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CLERK SUPREME COURT

IN THE SUPREME COURT OF CALIFORNIA

FACEBOOK, INC.,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,
Respondent.

LANCE TOUCHSTONE,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D072171

SUPPLEMENTAL AMICI CURIAE BRIEF OF TWITTER, INC. AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER FACEBOOK, INC.

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APPLICATION TO FILE SUPPLEMENTAL AMICI CURIAE BRIEF

Pursuant to this Court's August 14, 2019, order and California Rules of Court, rule 8.520(f)(1), amici Twitter, Inc. and the California Chamber of Commerce request permission to file the attached supplemental amici curiae brief in support of petitioner Facebook, Inc.[1] This Court granted amici's application to file their initial brief on May 17, 2018.

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[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

Amici represent the interests of some of the world's leading technology companies. Billions of people rely daily on these companies' search engines, email services, social networks, communication platforms, smartphones, cloud storage, and internet-based devices and applications. Users entrust these companies with some of their most important information. Given the sensitivity of this data, these companies work continuously to secure their users' privacy.

Amici's interest in this case arises out of concern for the important privacy interests of the individuals that use online services, the impact on technology companies of the high cost and burden of responding to routine subpoenas from third parties, and the potential civil liability involved in acting contrary to federal law.

Twitter, Inc. is a technology company based in San Francisco, California. Its primary service, Twitter, is a global platform for public self-expression and conversation in real time. Twitter allows people to consume, create, distribute, and discover content and has democratized content creation and distribution. Twitter has more than 300 million monthly active users, spanning nearly every country, and creating approximately 500 million Tweets every day. One of Twitter's core values is defending users' freedom of expression and privacy. Twitter carefully reviews requests for user information and releases regular transparency reports detailing government requests for user data.

The California Chamber of Commerce (CalChamber) is a nonprofit business association with over 13,000 members, both

individual and corporate, representing virtually every economic interest in California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing businesses on a broad range of legislative, regulatory, and legal issues. CalChamber often advocates before the courts by filing amicus curiae briefs in cases involving issues of paramount concern to the business community, and it counts among its members many technology companies who are concerned about their users' privacy interests.

October 9, 2019

HORVITZ & LEVY LLP
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TWITTER, INC. AND CALIFORNIA CHAMBER OF COMMERCE

IN THE
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SUPPLEMENTAL AMICI CURIAE BRIEF

INTRODUCTION

This supplemental brief addresses the questions posed by this Court's August 14, 2019, order: (1) whether Touchstone's subpoena is supported by good cause, and (2) whether this matter should be remanded to the trial court for further proceedings regarding the motion to quash.

User privacy concerns weigh against finding that Touchstone's subpoena—or any subpoena to a service provider for a user's private communications—is supported by good cause. Users of electronic services should not be required to rely on service providers to assert privacy objections on users' behalf. Imposing such a rule would be inconsistent with the structure and

purposes of the Stored Communications Act (SCA), and would harm users' privacy interests.

In any event, this Court should hold that the SCA bars Touchstone's subpoena independently from any good cause determination, without the need for further proceedings in the trial court. This Court should resolve the instant dispute with a broadly applicable rule that will avoid the expense, unpredictability, and unruliness of trial courts' examining the facts in thousands of matters to determine whether to fabricate case-by-case exceptions to the clear dictates of the SCA, which would imperil the privacy interests of all users affected by the subpoenas.

LEGAL ARGUMENT

I. The subpoena is not supported by good cause.

A. The Stored Communications Act contemplates that users should not be required to rely on service providers to assert users' privacy objections to subpoenas.

People have a privacy interest in their stored communications that is distinct from the interests of the services storing their communications. The SCA was intended to protect those privacy interests. (Sen.Rep. No. 99-541, 2d Sess., p. 3 (1986) [discussing purpose of SCA: "to protect privacy interests in personal and proprietary information"].)

