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

BRIEF IN OPPOSITION FOR RESPONDENT LEE SULLIVAN

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QUESTION PRESENTED

Whether the California Court of Appeal erred in denying petitioners' application for extraordinary relief from the Superior Court's judgment of contempt, where petitioners willfully violated an order of the Superior Court.

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STATEMENT

Jaquan Rice, Jr., was killed and his girlfriend was seriously injured in a drive-by shooting in San Francisco in June 2013. Pet. App. 90a. Quincy Hunter, the 14-year-old brother of respondent Derrick Hunter, promptly confessed to the crime. *Id.* at 90a-91a. He told the police that he shot Rice because he feared that if he did not, Rice would kill him first. *Id.* Quincy explained that Rice had repeatedly threatened him, both in person and in violent messages on Facebook and Instagram. *Facebook, Inc. v. Superior Court*, 2020 WL 744009, *2 (Cal. Ct. App. Feb. 13, 2020). Quincy was ultimately tried in juvenile court, where he was found responsible for the murder and committed to the Department of Juvenile Justice. Pet. App. 91a n.3.

A few minutes after the shooting, the police stopped the car from which the shots had been fired. *Id.* at 91a. By then, the only person in the car was the driver, Renesha Lee, who was then the girlfriend of respondent Lee Sullivan. *Id.* Renesha Lee told the police that Derrick Hunter and Quincy had been in the car. *Id.* She did not mention Sullivan until later, when she asserted that Sullivan had been in the car as well. *Id.* Although the shooting took place in front of a crowd, no witness other than Lee—not even Quincy—claimed that Sullivan was involved. *Id.* at 101a & n.11.

Sullivan and Hunter were charged with murder and other related offenses. The government's theory of the case was that they were members of a gang who shot Rice because he was a member of a rival gang. *Id.* at 92a.

To prepare for trial, Sullivan's counsel served third-party subpoenas duces tecum on Facebook, Twitter, and Instagram seeking records from the social media accounts held by Jaquan Rice and Renesha Lee. *Id.* at 94a-95a. The purpose of seeking Rice's records was to show that the incident was not gang-related but rather was provoked by Rice's personal threatening messages to Quincy. *Id.* at 100a. The purpose of seeking Lee's records was to corroborate Sullivan's defense that Lee falsely implicated him in the murder because she was angry and jealous that he had ended their relationship and was seeing other women. *Id.* at 101a. Many of these requested records were not accessible to the public. Apart from the social media companies, the only parties who could produce the records were Rice and Lee themselves, but Rice was dead and Lee could not be located for service despite a diligent search. *Id.* at 102a.

Facebook, Twitter, and Instagram moved to quash the subpoenas on the ground that disclosure of the requested records is prohibited by the Stored Communications Act, 18 U.S.C. § 2701 et seq. Pet. App. 97a-98a. The Superior Court denied the motions to quash. *Id.* at 106a. The court agreed with Sullivan and Hunter's contention that their constitutional rights to present a complete defense and to cross-examine witnesses took precedence over the Stored Communications Act. *Id.* at 99a. The Superior Court accordingly ordered Facebook, Instagram, and Twitter to submit the requested materials to the court for its *in camera* review. *Id.* at 106a.

The social media companies filed a petition for a writ of mandate in the California Court of Appeal, in

which they contended that the Superior Court abused its discretion by denying their motion to quash. *Id.* at 106a. The Court of Appeal granted the writ of mandate and ordered the Superior Court to grant the motions to quash. *Id.* at 107a-108a; *Facebook, Inc. v. Superior Court*, 240 Cal. App. 4th 203 (Cal. Ct. App. 2015). The Court of Appeal emphasized that its conclusion was limited to pretrial proceedings, and that Sullivan and Hunter would remain free to seek the production of the requested materials at trial. Pet. App. 107a.

