No. A-

IN THE

Supreme Court of the United States

FACEBOOK, INC. AND TWITTER, INC.,

Applicants / Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,
DERRICK D. HUNTER, AND LEE SULLIVAN,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to this Court's Rule 13.5, Facebook, Inc. and Twitter, Inc. (collectively, "Petitioners") respectfully request a 60-day extension of time, to and including February 10, 2020, within which to file a petition for a writ of certiorari to the Supreme Court of the State of California.[*]

Petitioners seek review of a September 11, 2019 California Supreme Court order denying Petitioners' Petition for Review. *See* Order Denying Petition for Review, *Facebook, Inc. v. Superior Court*, No. S257385 (Cal. Sept. 11, 2019); Cal. Rules of Court, Rule 8.532(b)(2)(A). Unless extended, the time to file a petition for a writ of certiorari will expire on December 10, 2019. This Court's jurisdiction would be invoked under 28 U.S.C. § 1257(a). A copy of the California Supreme Court's Order Denying Petitioners' Petition for Review is attached hereto as Exhibit A; a copy of the California Court of Appeal's Order Denying Petitioners' Petition for Writ of Mandate or Prohibition is attached hereto as Exhibit B; a copy of the Superior Court of California, County of San Francisco's Order and Judgment of Contempt is attached hereto as Exhibit C; and a copy of the Superior Court of California, County of San Francisco's Production Order is attached hereto as Attachment 2 to Exhibit C.

1. This case raises an important question of federal law that affects the privacy interests of all Americans: Whether a criminal defendant has a constitutional right to

[*] Facebook, Inc. and Twitter, Inc. are publicly traded corporations with no parent corporation, and no publicly held corporation owns 10% or more of their stock.

subpoena electronic service providers and force them to turn over the contents of their account holders' communications, notwithstanding the express prohibition on such disclosures set forth in the federal Stored Communications Act (the "SCA"), 18 U.S.C. § 2702(a), and whether a service provider can be held in contempt for refusing to violate the SCA in response to such a subpoena.

Courts around the country have correctly held that the SCA's bar on providers' disclosure of communications is absolute because of the unambiguous statutory language of the SCA, and that this prohibition may not be circumvented by a criminal defendant seeking discovery in support of his defense. *See*, *e.g.*, *United States v. Pierce*, 785 F.3d 832, 842 (2d Cir. 2015); *Facebook, Inc. v. Wint*, 199 A.3d 625, 629 (D.C. 2019); *Facebook, Inc. v. Superior Court* ("*Hunter II*"), 417 P.3d 725, 728 (Cal. 2018); *State v. Bray*, 422 P.3d 250, 256 (Or. 2018). Indeed, this Court's precedent establishes that criminal defendants are not entitled to unbounded discovery, and are subject to reasonable restrictions on evidence gathering. *See United States v. Scheffer*, 523 U.S. 303, 308 (1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987); *Delaware v. Fensterer*, 474 U.S. 15, 19-20 (1985). If a criminal defendant cannot obtain a fair trial without evidence accessible to the prosecution (like content covered by the SCA, which may be obtained by search warrant), the remedy is to limit the prosecution, not to strike down or order a violation of a federal law. *See, e.g.*, *Davis v. Alaska*, 415 U.S. 308, 320 (1974) ("[T]he State could have protected [its witness] from exposure of his juvenile adjudication . . . by refraining from using him to make out its case"); *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 484-85 (2011) (holding that if a prosecution depends on information that

cannot be disclosed because it would violate federal law protecting state secrets, the prosecution "must be dismissed").

The California Supreme Court's holding in earlier proceedings in this case was consistent with this weight of authority. *Hunter II*, 417 P.3d at 727 ("[A]s a general matter [providers] may not disclose stored electronic communications except under specified circumstances (including with the consent of the social media user who posted the communication) or as compelled by law enforcement entities employing procedures such as search warrants or prosecutorial subpoenas."). Upon remand, however, the Superior Court wrongly determined that criminal defendants' confrontation and compulsory process rights to certain electronic communications "outweigh[ed]" Petitioners' burden of production, notwithstanding this Court's precedent, the SCA's clear prohibition on disclosure, and the alternative means through which criminal defendants may obtain electronic communications. Ex. C, Attachment 2 at 41. Then, the Superior Court held Petitioners in contempt for not complying with its unlawful order that would have required them to violate the SCA. Ex. C at 6. And the California Court of Appeal and California Supreme Court allowed this contempt order to stand, effectively punishing Facebook and Twitter for refusing to violate the SCA.

Litigants around the country (and beyond) are serving electronic service providers with subpoenas that improperly rely on the California court's decision to support their argument that the SCA is unconstitutional and that providers must comply with subpoenas notwithstanding the SCA's prohibition. This Court's guidance is needed to resolve the important question whether the SCA's unambiguous bar on unauthorized

productions must give way to a criminal defendant's asserted constitutional rights to obtain evidence.

