SUPREME COURT COPY

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Jorge Navarrete Clerk
Deputy

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 in response to the supplemental briefs filed by Touchstone and Intervenor San Diego County District Attorney. Both briefs confirm Facebook's core points: (1) this Court should reach the merits of the issues in this appeal; and (2) in the event that the Court rules on the existence of good cause, it is clear that none exists.

I. Touchstone Agrees that the Court Should Reach the Important Issues Over Which the Court Granted Review.

The Court should not remand for further proceedings because, regardless of whether good cause exists, Touchstone's 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. Touchstone agrees that remand is neither necessary nor appropriate, and that the appeal is "ripe for resolution." (Touchstone's Sept. 4, 2019 Supplemental Br. ("Touchstone Br.") at pp. 16-17.)

II. There Is No Good Cause Supporting The Subpoena.

A. Touchstone's arguments demonstrate the lack of good cause.

Touchstone's brief confirms that there is no plausible justification for production of the alleged private messages he seeks.

Touchstone concedes that Jeffery Renteria (the "Victim") "led a public life through his social media page." (Touchstone Br. at p. 5.) He further notes that the Victim's *public* posts about the shooting and his injuries "garnered considerable interest on his page, spurring lengthy communications with [his] friends" on that page in *public*. (*Id.* at p. 6.) And Touchstone describes at length the statements that the Victim posted publicly on that page. (*Id.* at pp. 5-6.)

Touchstone asserts, without support, that these public records reveal only "the tip of [the] iceberg as to the universe of material and relevant contents in his complete social media record." (*Id.* at p. 9.) But these records in fact point another way: They demonstrate that the Victim often communicates publicly via social media regarding a wide range of matters, including the matters at issue in this case. (Facebook's Sept. 4, 2019 Supplemental Br. ("Facebook Br.") at p. 4.) Touchstone already has access to *all* of the Victim's public content. There is nothing to suggest that any private records Touchstone might obtain would contain any relevant information whatsoever, or would be anything other than cumulative of the public records he already possesses. Indeed, to the extent some of these posts evidence, as Touchstone claims, the Victim's "growing propensity for, and fascination with, violence" (Touchstone Br. at p. 5), they demonstrate that the discovery Touchstone seeks is unnecessary to achieve the purpose for which it is sought—Touchstone does not need private messages to show the Victim's "true character for violence" if he has already put this in the "public record." (*Id.* at p. 7; *see also* Intervenor Br. at p. 1.)

Touchstone also claims that the Victim's preliminary hearing testimony provides plausible justification to obtain his private messages because it provided a troubling narrative of growing violence by a person with access to firearms. (Touchstone Br. at pp. 7–9.) But notably, Touchstone fails to point to any testimony recounting or referring to private messages. (*Id.*; *see also* Intervenor Br. at pp. 1-4.) This testimony does not supply plausible justification to seek nearly all of the Victim's non-public Facebook communications from Facebook. Instead, it demonstrates that Touchstone has all he needs for the trial: by Touchstone's account, the preliminary hearing "revealed" that the Victim is "an unstable man," and the "public Facebook records" create an "alarming image of [the Victim as] a dangerous and unpredictable man." (*Id.* at p. 8.)

Touchstone also points to the Victim's public post nearly two weeks after the shooting, in which he stated that he "do[es] not have access to [his] private messages while in the hospital," and asked people to "post on [his] wall if [they] want to communicate" (Unsealed Decl. Ex. E). Touchstone says this post "evidences" that the Victim "was using Facebook's private messaging feature as a means of communication" during that two-week timeframe. (Touchstone Br. at p. 5.) But that makes no sense. The Victim went to the hospital immediately after the shooting and stayed there for several weeks. (Intervenor Br. at

p. 1.) His post indicates that he could *not* access his private messages throughout his hospital stay, which means he could not have sent private messages during this period. Because Touchstone concedes that any messages before the incident are irrelevant and unnecessary (Touchstone Br. at pp. 10–11), and the Victim's post indicates he likely did not create private messages during the most relevant timeframe after the shooting, this evidence does not plausibly justify the discovery he seeks.

Touchstone finally claims support from the fact that the Victim announced his preliminary hearing on Facebook, and a man named "Danny" attended the hearing. (Touchstone Br. at p. 6.) But Touchstone fails to provide any plausible basis to connect the two events with private messages—no suggestion that Danny was a Facebook friend, no hint that Danny ever communicated with Touchstone on Facebook before, and no indication that Danny learned of the hearing through Facebook.[1] Instead, Touchstone passes off unanswered questions as evidence. (*Id.* at p. 6 ["Did Danny respond to Renteria privately on Facebook messenger? Did he post to Renteria's page under restricted settings?"].) Because Touchstone has not shown more than "merely . . . the hope or expectation that the investigation will disclose favorable information" (*Johnson v. Superior Court* (1968) 258 Cal.App.2d 829, 836), discovery of the Victim's private messages is not plausibly justified.

B. Touchstone admits that the subpoena is overbroad.

Touchstone's subpoena seeks nearly all records generated on the Victim's Facebook account from when the account started to the date of the subpoena. Touchstone now concedes that this subpoena "is overbroad." (Touchstone Br. at p. 10; see also *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 224–225; *United States v. Zavala-Tapia* (E.D.Cal. Dec. 20, 2010) 2010 WL 5330506, at *1.) As a remedy, he asks to narrow his subpoena to seek only communications on the Victim's Facebook page from the date of the incident to the date of the subpoena. (Touchstone Br. at pp. 10–11.)

As an initial matter, Touchstone offers no support to suggest that a defendant may narrow the subpoena at this stage in the appellate proceedings.