The California Supreme Court vacated the decision of the Court of Appeal and remanded the case to the Superior Court. *Id.* at 85a-163a; *Facebook, Inc. v. Superior Court*, 417 P.3d 725 (Cal. 2018). The California Supreme Court did not address any of the constitutional issues. Pet. App. 132a-133a. Rather, the court held, as a matter of statutory interpretation, that the Stored Communications Act does not prohibit disclosure of social media communications configured by a user to be public. *Id.* at 131a-132a. The California Supreme Court remanded to the Superior Court, so the Superior Court could determine which portions of the requested material were configured to be public and which were not. *Id.* at 133a. As the California Supreme Court explained, "it is possible that any resulting disclosure may be sufficient to satisfy defendants' interest in obtaining adequate pretrial access to additional electronic communications that are needed for their defense." *Id.* The court thus concluded: "we will not reach or resolve defendants' constitutional claims at this juncture." *Id.*

On remand, the social media companies disclosed the portion of the requested material configured to be public, but they renewed their motion to quash the subpoenas for the non-public portion of the requested material. *Id.* at 5a. The Superior Court once again denied the motion to quash and once again ordered the social media companies to produce specified documents for *in camera* review. *Id.* The companies once again refused to comply with the court's order. *Id.* The Superior Court held a hearing at which it advised the companies that they would be held in contempt if they continued willfully to violate the court's order. *Id.* at 6a. The companies informed the court that they would not comply. *Id.* The Superior Court accordingly found the companies guilty of contempt of court and sentenced them to pay fines of $1,000 apiece, the maximum permitted by state law. *Id.* at 7a-8a.

The social media companies sought review of the contempt order in the California Court of Appeal. The Court of Appeal denied, without opinion, their petition for a writ of mandate/prohibition. *Id.* at 2a. The California Supreme Court denied review. *Id.* at 1a. This is the judgment with respect to which the social media companies seek certiorari.

While the social media companies were seeking review of their contempt convictions, they were simultaneously seeking review of the underlying order to produce the subpoenaed material. They filed another petition for a writ of mandate in the California Court of Appeal, in which they argued that the Superior Court abused its discretion in denying their motion to quash the subpoenas. On February 13, 2020 (six days after this certiorari petition was

filed), the Court of Appeal granted the writ of mandate, vacated the Superior Court's order to produce the requested materials, and ordered the Superior Court to grant the motion to quash. *Facebook, Inc. v. Superior Court*, 2020 WL 1130059 (Cal. Ct. App. Feb. 13, 2020). Sullivan is currently seeking review of this decision in the California Supreme Court. As things stand now, however, the Superior Court order with which the social media companies refused to comply—the order that served as the basis for the contempt citation—no longer exists.

While all this was going on, the criminal trial took place. Sullivan still lacked the materials he subpoenaed from the social media companies. Sullivan was convicted on all counts. He has not yet been sentenced. Hunter was acquitted.

REASONS FOR DENYING THE PETITION

The certiorari petition should be denied, for three reasons. First, the case is moot. Second, the very unusual procedural posture of this case makes it a singularly inappropriate vehicle for addressing petitioners' question presented. Finally, there is no lower court conflict. In the cases claimed to conflict with the decision below, the courts never even addressed the question.

I. This case is moot.

Six days after this certiorari petition was filed, the California Court of Appeal vacated the Superior Court's order to produce the subpoenaed material and instructed the Superior Court to grant petitioners' motion to quash the subpoenas. *Facebook, Inc. v. Superior Court*, 2020 WL 1130059 (Cal. Ct. App.

Feb. 13, 2020). Under California law, now that the order underlying petitioners' contempt convictions has been vacated, the contempt convictions are void as well. *People v. Gonzalez*, 910 P.2d 1366, 1374 (Cal. 1996) ("The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment."); 8 B.E. Witkin, *California Procedure*, Enforcement of Judgment § 349(1) (Westlaw ed.) ("A contempt adjudication cannot be upheld if the order violated was itself fatally defective.").

As of now, therefore, petitioners' challenge to their contempt convictions is moot. They have already won. The appropriate forum for seeking the return of their $1,000 fines is the Superior Court, not this Court.

II. The bizarre procedural posture of this case makes it a terrible vehicle for addressing petitioners' question presented.

This case is currently being litigated on three separate tracks simultaneously.

First, in this certiorari petition, Facebook and Twitter are seeking review of the Superior Court judgment holding them in contempt.

Second, in the California Supreme Court, Sullivan is seeking review of the recent judgment of the California Court of Appeal that quashed his subpoenas. Sullivan will argue that the Superior Court correctly held that his constitutional rights to present a defense and to cross-examine witnesses take precedence over the Stored Communications Act.

Third, in the Superior Court, Sullivan is awaiting sentencing. Once he has been sentenced, he will ap-

peal his conviction to the California Court of Appeal, where 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.

