 829, 835-836 [quoting *McClatchy Newspapers v. Superior Court* (1945) 26 Cal.2d 386, 398].)

Defendant asserts that the content sought by the subpoena "is relevant because (1) it *may* contain additional information that is inconsistent with the information previously provided by Mr. Renteria to law enforcement and the prosecution as it relates to this case, (2) it *may* contain additional information that demonstrates a motivation or character for dishonesty in this matter, (3) it *may* contain additional information that demonstrates a character for violence that is relevant to the self-defense that will be asserted by defense counsel at trial, and [(4)] it *may* contain additional information that provides exonerating,

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[1] The four factors are: "(i) whether in light of the preliminary hearing transcript and related exhibits, and the above-referenced declaration and exhibits, defendant's subpoena seeking all of Jeffrey Renteria's private messages and restricted social media communications is supported by a 'plausible justification' to acquire those documents; (ii) whether the request for all of Renteria's Facebook communications from inception of his account to March 16, 2017, is overbroad; (iii) whether, under these circumstances, defendant made adequate efforts to locate and subpoena Renteria (or others) directly and attempt to acquire the communications from him (or them) instead of resorting in the first instance to Facebook; and (iv) whether, under these circumstances, Renteria's privacy or constitutional rights would be impaired or violated by enforcement of the underlying subpoena, or a subpoena served on him." (Order at pp. 1-2.)

exculpatory evidence for Mr. Touchstone." (Unsealed Decl. in Opposition to Facebook's Motion to Quash ("Unsealed Decl.") ¶ 23, italic emphasis added.) But none of these aspirational statements are actually supported by specific facts tending to show plausible justification that such private content exists. Indeed, Defendant *admits* that his request is entirely speculative. (*Id.* ¶ 20 ["It is unknown whether additional relevant posts have been made . . . ."].)

In fact, the recently unsealed materials show only that Defendant already possesses information that support Defendant's theory such that even if Defendant's speculation is correct and some relevant information exists, that evidence would be cumulative of evidence Defendant already has. (Defendant's Opening Brief at pp. 9-10, 28 [admitting that Defendant already has access to public exculpatory information of the type sought by his subpoena].)

None of the newly unsealed documents alter the speculative nature of the request. If anything, they bolster it, since they consist of statements by the Victim that are directed to a public, not private audience. (Unsealed Decl. ¶ 12 [imploring others to support gofundme.com page]; *id.* ¶ 14 [imploring others to attend public hearings in the case].) If anything, the public statements suggest that there likely *are not* any sentiments that the Victim held back from the public and only expressed privately, since many of the public posts contain statements that would not normally be viewed as appropriate for a public audience, but were nonetheless made publicly by the Victim. (*Id.* ¶ 15 [statement that Victim will be forced to rob others]; *id.* ¶ 16 [statement that Victim was in a location to dump a body]; *id.* ¶ 17 [statement that Victim has to fight the urge to kill]; *id.* ¶ 18 [statement that Victim has conversations with himself about violence while on drugs].) Moreover, Defendant admits that he has obtained from other sources a message from the Victim to a member of Mr. Touchstone's family, but does not explain how that message suggests there is relevant private content. There is simply no suggestion that other relevant statements were made privately.

Further, the unsealed documents include a public post by the Victim stating: "Btw[] folks I do not have access to my private messages while in the hospital. You must call me or post on my wall if you want to communicate." (*Id.* Ex. E [August 30, 2016 post by the Victim].) Thus, if anything, the content of the unsealed documents *reduces* the likelihood that inaccessible exculpatory private content exists for the most relevant period (the direct aftermath of the shooting), because it suggests that the Victim *did not have access to his private messages* during that time, and therefore could not have generated the type of non-public content sought by Defendant's subpoena. And, as described above, the Victim's continuous public expression of matters that many would generally only express privately—

even *after* the Victim presumably left the hospital—belies any argument that there are likely relevant and non-cumulative private messages from other, less-relevant time periods.

B. Defendant's subpoena is an overbroad fishing expedition.

Defendant's subpoena is also not supported by good cause because it is an overbroad fishing expedition, seeking practically *all* records generated on the Victim's Facebook account from the inception of the account to the date of the subpoena. A criminal defendant's subpoena cannot be enforced if it is "intended as a general 'fishing expedition.'" (*United States v. Nixon* (1974) 418 U.S. 683, 700.) That is especially so when a subpoena is directed to a third party, as is the case here. (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 224-225 [noting that limits on "fishing expeditions" apply "with even more weight to a nonparty"].) Here, Defendant seeks all of the Victim's content—including content that significantly predates the Victim being shot—but has articulated no reason whatsoever demonstrating the significance of that content.

The SCA's bar on production by service providers like Facebook was specifically designed, in part, to prevent fishing expeditions like Defendant's subpoena. Congress desired to promote the use of electronic communications technologies by, *inter alia*, ensuring the privacy of users' communications by preventing litigants from seeking a download of all such content from the provider. (See Sen.Rep. No. 99-541, 2d Sess., p. 5 (1968) [explaining that the SCA is important because failing to implement protections against disclosure by electronic service providers "may unnecessarily discourage potential customers from using innovative communications systems"]; Remarks of Sen. Leahy, 132 Cong.Rec. 7992 (1986) ["[T]he absence of [] privacy protections may be inhibiting further technological development in this country and [] enactment of [] privacy protections will encourage the full use of modern computer technology."].) Rather, the SCA forces litigants to seek content directly from the parties to the communications, thereby allowing account holders to assert any privacy objections for themselves.