As Facebook put it, the SCA allows people "to be the masters of their own privacy." (9/4/19 Facebook Letter Brief 7.) The SCA generally prohibits a service provider from disclosing the contents of stored communications (18 U.S.C. § 2702(a)), but allows disclosure when the originator or recipient of the communication consents (18 U.S.C. § 2702(b)(3)). Prior to the constitutional limitation announced by *United States v. Warshak* (6th Cir. 2010) 631 F.3d 266, 288 (requiring the government to obtain a warrant to compel user content from providers), the SCA permitted the government to use a subpoena to obtain content after notifying the user and giving the user a chance to object (18 U.S.C. § 2704(a)(2), (a)(4)(A)). And the SCA provides a private right of action against service providers who violate it. (18 U.S.C. § 2707(a).) These features of the SCA put the individual users front and center in controlling the assertion of their own privacy interests and put the service providers at risk if they independently provide information about the users.

B. The SCA's approach is consistent with other authority and common sense.

The SCA's approach makes especially good sense in light of how some courts have applied the principles of standing. In particular, providers of internet services have sometimes been held (perhaps incorrectly) to lack standing to assert the interests of their users when responding to subpoenas. (See *City and County of San Francisco v. HomeAway.com, Inc.* (2018) 21 Cal.App.5th 1116, 1131 [holding that provider of internet platform for

temporary housing rentals lacked standing to assert the constitutional rights of its customers to challenge a subpoena]; *State v. Charter Communications, Inc.*, (Mo.Ct.App. 2015) 461 S.W.3d 851, 859, fn. 6 ["Charter simply does not have standing to assert Fourth Amendment electronic privacy interests that belong to Charter's *subscribers*—not to *Charter*"]; *In re Grand Jury Subpoena Issued to Twitter, Inc.* (N.D.Tex., Sept. 22, 2017 No. 3:17-mc-40-M-BN) 2017 WL 9287146, at p. *5 [nonpub. opn.].)[2]

By contrast, courts uniformly recognize that individuals whose confidential communications are subpoenaed from third-party service providers do have standing to challenge the subpoenas on the basis of their important privacy interests. (See *Crispin v. Christian Audigier, Inc.* (C.D.Cal. 2010) 717 F.Supp.2d 965, 974 ["At least two district courts have concluded that individuals have standing to move to quash a subpoena seeking personal information protected by the SCA"]; *Chasten v. Franklin* (N.D.Cal., Oct. 14, 2010 No. C10-80205 MISC JW (HRL)) 2010 WL 4065606, at p. *1 ["Several courts . . . have determined that an individual has standing to move to quash a subpoena seeking electronic personal information and communications protected by the SCA"].)

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[2] Other authorities have determined (perhaps correctly) that service providers did have standing to assert the interests of their users when responding to a subpoena. (See, e.g., *East Coast Test Prep LLC v. Allnurses.com, Inc.* (D.Minn. 2016) 167 F.Supp.3d 1018, 1022; *McVicker v. King* (W.D.Penn. 2010) 266 F.R.D. 92, 97.) But an individual should not have to rely on the uncertain outcome of a standing analysis before a court will consider the full scope of his or her privacy interests.

The lesson from these authorities is that individuals should assert their own privacy interests when their own private information is sought, rather than relying on the service providers to do so. Indeed, the interests of service providers and their users in responding to subpoenas do not always align perfectly. While some service providers attempt to provide the narrowest possible data responsive to a subpoena request, such a response requires human expertise and substantial resources. (Amici's ACB 33.) Service providers may not have the necessary resources to allot to their responses, particularly if they face a high volume of subpoena requests. As a result, some service providers may interpret requests more broadly than a user responding to a subpoena.

C. Allowing case-by-case exceptions to the SCA would undermine users' ability to protect their own privacy.

If this Court determines that a criminal defendant's subpoena to a service provider is supported by good cause, and that the good cause is somehow sufficient to overcome the SCA's general prohibition against a service provider disclosing a user's stored communications, it will undermine users' ability to protect their own privacy.

Theofel v. Farey-Jones (9th Cir. 2004) 359 F.3d 1066 illustrates the risk of allowing litigants to seek private communications directly from service providers rather than from the parties to the communications. In *Theofel*, an internet service provider gave the subpoenaing litigant a sample of the

communications sought, without notifying opposing counsel. (*Id.* at p. 1071.) Many of the communications were privileged and personal, yet were produced by the service provider—who failed to challenge the subpoena even though it was "patently unlawful" under the SCA. (*Id.* at pp. 1071-1072.) (Indeed, the magistrate judge sanctioned the subpoenaing litigant and his counsel for their intentional misconduct in drafting the unlawful subpoena.) (*Ibid.*) It stands to reason that if there is some kind of amorphous "good cause" exception to the SCA in particular cases, litigants will be further incentivized to disregard the SCA's prohibitions and violate users' privacy.

