IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., INSTAGRAM, LLC, and TWITTER, INC., Petitioners, vs. SAN FRANCISCO COUNTY SUPERIOR COURT, Respondent, DERRICK D. HUNTER and LEE SULLIVAN, Real Parties in Interest.	No. S230051 1st D.C.A. Div 5 No.: A144315 S.F.C. S.Ct. No.: 13035657 and 13035658 Hon. Bruce E. Chan

SUPPLEMENTAL AMICI BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT REAL PARTIES IN INTEREST

DONALD E. LANDIS, JR. (CBN 149006)
Law Offices of Donald E. Landis, Jr.
P.O. Box 1008
Monterey, Ca 93942
(310) 710-7232
Landisde@icloud.com

JOHN T. PHILIPSBORN (CBN 83944)
Law Offices of J.T. Philipsborn
Civic Center Building
507 Polk Street, Ste. 350
San Francisco, CA 94102
(415) 771-3801
Jphilipsbo@aol.com

Attorneys for Amicus Curiae CACJ

DAVID M. PORTER (CBN 127024)
801 I Street, 3rd Floor
Sacramento, CA 95814
(916) 498-5700
David_Porter@fd.org

Attorney for Amicus Curie NACDL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Federal Constitution

Federal Statutes

State Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FACEBOOK, INC., INSTAGRAM, LLC, and TWITTER, INC., Petitioners, vs. SAN FRANCISCO COUNTY SUPERIOR COURT, Respondent, DERRICK D. HUNTER and LEE SULLIVAN, Real Parties in Interest.	No. S230051 1st D.C.A. Div 5 No.: A144315 S.F.C. S.Ct. No.: 13035657 and 13035658 Hon. Bruce E. Chan

SUPPLEMENTAL AMICI BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT REAL PARTIES IN INTEREST

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

California Attorneys for Criminal Justice (CACJ) and the National Association of Criminal Defense Lawyers (NACDL) jointly submit this supplemental amici brief in support of Real Parties in Interest.

I. THE STORED COMMUNICATIONS ACT DOES NOT PROHIBIT THE DISCOVERY OF "PUBLIC" POSTS AND THE FEDERAL CONSTITUTION REQUIRES THE DISCOVERY OF PRIVATE "POSTS."

From the plain language of the 1986 federal Stored Communications Act (SCA), its legislative history, other language in the 1986 federal Electronic Communications Privacy Act (ECPA) – of which SCA is a part of, and the case law interpreting the SCA as referenced by this Court in its December 21, 2016, order for supplemental briefing, it is clear that "public" posts fall within the gambit of the SCA in that they are, like "private" posts,

electronically transmitted communications as defined by § 2702 (a)(1) and (2)(a) & (b). But the SCA's protection from unauthorized nonuser access (§ 2701 (a)(1) & (2)) and prohibition from the providers' unwarranted divulgement (§ 2702 (a)(1) & (2)) do not come into effect where the user's "privacy interests" are necessarily vitiated by the post's intentional public publication, which by its very act certifies the user's consent for anyone to do what they want with the "public" posts (H.R. Rep. No. 99-647, at p. 66 (1986); 132 Cong. Rec. E4128 (1985) [statement of Rep. Kastenmeier]; *Viacom Intern. Inc. V. Youtube Inc.* (S.D.N.Y. 2008) 253 F.R.D. 256, 264–265; *People v. Harris* (Crim. Ct. N.Y. 2012) 949 N.Y.S 2d 590, 593), and as an enumerated exception for providers to furnish such "public" posts when requested in legal or nonlegal settings. (18 U.S.C.A. § 2511 (2)(g)(I) (West) ECPA ["It shall not be unlawful under this chapter or chapter 121 of this title for any person – (I) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;"].)