C. Defendant is required to seek records from the Victim.

Defendant's subpoena also lacks good cause because he has not even attempted to obtain the desired records directly from the Victim or other party to the speculated communications. Indeed, Defendant has numerous other ways to obtain the materials he seeks without requiring Facebook to risk violating federal law. (See Facebook's Answer Brief at pp. 19-35.) As reflected in the Superior Court's preliminary hearing transcript, Defendant has neither attempted to subpoena the Victim or any other recipient of the communications Defendant seeks, nor sought to obtain the information through a court order (1) compelling disclosure by the account holder, or (2) requiring the prosecution to choose

between obtaining a search warrant or facing evidentiary sanctions. (Appendix of Exhibits ("AE") at pp. 122-127.)

Nor does Defendant's speculative concern about spoliation—that he "*believes* that Mr. Renteria is likely to destroy or delete relevant evidence from his Facebook account, if he is personally served with a subpoena to produce his own records," (Unsealed Decl. ¶ 35, italic emphasis added)—excuse Defendant from seeking records from the Victim directly. The only factual basis offered for Defendant's expressed concern is the assertion that the Victim "is chronically uncooperative and combative with authority figures." (*Id.* ¶ 34.) But, as the Court's August 14 unsealing order reveals, that belief is based *entirely* on descriptions of four encounters with police officers from 2012-2014, the most recent of which was a 2014 encounter in which the Victim allegedly was "argumentative about not being able to use marijuana." (*Id.* ¶ 34.a.) Such dated and factually dissimilar events have no bearing on whether the Victim would "destroy or delete" evidence if subpoenaed at which time he could be appropriately admonished. And there is no greater risk of spoliation by the Victim in the electronic data context than that which is inherent in any subpoena for physical documents. (*Touchstone*, *supra*, 15 Cal.App.5th at p. 747 ["As a threshold matter, [spoliation] concerns apply equally to paper documents and are not unique to electronic documents stored by third party providers."].) Indeed, there is even *less* of a spoliation risk here than in the case of a subpoena for physical documents, since Facebook has taken steps to preserve the account at issue.

More importantly, Defendant is *required* to seek information from the Victim or another source, because the SCA does not permit Defendant to compel disclosure from Facebook with a subpoena. As described in Facebook's Answering Brief (Facebook's Answering Brief at pp. 19-37), Defendant can obtain the discovery he seeks from a number of sources that do not require Facebook to violate the SCA. For instance, he could issue a subpoena to the Victim himself, or to recipients of the Victim's private communications. (See *Negro v. Superior Court* (2014) 230 Cal.App.4th 879, 897-898 [enforcing subpoena for witnesses own social media records].) And if Defendant does not know the recipients of the Victim's communications, he can subpoena or obtain a court order for the non-content information from Facebook and then subpoena the recipients that the non-content production reveals. Defendant could also work with the prosecution to obtain a search warrant. (See *People v. Goliday* (1973) 8 Cal.3d 771, 779-782 [explaining that the prosecution must help locate witnesses vital to the defense].) Defendant has taken none of those steps; his efforts to obtain the information from the Victim or another source consist of Defendant's counsel leaving business cards at two addresses associated with the Victim. (Unsealed Decl. ¶ 28.)

D. The SCA ensures that account holders have an opportunity to assert any privacy interests themselves.

Finally, the Court asks the parties to address "whether, under these circumstances, Renteria's privacy or constitutional rights would be impaired or violated by enforcement of the underlying subpoena, or a subpoena served on him." (Order at p. 2.) One of the SCA's primary purposes is to allow people to be the masters of their own privacy when using electronic communications technologies, by prohibiting providers like Facebook from disclosing the contents of stored communications except in a limited number of specifically identified circumstances, which do not include subpoenas. As a result, litigants must obtain such content directly from the senders or recipients, thereby giving the people with direct privacy interests an opportunity to protect those interests. To the extent the Victim wishes to assert privacy or constitutional interests in the communications at issue, the SCA gives him an opportunity to do so—subpoenaing Facebook directly does not.

III. Conclusion

This Court should affirm the Court of Appeal's decision and hold that Defendant's subpoena is barred by the SCA, and should address the important questions raised by the Court's order granting review of this case. Alternatively, if the Court is inclined to address the issue of whether Defendant's subpoena is supported by good cause, it should hold as a matter of law that it is not because the SCA requires Defendant's subpoena to be directed at the Victim himself or recipients of the Victim's communications, and not at Facebook.

Very truly yours,

Joshua S. Lipshutz /s/
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James G. Snell /s/
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Counsel for Petitioner Facebook, Inc.

Case Name: *Facebook, Inc. v. Superior Court of San Diego*
Case No: S245203

PROOF OF SERVICE

I, Lorelei L. Gerdine, declare as follows:

I am a citizen of the United States and employed in Los Angeles County, California; I am over the age of eighteen years, and. not a party to the within action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071. On September 4, 2019, I served the within documents:

PETITIONER'S LETTER BRIEF RE GOOD CAUSE

On the parties stated below, by the following means of service:

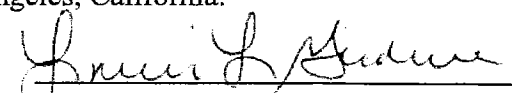
SEE ATTACHED SERVICE LIST

☑ **BY UNITED STATES MAIL**: I placed a true copy in a sealed envelope or package addressed to the persons as indicated above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

☑ I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 4, 2019, at Los Angeles, California.



Lorelei L. Gerdine

SERVICE LIST FOR *Facebook, Inc. v. Superior Court of San Diego*
CALIFORNIA SUPREME COURT CASE NO. S245203

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