

**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

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FACEBOOK, INC.,)	
)	
	Petitioner,)	
)	No. S245203
	v.)	
)	Court of Appeal No.
THE SUPERIOR COURT OF SAN DIEGO)	D072171
COUNTY,)	
)	Superior Court No.
	Respondent.)	SCD268262
)	
)	
LANCE TOUCHSTONE,)	
)	
	Real Party in Interest.)	
<hr/>)	

REPLY IN SUPPORT OF PETITION FOR REVIEW

**After Published Opinion by the Court of Appeal,
Fourth District, Division One, No. D072171
Filed September 26, 2017**

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ARGUMENT

I. REVIEW SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS A NOVEL ISSUE OF FIRST IMPRESSION THAT EFFECTS THOSE CRIMINAL DEFENDANTS RIGHTEOUSLY SEEKING RELEVANT, MATERIAL, AND/OR EXCULPATORY SOCIAL MEDIA RECORDS PRE-TRIAL IN ORDER TO PREPARE AN ADEQUATE DEFENSE.

Facebook concedes that the issues raised by Real Party in Interest Touchstone in the instant petition are the same as those novel issues of first impression raised by Real Parties in Interest Hunter and Sullivan in *Facebook, Inc. v. Superior Court (Hunter)* (2015) 240 Cal.App.4th 203, review granted and opinion superseded in *Facebook, Inc. v. Superior Court* (Cal. 2015) 362 P.3d 430 (hereinafter "*Facebook P*"). (Answer at pages 8, 29.) For this and other enumerated reasons, Touchstone respectfully requests that this Court grant review of this matter so that the issue, relevant to all criminal defendants facing an unfair trial in light of an unconstitutional interpretation of the Stored Communications Act, 18 U.S.C. § 2701, et seq. ("SCA"), is settled and uniformly applied throughout the Court's jurisdiction.

The Court of Appeal opinion in this matter closely mirrored that of the order issued by the court in *Facebook I*; both demand further review by the highest court of California to ensure that criminal defendants are protected and that their constitutional rights are preserved when placed under duress by an unconstitutional federal law. Facebook is incorrect in asserting that this is a settled area of law requiring no further judicial review: the review of - and lengthy briefing in - *Facebook I* currently before this Court demonstrates the novel, relevant, and unsettled nature of this precise issue and underscores the need for this issue to be addressed in both of these cases.

II. THE COURT OF APPEAL ERRED IN RULING THAT A CONSTITUTIONAL RIGHT OF PRE-TRIAL ACCESS TO SOCIAL MEDIA RECORDS DOES NOT EXIST FOR CRIMINAL DEFENDANTS, EVEN UPON A SHOWING OF GOOD CAUSE FOLLOWED BY *IN CAMERA* REVIEW.

Real Party in Interest Touchstone persists in his assertion that the right to pre-trial discovery-such as the social media records sought in this case-is constitutional and that any law diminishing the criminal defendant's right to such discovery should be limited or overruled to permit the fair exchange of material, exculpatory evidence in criminal cases. Touchstone does not seek traditional prosecutorial powers such as the issuance of search warrants, arrest warrants, or wiretap orders, but seeks the ability to obtain relevant and material records prior to trial pursuant to a court order subpoena duces tecum upon a showing to the court that the records are necessary for a fair and constitutional trial, followed by an *in camera* review by that court to ensure proper and necessary measures are taken to accommodate any conflicting privacy rights implicated in the release of those records. This is not a demand for exorbitant measures, but for reasonable and just means of obtaining the fair trial and impartial administration of justice that this country purports to offer its citizenry.

The arguments supporting Real Party in Interest Touchstone's assertion of constitutional right have been briefed at length in both the lower court papers in this matter as well as those papers filed in *Facebook I* by real parties in interest and amicus parties from the criminal defense bar. The U.S. and California Constitutions are *supposed* to offer the criminally accused effective assistance of counsel, the right to confront and cross examine witnesses, due process, and a fair trial. Those fundamental promises are empty without meaningful defense access to relevant and exculpatory evidence relating to percipient, complaining, material witnesses who present against the criminally accused.