"Private" posts expressly configured and restricted to discrete recipients, however, appear to be comprehensively protected from nonuser access under § 2701 (a)(1) & (2) and provider divulgement under § 2702 (a)(1) & (2) (*Snow v. DirecTV, Inc.* (11th Cir. 2006) 450 F.3d 1314, 1322 ["website must be configured in some way ... to limit ready access to general public"]; *Konop v. Hawaiian Airlines, Inc.* (9th Cir. 2002) 302 F.3d 686, 873 [electronic bulletin board content not readily available to the public by login and rules restrictions]), subject to only limited exceptions related to transmission processes, client consent, emergency governmental functions, and warranted law enforcement requests (18 U.S.C.A. § 2702 (b)(1-8) (West); § 2517; § 2511 (2)(a); § 2703), and none of which includes

defendants facing state or federal criminal prosecution executing legally authorized criminal subpoena duces tecum procedures.

Of course, with the subsequent advent of the World Wide Web 1.0 and 2.0, hardware and software technological advancements for the rapidly developing and ubiquitous personal computers, tablets, and smart phones, and mega social media platforms like Facebook, Twitter, and Instagram with billions of users/followers that have developed over the past thirty years since the SCA was enacted, the "private" settings distinction becomes meaningless when YouTube stars have 1 million plus discrete followers/subscribers to their highly specific private channels or the President of the United States has over 20 million discrete Twitter followers, many of which include all the major news outlets that keep the public updated (divulge) on his many late night tweets. As the defendants argue, this "private" settings distinction falls away when "private" electronic communications recipients and/or their friends or friends of friends can do whatever they want with the posts – including giving it to law enforcement (*U.S. v. Meregildo* (S.D.N.Y. 2012) 883 F.Supp.2d 523, 526; *Chaney v. Layette County Public School* (2013) 997 F.Supp.2d 1308, 1315; *contra Crispin v. Christian Audigier, Inc.* (C.D. Cal. 2010) 717 F.Supp.2d 965, 990; *Ehling v. Monmouth-Ocean Hosp. Service Corp.* (D.N.J. 2013) 961 F.Supp.2d 659, 668; *Viacom Intern. Inc.*, *supra*, 253 F.R.D. 256), or when the "private" electronic communications are material and necessary to the case in controversy. (*Fawcett v. Altieri* (Supp. 2013) 960 N.Y.S.2d 592, 598.)

The latter approach is especially imperative for defendants facing criminal prosecution where loss of liberty – substantial in this case – is at stake and not someone's money or pride, which must give way to criminal defendants' federal and state constitutional rights to due process, a fair trial,

and compulsion of material and relevant witnesses/evidence. (*Davis v. Alaska* (1974) 415 U.S. 308, 318–320.) It seems pretty fantastic to argue seriously that a criminal defendant's fundamental federal and state constitutional rights to compel potentially exculpatory evidence to ensure a fair trial that confirms his innocence should hang in the balance with a multi-national social media provider's independent discretion to not release such exculpatory electronic evidence even where the user consents to its release. But that is exactly what the petitioners are arguing (Pet. Supp. Brief, p. 12), and that is why it should be rejected as theoretical arguments self-serving to the social media providers' business interests regarding phantom concerns of potential civil liability, despite a viable, practical, and just solution ensuring their legal protection through judicial compulsion by court order after a fully noticed and vetted subpoena duces tecum discovery process for all parties and nonparties alike. (Penal Code § 1326 *et.seq.*; *Kling v. Superior Court of Ventura County* (2010) 50 Cal.4th 1068, *as modified (Nov. 17, 2010).*) Ultimately, crediting petitioners' arguments will undermine the right to present a defense under *Crane v. Kentucky* (1986) 476 U.S. 683. Under *Chambers v. Mississippi* (1972) 410 U.S. 284, a rule of evidence that impairs the right to present a defense is unconstitutional. These rulings are built on the constitutional violation found in *Gardner v. Florida* (1977) 430 U.S. 349, 362, that an individual cannot be sentenced to death based on evidence that he cannot explain or deny. Here, given the spectrum of criminal cases that are tried in California courts – which include both capital and non-capital cases – the very right to present a defense is no less at stake.

As evidenced by its legislative history and the plain language of the statute, the SCA simply failed to consider and/or address non-law enforcement party procurement of public/private electronic communications

for civil or criminal litigants. As such, this Court must step in to require a constitutionally mandated legal discovery process for at least criminal defendants most logically utilizing the subpoena duces tecum procedures found under Penal Code § 1326 as a parallel procedure in breath and judicial review reserved for law enforcement under the SCA in § 2703 *et.seq.* and the other related federal wiretapping statutes. (*Wardius v. Oregon* (1973) 412 U.S. 470, 479.)