All three tracks involve the same constitutional issues. But the issues are cleanly presented only in tracks two and three. By contrast, in track one—where we are now—the constitutional issues are subsidiary to the ultimate question of whether the state Court of Appeal erred in denying petitioners' request for extraordinary relief from their convictions of contempt. Resolution of the constitutional issues will not necessarily answer that ultimate question. Even if petitioners' view of the constitutional issues turns out to be right, the Court of Appeal may nevertheless have been correct in denying extraordinary relief by way of a writ of mandate or prohibition. That depends on the state law governing the availability of such writs.

There is another important difference between track one and tracks two and three. Track two has, so far, produced two lengthy opinions from the California Court of Appeal and one extremely lengthy opinion from the California Supreme Court. It may yet produce another opinion from the California Supreme Court. Track three is likely to produce a reasoned opinion from the California Court of Appeal at the very least, and perhaps another from the California Supreme Court. Track one, by contrast, has produced no appellate opinions at all. The Court of Appeal denied extraordinary relief in a single sentence. Pet. App. 2a. The California Supreme Court denied review. *Id.* at 1a.

And there is a third important difference between track one and tracks two and three. Tracks two and three are presently-existing disputes. Track one, by contrast, is moot.

The constitutional issues are the same in all three tracks. The present certiorari petition comes from track one, where the constitutional issues are filtered through a state law lens, where there are no reasoned opinions of the lower appellate courts, and where the case is moot. Track two may soon arrive at this Court. Track three may arrive eventually. Either track would be a better vehicle than track one.

In the larger picture, if the constitutional issues are as important as petitioners say they are, they will arrive at the Court in many other cases. *See* Pet. App. 182a-185a (listing cases). The Court will not lack opportunities to address these issues.

III. There is no lower court conflict.

Petitioners allege (Pet. 11-14) that courts in three jurisdictions have rejected the constitutional argument that was accepted by the Superior Court below. If this supposed conflict had ever existed, it would exist no longer, now that the Superior Court's judgment has been vacated by the Court of Appeal. *Facebook, Inc. v. Superior Court*, 2020 WL 1130059 (Cal. Ct. App. Feb. 13, 2020). But it never even existed in the first place. In each of the three cases cited by petitioners, the court explicitly avoided reaching the constitutional issues.

In *Facebook, Inc. v. Wint*, 199 A.3d 625 (D.C. Ct. App. 2019), the defendant argued only that the Stored Communication Act was properly interpreted to permit Facebook to disclose the material he re-

quested. He did not argue on appeal that the Constitution required disclosure. *Id.* at 628. The court accordingly concluded: "Mr. Wint has not argued in this court that he has a constitutional right to enforcement of the subpoenas at issue, and we therefore have no occasion to address that issue." *Id.* at 634.

In *State v. Bray*, 422 P.3d 250 (Or. 2018), the court recognized that given appropriate facts, a court would have to decide whether a defendant's constitutional rights take precedence over the Stored Communications Act. *Id.* at 259-60. On the facts of *Bray*, however, the court determined that "we need not step through that open door or precisely describe its measurements." *Id.* at 260. The court found that alternative methods were available for obtaining the information the defendant sought from Google. *Id.* First, "even if defendant could not prove the precise search terms that J [the victim] used to search the internet without the searches themselves, he could prove that J had consulted the internet to determine whether what happened to her counted as rape." *Id.* Second, "J's computer may contain that evidence"—i.e., evidence of her internet search terms—which rendered unnecessary an order requiring Google to provide it. *Id.* Because of these alternatives, the court held that the defendant had not been denied due process by the trial court's failure to order Google to disclose the information. *Id.* The court did not decide whether, in the absence of such alternatives, a defendant would have a constitutional right to obtain the information from Google. *Id.*

Finally, in *United States v. Pierce*, 785 F.3d 832 (2d Cir. 2015), the court explicitly concluded: "We

have not previously addressed the constitutionality of the SCA, and we need not do so now. [The defendant] possessed the very contents he claims the SCA prevented him from obtaining." *Id.* at 842.

None of these three cases stands for the proposition that defendants have no constitutional right to obtain information that the Stored Communications Act otherwise prohibits disclosing. None of the cases even addressed the issue. There is no lower court conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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