No. 19-1006

IN THE
Supreme Court of the United States

FACEBOOK, INC., AND TWITTER, INC.,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal

REPLY BRIEF FOR PETITIONERS

MICHAEL J. HOLECEK
THOMAS F. COCHRANE
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

JOSHUA S. LIPSHUTZ
Counsel of Record
NAIMA L. FARRELL
AARON SMITH
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
jlipshutz@gibsondunn.com

Counsel for Petitioners
[Additional counsel listed on signature page]

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONERS

Petitioners Facebook, Inc. and Twitter, Inc. were held in contempt for refusing to disclose their account holders' electronic communications in response to a subpoena from two criminal defendants—a disclosure that would have violated the Stored Communications Act ("SCA"). The California Court of Appeal now agrees that the Superior Court's production order was unlawful, yet it declined to reverse the contempt order or remedy the sanction imposed by the Superior Court. *Facebook, Inc. v. Superior Court*, 259 Cal. Rptr. 3d 331 (Cal. Ct. App. 2020), *reprinted at* Reply App. 1a–19a.

Respondent Lee Sullivan does not dispute the importance of the question presented by the petition. Indeed, he has petitioned the California Supreme Court to review the lawfulness of his subpoena and the constitutionality of the SCA based on the critical importance of these issues to the parties and society writ large. Pet. for Review, *Facebook, Inc. v. Superior Court*, No. S260846 (Cal. Feb. 24, 2020), *reprinted at* Reply App. 20a–50a.

Respondent argues instead that this Court should deny the petition because, according to Respondent, this case is moot. *See* Brief in Opposition ("Opp.") 5–6. That is incorrect. The Superior Court has left the contempt order against Petitioners in place, the California appellate courts have so far declined to disturb the contempt order, and the fines levied against Petitioners have not been returned. If Petitioners are correct that the SCA precludes criminal defendants from subpoenaing service providers for third parties' electronic communications, then the contempt order must be vacated.

This Court should grant review to resolve the live, important, and recurring issues at stake in this case.

I. THIS CASE PRESENTS A LIVE AND JUSTICIABLE CONTROVERSY.

The Superior Court ordered Petitioners to produce electronic content in violation of the SCA, then held Petitioners in contempt for refusing to produce the content. Although the California Court of Appeal recently vacated the *production* order, Reply App. 18a, it did not vacate the *contempt* order. As long as the contempt order still stands, there is a live controversy for this Court to decide.

The real-world consequences of the contempt order underscore that the case is not moot. The Superior Court fined Facebook and Twitter $1,000 apiece, the "maximum [amount] permitted by" law, when it held Petitioners in contempt. Pet. App. 7a–8a. Those fines have not been lifted and the money has not been returned. Until Petitioners are "made whole," "the case is not moot notwithstanding the size of the dispute." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984); *see also Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) ("[N]othing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents.").

Contrary to Sullivan's suggestion (Opp. 6), there is no guarantee that the Superior Court will—or even could—vacate the contempt order or lift the fines levied against Petitioners. California law precludes Petitioners from moving for reconsideration of the contempt order after 10 days have passed. *See* Cal. Code Civ. Proc. § 1008; *Le Francois v. Goel*, 112 P.3d 636, 637 (Cal. 2005). Moreover, Facebook and Twitter already asked the California Court of Appeal and the

California Supreme Court to overturn the contempt order and both courts declined. Pet. App. 1a–2a. Because Facebook and Twitter remain subject to the contempt order, they have not "already won." Opp. 6. This Court is an "appropriate forum" to seek relief. *Id*.

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION ON WHICH LOWER COURTS ARE DIVIDED.

A. The court below held Petitioners in contempt for complying with the SCA and refusing to comply with a subpoena. Pet. App. 63a–65a. That ruling jeopardizes the privacy rights of all Americans who use the internet by putting enormous pressure on service providers to disclose their account holders' communications notwithstanding the SCA's prohibition on doing so. *See* Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 Colum. L. Rev. 279, 293 (2005) ("[T]he power to compel evidence from [Internet service providers] can be the power to compel the disclosure of a user's entire online world."). And that, in turn, "unnecessarily discourage[s] potential customers from using innovative communications systems," and dissuades "American businesses from developing new innovative forms of telecommunications and computer technology." S. Rep. No. 99-541, at 5 (1986).