Regardless, narrowing the relevant time period would not fix the subpoena. The SCA prohibits providers like Facebook from divulging the contents of communications absent a statutory exception. (*Facebook, Inc. v. Superior Court* (2018) 4 Cal.5th 1245, 1250.) No

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[1] Indeed, other evidence that Touchstone sets forth demonstrates that the Victim communicated privately with friends by means other than Facebook. For example, when Touchstone needed a ride to a pain management appointment, he asked his friends to "[t]ext [him]," *not* to private message him on Facebook. (Unsealed Decl., Ex. F at 2.)

one has even argued that an exception applies here—where a criminal defendant asks the provider to turn over contents of a subscriber's private information. (*Facebook, Inc. v. Superior Court* (2017) 15 Cal.App.5th 729, 736 ["none [of the SCA's exceptions] apply to the instant situation"].) Accordingly, this appeal does not turn on whether Touchstone's subpoena may properly seek records from before the incident; it turns on whether Touchstone's subpoena may properly seek records in violation of the SCA (which it cannot). Touchstone's attempt to drop that portion of the request is of no consequence. (*See* Intervenor's Br. at pp. 4-5.) Remanding for further proceedings on an overbroad subpoena that has been narrowed in an immaterial manner is not an effective or efficient use of judicial resources, and it would only delay resolving the important issues on which the Court has granted review.

C. Recent developments do not excuse Touchstone from exhausting other means of obtaining the evidence he seeks.

Touchstone admits that he did not come close to exhausting other avenues for obtaining the Victim's records from any source other than Facebook. (See Touchstone Br. at pp. 10–11.) He attempts, however, to rationalize this failure by stating that the Victim allegedly deleted his Facebook account nearly a year into the subpoena proceedings (*id.*). This merely begs the question of why Touchstone did not subpoena the Victim earlier, at which point the Victim would be under Court supervision (allowing the Superior Court to issue curative orders to address any evidence preservation or spoliation concerns). Touchstone should not benefit from his own failure to exhaust other means of discovery before subpoenaing Facebook in violation of the SCA.

The alternative means available to (but unexplored by) Touchstone are numerous. (See Facebook's Answer Brief at pp. 19–35.) Touchstone could have subpoenaed the victim; he did not do so. Touchstone could have subpoenaed the recipients of the Victim's messages (and could have subpoenaed the Victim's *non-content* social media records to determine who those recipients are); he did not do so. And Touchstone could have sought the Superior Court's help by seeking an order (1) compelling disclosure by the account holder, or (2) requiring the prosecution to choose between obtaining a search warrant or facing evidentiary sanctions. Again, he did not do so. Without taking these steps toward obtaining discovery in a manner that does *not* require Facebook to violate a federal law, Touchstone cannot establish good cause justifying his subpoena.

III. Touchstone Seeks to Undermine Both the SCA and Marcy's Law by Denying People the Right to Make Their Own Privacy Objections.

Touchstone's argument in support of his subpoena turns both the SCA and the California Constitution on their heads by seeking to prevent social media subscribers from

asserting their own privacy objections. Touchstone concedes that the Victim "has protective rights related to his own records, including the right to object to their release or refuse to comply with a subpoena ordering their release" pursuant to Marcy's Law, Cal. Const., art. I, § 28(b)(4). (Touchstone Br. at p. 14.) Nonetheless, Touchstone argues that Facebook should be ordered to produce the Victim's social media records without the Victim's involvement—thereby defeating the very constitutional rights Touchstone says are established. (See *id.* at p. 15.)

Touchstone's own analogy demonstrates the importance of permitting the affected person to assert his own privacy interests: "When [the Victim] 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 . . . . This same balance of interests should occur with the alleged victim's Facebook records." (*Id.* at p. 15.) Similarly, Touchstone analogizes to the *Pitchess* statutes, which "'carefully balance[] two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense.'" (*Id.*, quoting *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.) The key to both comparisons is that *the owner of the records* advanced his own privacy objections.

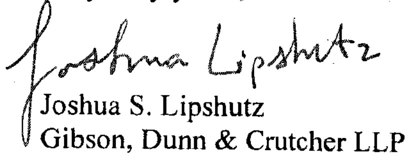
Here, in contrast, Touchstone seeks to shut the Victim out of proceedings regarding his own social media content. That is one of the very harms that the SCA was designed to address by preventing providers like Facebook from producing a subscriber's content except in very narrow circumstances, such as with the consent of a subscriber. A contrary ruling permitting litigants to sidestep the privacy objections of social media account holders would create the very ill that the SCA was meant to address: consumer reluctance to use online communications systems. (See S. Rep. No. 99-541, 2d Sess., at p. 5 (1986) [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."].)

IV. Conclusion

This Court should affirm the Court of Appeal's decision, hold that Touchstone's subpoena is barred by the SCA, and 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 Touchstone's subpoena is supported by good cause, it should hold as a matter of law that Touchstone has not demonstrated good cause. Among other reasons, Touchstone

makes no showing that discovery of the Victim's private messages is plausibly justified (his arguments instead show that Touchstone is on a fishing expedition), and Touchstone has not exhausted other means to obtain the content that he seeks—including by directing a subpoena at the Victim himself or recipients of the Victim's communications.

Very truly yours,



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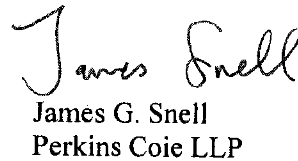

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Counsel for Petitioner Facebook, Inc.

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 25, 2019, I served the within documents:

PETITIONER'S RESPONSIVE 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 25, 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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