III. THE SOCIAL MEDIA RECORDS SOUGHT IN THIS CASE ARE NOT REASONABLY AVAILABLE THROUGH OTHER SOURCES SUCH AS THE ACCOUNT HOLDER, THE PROSECUTION, OR “FRIENDS” OF ACCOUNT HOLDER.

Repeating the assertion that records can be obtained through other sources does not render that argument true. Facebook continues to assert that the sought records can be obtained through other means and sources, while at the same time withholding the very records required to explore those sources by name and identity. Facebook encourages Touchstone to obtain the subject account holder’s records by serving subpoenas on the account holder’s “friends” on the social media site. However, Facebook will not provide that list of people to Touchstone, instead invoking the protections of the SCA to refuse production. This renders their suggestion to contact the account holder’s friends both ironic and disingenuous.

Facebook additionally suggests that the trial court could order the prosecution to issue a search warrant for the records. This suggestion relies on a fundamental misunderstanding of criminal procedure and the separation of power between judicial and executive branches. The trial court cannot order the prosecution to conduct specific investigation in this case. Respondent Court did not make such an order when defense counsel moved to compel these records from them on March 10, 2017. Respondent Court did not make such an order when the prosecution was present for the motion to quash hearing on April 27, 2017. The Court of Appeal did not make such an order or recommendation in their final opinion for this case.

Both Facebook and the Court of Appeal suggest that Touchstone can compel the account holder personally in order to force his consent to the release of his social media records. As stated in earlier briefing, this account holder has valid and viable Fifth Amendment rights against self-incrimination that would support his refusal to produce the records, even in

the face of a court order. Respondent Court could not rightly order sanctions against a witness properly invoking constitutional rights that justify the refusal to comply with that court order. No matter who forces this user to court-the prosecution or Touchstone-and no matter what court order issues to force his consent, it cannot withstand constitutional scrutiny when a valid Fifth Amendment right is invoked. Additionally, as discussed in earlier briefing, this particular account holder has a lengthy and documented history of combativeness with law enforcement and court officers, refusal to comply with reasonable requests, and an unwillingness to participate in court proceedings in this case. A criminal defendant's access to relevant, material, and exculpatory social media records should not be produced subject to the whim and disposition of a contentious and unreliable party. For these reasons, obtaining the records via subpoena or court order to the account holder himself is not reliable or reasonably available in this case.

CONCLUSION

The constitutional issues raised by the instant petition are novel, colorable, and worthy of review as a matter of first impression. For this and the reasons stated herein, it is respectfully requested that this petition for review be granted so that criminal defendants are granted the panoply of fundamental rights promised to them in the U.S. and California Constitutions.

Dated: December 4, 2017

Respectfully submitted,

MEGAN MARCOTTE, Chief Deputy
Office of the Alternate Public Defender



KATE TESCH

Deputy Alternate Public Defender

Attorneys for Real Party in Interest
LANCE TOUCHSTONE

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 1,157 words. I swear under the penalty of perjury that the foregoing is true and correct.

Dated: December 4, 2017

Respectfully submitted,



KATE TESCH

Deputy Alternate Public Defender

Attorney for Real Party in Interest
LANCE TOUCHSTONE

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 December 4, 2017, I personally served the attached **REPLY IN SUPPORT OF PETITION FOR REVIEW** to the following parties:

San Diego Superior Court, *Respondent*
Hon. Kenneth So, Judge C/O Judicial Services
220 W Broadway, San Diego, CA 92101
Via U.S. Postal Service in sealed, stamped envelope

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Attn: James Snell and Christian Lee
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3150 Porter Drive, Palo Alto, California 94304
Via U.S. Postal Service and Electronic Transmission

Court of Appeal, Fourth Appellate District, Division One
750 B Street, Suite 300, San Diego, California 92101
Via U.S. Postal Service and Truefiling Electronic Service

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 4, 2017, in San Diego, California.

Signed: _____

Printed: _____
DECLARANT

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **FACEBOOK v. S.C. (TOUCHSTONE)**

Case Number: **S245203**

Lower Court Case Number: **D072171**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
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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.

12-04-2017

Date

/s/Kate Tesch

Signature

Tesch, Kate (284107)

Last Name, First Name (PNum)

San Diego County Office of the Alternate Public Defender

Law Firm