II. THIS COURT SHOULD DECIDE THE CONSTITUTIONAL ISSUES AT HAND.

Given this Court's supplemental briefing order, amicus, like the defendants (Def. Supp. Brief, p. 21), are concerned that this Court may consider resolving the matter on a strict statutory distinction between potentially unprotected "public" posts and clearly statutorily protected "private" posts without resolving the SCA's constitutionality as it relates to criminal defendants' federal and state constitutional rights to compel all electronic communications from social media providers, whether public or private. While the statutory construction rule of "constitutional avoidance" should be utilized in the first instance, if the plain language of the statute is unambiguous or the interpretation becomes so strained and distorted in an effort to preserve the statute's constitutionally, then this Court should move beyond the "constitutional avoidance" rule and decide squarely on the SCA's constitutionality.

This Court "may not enforce a statute whose terms are clearly unconstitutional." (*Miller v. Municipal Court of City of Los Angeles* (1943) 22 Cal.2d 818, 827–28, citing *Marbury v. Madison* (1803) 5 U.S. 137.) But "[j]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called upon to perform.'" (*Citizens United v. Federal Election Com'n* (2010) 558 U.S. 310, 373 (Roberts, CJ.,

concurring), citing *Blodgett v. Holden* (1927) 275 U.S. 142, 147–148 (Holmes, J., concurring).) In conducting the review, this Court must adhere to the settled principles that "'[statutes] are to be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional' [citation] and that California courts must adopt an interpretation of a statutory provision which, 'consistent with the statutory language and purpose, eliminates doubt as to the provision's constitutionality.'" (*People v. Amor* (1974) 12 Cal.3d 20, 30; *Erlich v. Municipal Court of Beverly Hills Judicial Dist.* (1961) 55 Cal.2d 553, 558; *In re Kay* (1970) 1 Cal.3d 930, 942 fn. 5; see also *People v. Harrison* (2013) 57 Cal.4th 1211, 1228.) This Court must "presume that the Legislature intended to enact a valid statute;" and "must, in applying the provision, adopt an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." (*In re Kay* (1970) 1 Cal.3d 930, 942, citing *City of Los Angeles v. Belridge Oil Co.* (1957) 48 Cal.2d 320, 324, and *Miller v. Municipal Court, supra*, at p. 828.)

"The Constitution and the statute are to be read together. If the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution." (*Los Angeles County v. Legg* (1936) 5 Cal.2d 349, 353.) "'[W]here a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The rule is based on the presumption

that the legislative body intended not to violate the Constitution, but to make a valid statute or ordinance within the scope of its constitutional powers.'" (*City of Los Angeles v. Belridge Oil Co., supra*, at p. 324, citing *Franklin v. Peterson* (1948) 87 Cal.App.2d 727, 730.) Finally, "[b]ecause the stakes are so high" (*Citizens United v. Federal Election Com'n, supra,* at p. 373), this Court may "inquire into the constitutionality of a statute or ordinance only to the extent required by the case under consideration" (*Franklin v. Peterson, supra*, at p. 730; see also, *Citizens United v. Federal Election Com'n, supra,* at p. 373*; Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 346–348 (Brandeis, J., concurring)), and "will formulate a rule no broader than that necessitated by the precise facts in controversy." (*Miller v. Municipal Court, supra*, at p. 828-29; see also, *Citizens United v. Federal Election Com'n, supra*, at p. 373; *U.S. v. Raines* (1960) 362 U.S. 17, 21; *Liverpool, N.Y. & P.S.S. Co. V. Emigration Com'rs* (1885) 113 U.S. 33, 39.)