Even where a service provider has the resources to devote to scrupulously complying with their obligations, allowing a party to subpoena private communications from service providers can lead to unwarranted disclosures. The stored communications may include attorney-client privileged information, which the Evidence Code generally shields from disclosure even to a court for in camera review. (See Evid. Code, § 915, subd. (a) [a court generally "may not require disclosure of information claimed to be privileged . . . in order to rule on the claim of privilege" (citation omitted)]; *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451, 466, fn. 5 [improper to require in camera disclosure of privileged information to resolve privilege claim].) A service provider likewise may not be in a position to interpret its users' slang, or to determine what type of information will be particularly embarrassing to its users, and therefore not interpret a subpoena as narrowly or resist as strongly as its users might. And the ease

with which a subpoena can be drafted and served on a service provider, combined with the massive amounts of information service providers can access, encourages fishing expeditions for marginally relevant private communications.

Requiring a party who seeks another's stored communications to obtain them from the participants in the communications—consistent with the plain mandates of the SCA—ameliorates these possible privacy impositions by giving the user control over the disclosure of his or her information and what objections to raise *before* the information is more broadly disseminated. This action shows the danger of a different rule: the parties are already publicly debating whether an individual's public Facebook postings show that he is "a mentally ill man" with a "true character for violence" (9/4/19 Touchstone Brief Regarding Good Cause 7), or merely someone with a propensity to "engage in dark humor" (Intervenor's Supp. Brief 3). Individuals should not have to undergo similar scrutiny of their private postings unless they themselves have been served with a subpoena, for which they themselves control any objections and response.

D. There are alternate ways to obtain stored communications that allow users to protect their privacy.

The SCA does not prohibit a criminal defendant from seeking the communications from their originators or the recipients, or the trial court from ordering such relief. (See 18 U.S.C. § 2702(a)(1) [prohibiting service providers from disclosing

electronic communications], (b)(3) [permitting disclosure with consent of communication's recipient]; *Negro v. Superior Court* (2014) 230 Cal.App.4th 879, 897-898; see also ABOM 18-21.)

A party who seeks the contents of private electronic communications, but who is barred by the SCA from obtaining them from service providers, is "no worse off" than a party seeking the contents of private communications would have been when those communications were in paper form. (*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1447.) There is no right to an "informational windfall" from subpoenaing neutral repositories for communications, which comes "at too great a cost to digital media and their users." (*Ibid.*) Thus, a criminal defendant has a ready remedy to subpoena the records from the users who made or received the stored communications he seeks.

II. This Court should not remand to the trial court for further proceedings because the SCA bars a defendant's subpoena independently from any good cause determination.

The trial court's denial of the motion to quash the subpoena should be vacated, but the matter should not be remanded to the trial court for further proceedings. Indeed, Touchstone and Facebook agree that the propriety of the subpoena is ripe for determination, and that this Court should inform the parties whether Facebook should comply, and why. (See 9/4/19 Touchstone Brief Regarding Good Cause 16-17; 9/4/19 Facebook Letter Brief 1-2.) Amici also agree.

If this Court were to conclude that the particularities of a good cause determination affect whether a communications service provider should comply with a subpoena, it would permit the privacy invasions the SCA was designed to prevent. The question is whether a criminal defendant's constitutional rights overcome the plain text of the SCA. This Court should resolve that question with broadly applicable guidance that clarifies that the SCA does indeed apply as it is written so that communications service providers, their users, and litigants know that private communications will remain protected as Congress intended.

CONCLUSION

For the reasons explained above, the judgment of the Court of Appeal should be affirmed.

October 9, 2019

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 1,859 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

Dated: October 9, 2019

Eric S. Boorstin

PROOF OF SERVICE

Facebook v. Superior Court (Touchstone)
Case No. S245203

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On October 11, 2019, I served true copies of the following document(s) described as **SUPPLEMENTAL AMICI BRIEF OF TWITTER, INC. AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER FACEBOOK, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on October 11, 2019, at Burbank, California.

Cassandra St. George

Cassandra St. George

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