2. Petitioners are subject to the SCA's prohibition on the disclosure of the content of electronic communications absent the application of an enumerated exception, such as where there is consent by a message sender or recipient. 18 U.S.C. § 2702(b)(3). In 2014, Defendants Derrick Hunter and Lee Sullivan ("Defendants") were awaiting trial for murder and other crimes stemming from an alleged drive-by shooting. They subpoenaed Petitioners for all content from Facebook, Instagram, and Twitter social media accounts belonging to the murder victim and a key prosecution witness. *Hunter II*, 417 P.3d at 730-31. Petitioners moved to quash the subpoenas on the basis that the SCA prohibited them from complying, and that Defendants could obtain the content they sought by other means, including by subpoenaing the account holders. *Id.* at 731-32.

The Superior Court denied Petitioners' motions to quash. *Hunter II*, 417 P.3d at 735. The California Supreme Court subsequently held that the SCA's bar on disclosure is absolute and makes no exception for criminal defendant subpoenas. *Id.* at 744. The California Supreme Court remanded for further evaluation of whether the SCA's consent exception applied, and whether "the proponents can obtain the same information by other means." *Id.* at 755.

3. Facebook and Twitter produced publicly available content, leaving only private content to which no statutory exception (like sender consent) applied. But the Su-

perior Court found that Defendants had shown a need for such content—noting Defendants' confrontation and compulsory process rights under the U.S. Constitution—and ordered Providers to produce it. Petitioners filed a petition for a writ of mandate and a stay of the production order on the grounds that it was barred by the SCA, and that Defendants' constitutional rights were not impinged upon by the SCA's bar on production. The Court of Appeal ordered that (1) it would retain the matter for appeal; but (2) it would dissolve the stay of the production order "notwithstanding any potential issues of mootness that could arise from the dissolving of [its] prior stay [order]." Ex. C at 5.

Petitioners immediately sought a further writ of mandate from the California Supreme Court, explaining that the Court of Appeal's order retaining the matter for appeal but simultaneously ordering the production of the records at issue risked rendering review of the production order moot at higher stages of appellate review, including before this Court. *See* Ex. C at 3. The California Supreme Court declined to reinstate the stay of the production order but said nothing about the lawfulness of that order. *Id.* Thus, Petitioners' merits appeal of the production order remains live in the Court of Appeal. The Court of Appeal has not yet issued a decision.

4. With no stay left in place, Petitioners had no choice but to take a contempt order to comply with the SCA and perfect and preserve appellate jurisdiction over the lawfulness of the production order. On July 26, 2019, the Superior Court ordered Petitioners in contempt of court and ordered both companies to pay a fine, which they subsequently paid. Ex. C at 6. Petitioners sought review of the contempt order in the Court

of Appeal and the California Supreme Court, along with return of the fine amounts, but both courts denied review. Ex. A; Ex. B.

5. The decision by the California Supreme Court permitted Petitioners to be held in contempt of court for refusing to produce user content in violation of the SCA, in direct conflict with the rulings of courts in other jurisdictions that have addressed this important issue. For example, the D.C. Court of Appeals unanimously reversed a contempt order that would have required Facebook to disclose a prosecution witness's private communications to a criminal defendant, held that the SCA precluded Facebook from producing the private communications, rejected the same constitutional arguments made by the defendants in this case, and found that the defendant should look to other means for obtaining the same communications. *Wint*, 199 A.3d at 628. The United States Attorney for the District of Columbia submitted a brief in that appeal, arguing that the SCA precluded Facebook from complying with the subpoena and that the SCA's disclosure prohibitions were necessary to safeguard the rights of crime victims, prosecution witnesses, and all Americans. Other courts are in accord. *See*, *e.g.*, *Pierce*, 785 F.3d at 842; *Bray*, 422 P.3d at 256.

These conflicting opinions implicate issues of critical importance affecting anyone who uses electronic communications platforms. Criminal defendants armed with access to private communications—or even the threat of access—could use them for improper purposes, at great costs to individual privacy, safety, and the integrity of the judicial system. These risks could dissuade witnesses and victims alike from coming to law enforcement to give or receive help. And the decision below forces service providers

to choose between complying with unlawful subpoenas and risking a contempt order. This Court's resolution is needed to clarify that a criminal defendant's constitutional rights do not entitle him to obtain private communications from electronic service providers in violation of the SCA, in light of other available means for obtaining the communications.

6. Additional time is necessary in order to permit counsel to complete an analysis of the extensive record below (which includes three Superior Court orders, three Court of Appeal orders, and three orders by the California Supreme Court, including a published decision), to research the relevant legal issues in this case, and to prepare and file a petition that would be helpful to the Court.

Additional time would also permit the ongoing, parallel appellate review of the Superior Court's production order before the California Court of Appeal (which is fully briefed and awaiting decision) to proceed and possibly conclude, so that the two appeals might be presented for review by this Court together. Petitioners must seek review of the contempt order now because it is final. But the petition for a writ of certiorari may fundamentally change based on the California courts' decisions about the lawfulness of the underlying production order. An extension would promote judicial economy and facilitate this Court's review by allowing the Court to consider the petition for a writ of certiorari in light of the California Court of Appeal's forthcoming decision.

7. Petitioners are not aware of any party that would be prejudiced by the granting of a 60-day extension, especially because Defendants' trial has concluded.

CONCLUSION

Accordingly, applicants respectfully request that the time to file a petition for a writ of certiorari be extended by 60 days, to and including February 10, 2020.

Respectfully submitted,

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