Sullivan responds by arguing, as he did below, that the SCA is unconstitutional because it allows the prosecution to access information with a warrant that criminal defendants cannot—a recurring issue that is being decided (in different ways) by trial courts around the country. *Compare* Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Investigations*, 68 UCLA L. Rev. (forthcoming 2021) (observing that the SCA "contains the privacy asymmetry

that has received the most attention from courts"), *with* Stephanie Lacambra, *A Constitutional Conundrum That's Not Going Away—Unequal Access to Social Media Posts*, Electronic Frontier Foundation (May 31, 2018) (despite the "unfair[ness]" of the imbalance of power between prosecution and defense, courts "should not seek to correct it by sacrificing hard-won privacy protections").

Trial courts confronting this hotly debated constitutional question—and considering whether to hold providers in contempt for refusing to unlawfully disclose information that criminal defendants say is necessary for their defense—need this Court's guidance. "Denying a criminal defendant access to evidence for trial is an extremely serious issue," but "other rights are at play here. Do we really want people rummaging through our Facebook and Instagram accounts after we're dead?" David Horrigan, *Data Privacy Trumps E-Discovery*, Relativity (Apr. 15, 2020).

B. Despite its somewhat unusual procedural history, this case presents a clean vehicle for resolving this constitutional question. The contempt order at issue turns entirely on the Superior Court's determination that the constitutional rights of criminal defendants override the SCA's disclosure prohibitions. If that is wrong, then the contempt order should be vacated because parties can be held in contempt only for violating a "valid and enforceable order." *In re Blaze*, 271 Cal. App. 2d 210, 212 (Cal. Ct. App. 1969); *see* Opp. 6 ("[N]ow that the order underlying petitioners' contempt convictions has been vacated, the contempt convictions are void as well.").

Importantly, this case provides the Court with an opportunity to decide *both* the constitutional issue—whether a criminal defendant's constitutional rights

override the SCA—*and* the related issue of whether service providers can be held in contempt for refusing to comply with a production order that contradicts the SCA. *See United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (ordering the vacatur of both the production order and contempt order).

Sullivan's alternative "tracks" are no substitute. Opp. 6–8. Sullivan's appeal of his conviction, for example, will not resolve either of these questions. He will argue that "his trial was conducted in violation of the Constitution because he was denied access to the material he subpoenaed from Facebook and Twitter," *id*. at 7, but there will be no occasion for the court to decide whether Sullivan must be able to get the material *from Facebook and Twitter*, rather than from—for example—the senders or recipients of the messages, as the SCA allows, 18 U.S.C. § 2702(b)(1), (3). Moreover, Petitioners will not be parties to Sullivan's direct appeal of his sentencing, further undermining the utility of that track for deciding the question presented.

C. There are compelling reasons for this Court to grant review now. Although the issue frequently presents itself in trial courts around the country, Pet. App. 182a–85a, it is unlikely to arrive before this Court "in many other cases" because the issue rarely reaches appellate courts, Opp. 8. Service providers may be unwilling or unable to face contempt in response to a production order; they may instead feel they have no choice but to produce the content, thereby mooting the issue without appellate review of the SCA's requirements or constitutionality. A decision in this case would benefit millions of Americans who send and receive electronic communications every day, service providers charged by Congress with

protecting the privacy of those communications, criminal defendants seeking evidence to present at trial, and trial courts across the country who are regularly confronted with the choice between criminal defendants' constitutional rights and the SCA.

Moreover, the decision to hold Petitioners in contempt conflicts with the decisions of other courts. The D.C. Court of Appeals, for example, vacated a contempt order against Facebook after holding that the SCA prohibited production—ruling that there was no "serious constitutional doubt" about the SCA's requirements. *Facebook, Inc. v. Wint*, 199 A.3d 625, 633 (D.C. 2019). That is precisely what the courts below have refused to do in this case. Pet. App. 1a–2a, 63a–65a; *see also State v. Bray*, 422 P.3d 250, 256–60 (Or. 2018); *United States v. Pierce*, 785 F.3d 832, 842 (2d Cir. 2015).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES G. SNELL
PERKINS COIE LLP
3150 Porter Drive
Palo Alto, CA 94304
(650) 838-4300

JOHN R. TYLER
ANNA M. THOMPSON
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101
(206) 359-8000

JOSHUA S. LIPSHUTZ
Counsel of Record
NAIMA L. FARRELL
AARON SMITH
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
jlipshutz@gibsondunn.com

MICHAEL J. HOLECEK
THOMAS F. COCHRANE
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Counsel for Petitioners

April 27, 2020