"It should go without saying, however, that" this Court "cannot embrace a narrow ground of decision simply because it is narrow; it must also be right." (*Citizens United v. Federal Election Com'n, supra*, at p. 375, citing *Ex parte Ex parte Randolph* (C.C.D. Va. 1833) 20 F.Cas. 242, 254 (Marshall, C.J.).) "There is a difference between judicial restraint and judicial abdication. When constitutional questions are 'indispensably necessary' to resolving the case *at hand*, 'the court must meet and decide them.'" (*Ibid,* [emphasis added].) "[T]he canon of constitutional avoidance has no application in the absence of statutory ambiguity." (*U.S. v. Oakland Cannabis Buyers' Co-op.* (2001) 532 U.S. 483, 494; *McFadden v. U.S.* (2015) 576 U.S. _, 135 S. Ct. 2298, 2306-07 ["constitutional avoidance" has no application in the interpretation of an unambiguous statute]; *Salinas v. U.S.* (1997) 522 U.S. 52, 59-60 ["a statute can be unambiguous without

addressing every interpretive theory offered by a party"].) Moreover, this Court "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." (*Salinas v. U.S., supra*, at pp. 59-60, citing *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 95, fn.9, citing *U.S. v. Locke* (1985) 471 U.S. 84, 96, quoting *George Moore Ice Cream Co. v. Rose* (1933) 289 U.S. 373, 379 (Cardozo, J.); see also, *U.S.—Holder v. Humanitarian Law Project* (2010) 561 U.S. 1, 17 [it must not and will not carry this to the point of perverting the purpose of a statute].)

"'Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. '[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from that language.'" (*Salinas v. U.S., supra*, at pp. 57–58, citing *U.S. v. Albertini* (1985) 472 U.S. 675, 680 (citations omitted), quoting *Garcia v. U.S.* (1984) 469 U.S. 70, 75; see also *Ardestani v. I.N.S.* (1991) 502 U.S. 129, 135 [courts may deviate from the plain language of a statute only in "'rare and exceptional circumstances'"].) Likewise, "'[n]o rule of construction ... requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope...." (*Salinas v. U.S., supra*, at pp. 59-60, quoting *U.S. v. Raynor* (1938) 302 U.S. 540, 552.) "'Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews*, 465 U.S. 728, 741–742, 104 S.Ct. 1387, 1396–1397, 79 L.Ed.2d 646 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution. United States v. Locke, 471 U.S. 84, 95–96, 105 S.Ct. 1785, 1792–1794, 85 L.Ed.2d 64 (1985).'" (*Salinas v. U.S., supra*, at pp.

59-60, quoting *U.S. v.. Albertini, supra*, at p. 680; see also, *U.S. v. Comstock* (2010) 560 U.S. 126 [The court may not pile inference upon inference in order to sustain congressional action under Article I of the Constitution].)

As best distilled by the United States Supreme Court, in *U.S. v. Locke, supra*, at pp. 95–97,

> "the fact that Congress might have acted with greater clarity or foresight does not give courts a carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. 'There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.' *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015, 56 L.Ed.2d 581 (1978). Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result. See *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98, 101 S.Ct. 1571, 1584, 67 L.Ed.2d 750 (1981). On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.' *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962). 'Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances.' *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75, 102 S.Ct. 1534, 1540, 71 L.Ed.2d 748 (1982) (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26, 97 S.Ct. 926, 941, 51 L.Ed.2d 124 (1977)). When even after taking this step nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words, and neither appellees nor the dissenters have pointed to anything that so suggests, any further steps take the courts out of the realm of interpretation and place them in the domain of legislation."

Here, the unambiguous language of the 1986 federal Stored Communications Act, 18 U.S.C.A. § 2701 (West) *et.seq.*, plainly fails to articulate a parallel discovery process for criminal defendants seeking relevant and material electronic communications to that of law enforcement's warranted access exception under § 2703, and no amount of statutory interpretation, filling in the gaps, or rewriting bits and pieces of its

provisions will remedy this clear and large void in the statute. Moreover, the Congressional Record is absolutely silent on a criminal defendant's ability to gain judicially sanctioned access to such electronic communications, and instead, focuses almost entirely on law enforcement's access to and limitations for obtaining the same relevant and material electronic communications. Finally, the legal community has long acknowledged that the SCA has significant constitutional problems concerning a criminal defendant's ability to compel disclosure of potentially exculpatory evidence in the nonparty provider's possession and/or control. (Zwillinger, Marc J., Genetski, Christian S.; *Criminal Discovery of Internet Communications Under the Stored Communications Act: It's Not a Level Playing Field,* Journal of Criminal Law and Criminology, Northwestern University School, p. 569-570, Vo. 97, No. 2, 2007.)

Focusing on the distinctions between "public" and "private" posts to avoid having to decide the larger constitutional issues that the lower court so fearlessly attempted to resolve below will not quell the SCA's unambiguous silence on criminal defendant access and the nagging reality that both "public" and "private" posts are and will always remain electronic communications as defined by the Act. Consequently, provider technical skills and end user ignorance will always dictate that providers are in the best position effectively and efficiently to provide the most complete copies of these electronic communications. And finally, compelling the nearest source to the original electronic communication will ensure the greatest evidentiary completeness, authenticity, and foundation by requiring the provider's production upon a court ordered subpoena duces tecum process.

There is no other appellate criminal case in the entire country where the federal constitutionality of the SCA is so squarely advanced as it is here before this Court today. By deciding this seminal and systemic

constitutional issue now, this Court can get out in front of the merging raging rivers of the criminal justice system and the internet originated in this Court's own jurisdiction to best delineate and direct for all of us the important balance between a criminal defendant's right to due process, a fair trial, and evidentiary compulsion, and an internet user's general right to privacy (or whatever is left of it in this day and age). Otherwise, this Court will be forced to play catch up with other more proactive jurisdictions who may utilize less developed facts and legal theories to leave a sparse trail of weak, incomplete, and ineffective legal precedent granting or deny such production.

CONCLUSION

For all of the reasons advanced by real parties, fellow *amici*, and discussed above, undersigned amici remains steadfast in requesting this Court uphold respondent trial court's order.

Dated: February 6, 2017

Respectfully submitted,

DONALD E. LANDIS, JR.
State Bar No. 149006
Attorney for *Amici Curiae*
CACJ/NACDL

RULE 8.204 (c)(1) CERTIFICATION

I, Donald E. Landis, Jr., declare as follows:

I represent petitioner on the matter pending in this court. This Supplemental Amici Brief was prepared in Wordperfect X7, and according to that program's word count, it contains 3130 words.

I declare under penalty of perjury the above is true and correct. Executed on February 6, 2017, in Carmel, California.

DONALD E. LANDIS, JR.
State Bar No. 149009
Declarant

PROOF OF SERVICE BY MAIL

Re: *Facebook, et.all, v. Superior Court (Hunter/Sullivan),* No. S230051

I, DONALD E. LANDIS, JR., declare that I am over 18 years of age and not a party to the within case; my business address is P.O. Box 1008, Monterey, Ca 93942. On February 6, 2017, I served the **SUPPLEMENTAL AMICI BRIEF** on each of the following by placing a true copy of the above mentioned brief in a sealed envelope with postage fully prepaid and deposited with the common carrier UPS addressed as follows:

Javelle Camwood and Susan Kaplan 3223 Webster Street San Francisco, Ca 94123	Jose Umali 507 Polk Street, Suite 340 San Francisco, Ca 94102
Heather Trevisan San Francisco District Attorney's Office 850 Bryant Street, 3rd Floor San Francisco, Ca 94103	Hon. Bruce Chan San Francisco Superior Court 850 Bryant Street, 3rd Floor San Francisco, Ca 94103
James Snell Perkins Coie, LLP 3150 Porter Drive Palo Alto, Ca 94304	Court of Appeal, First District, Div. 5 350 McAllister Street San Francisco, Ca 94102
Eric Miller and John Tyler Perkins Coie, LLP 1201 Third Avenue, Suite 4900 Seattle, Washington 98101	Donald M. Falk Mayer Brown, LLP Two Palo Alto Square 3000 El Camino Real Palo Alto, Ca 94306
Jeff Adachi and Dorothy Bischoff San Francisco Public Defender's Office 555 7th Street San Francisco, Ca 94103	Michael McMahon Ventura County Public Defender's Office 800 S. Victoria Street Ventura, Ca 93009

I declare under penalty that the foregoing is true and correct. Executed on February 6, 2017, in the City of Carmel, California.

DONALD E. LANDIS, JR.
Declarant