

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

**JOINT APPLICATION OF CALIFORNIA ATTORNEYS
FOR CRIMINAL JUSTICE AND NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
TO APPEAR AS *AMICUS CURIAE* ON BEHALF OF
REAL PARTIES IN INTEREST PURSUANT TO
CALIFORNIA RULE OF COURT, RULE 8.520 (f), AND
BRIEF IN SUPPORT OF REAL PARTIES**

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PARTIES**

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

California Attorneys for Criminal Justice (hereafter “CACJ”) and the National Association of Criminal Defense Lawyers (hereafter “NACDL”) jointly apply, under California Rules of Court, Rule 8.520 (f), for permission to appear as *amicus curiae* on behalf of Real Parties in Interest.

Under the California Rules of Court, Rule 8.520 (f), this brief may be filed by permission of the Presiding Justice of this Court, based on a showing of good cause. CACJ and NACDL has filed this brief within 30 days of real parties in interest’s Reply and respectfully tenders its showing of good cause below.

I. JOINT APPLICATION OF CACJ AND NACDL TO APPEAR AS AMICUS CURIAE ON BEHALF OF REAL PARTIES IN INTEREST.

A. Identification of CACJ.

CACJ is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including “to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law.” CACJ is administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 1,700 members, primarily criminal defense lawyers practicing before federal and state courts. These lawyers are employed throughout the State both in the public and private sectors.

CACJ has appeared before the United States Supreme Court, the California Supreme Court, and the Courts of Appeal in California on issues of importance to its membership. CACJ’s appearance as an amicus curiae before California’s reviewing courts has been recognized in a number of published decisions.

The undersigned, Donald E. Landis, Jr., at the request of John T. Philipsborn, Chair of the *Amicus* Committee of CACJ, certifies to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief, and additionally certifies that no party to this litigation has contributed any monies, services, or other form of donation to assist in the production of this brief.

B. Identification of NACDL.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct. NACDL was founded in

1958. It has a nationwide membership of approximately 9000 members, and up to 40,000 including affiliates' members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in the ABA House of Delegates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice and files numerous amicus briefs each year in this Court and other federal and state courts, addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The undersigned, Donald E. Landis, Jr., at the request of David M. Porter, Co-Chair of the *Amicus* Committee of NACDL, likewise certifies to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief, and additionally certifies that no party to this litigation has contributed any monies, services, or other form of donation to assist in the production of this brief.

C. Statement of Interest of *Amicus Curiae*.

CACJ and NACDL have both a general and specific interest in the subject matter of this litigation. First, CACJ and NACDL's memberships consists largely of criminal defense lawyers who practice either with defender offices or in private practice. CACJ and NACDL's memberships are regularly involved in state and federal constitutional and statutory criminal discovery issues that affect the defense of those charged with crimes across this State. As a result, CACJ and NACDL's memberships have an interest in ensuring the vitality of the constitutionally protected

right to trial, counsel, and confrontation that is ensured by a full and vigorous investigation, discovery search, case preparation, and trial presentation.

Second, CACJ and NACDL have a specific interest in the issues presented here, as some of the real parties in interest are represented by lawyers who are CACJ and/or NACDL members. CACJ and NACDL were contacted by lead counsel for real parties and requested to assert the interests of the defense bar, generally, as it is represented by CACJ and NACDL and its memberships, in the issues presented by this litigation.

D. Application to File.

For the reasons explained immediately above, CACJ and NACDL respectfully urge this Court to find that there is sufficient good cause for this Court to permit CACJ and NACDL to file a brief on the merits.

II. BRIEF ON THE MERITS

A. Introduction.

CACJ and NACDL submit the following arguments in support of the positions taken by real parties in interest (hereafter “real parties”) in their Petition for Review in this Court and in their defense of respondent superior court’s order from social media’s granted Writ of Mandate in the First District Court of Appeal, Division Five.

Real parties and fellow amicus have already provided a thorough and expert analysis of all the potential arguments supporting respondent court’s decision authorizing production of the Facebook, Instagram, and/or Twitter account content of the identified persons from petitioners pursuant to a lawfully served criminal subpoena duces tecum under Penal Code § 1326 *et.seq.* in anticipation of real parties’ upcoming murder trial. CACJ and NACDL agree with and affirm their arguments that the due process clause of the Fifth and Fourteenth Amendments and the confrontation and

competency of counsel clauses of the Sixth Amendment ensures real parties' use of a subpoena to obtain social media records regardless of whether no general constitutional right to pretrial discovery has been recognized yet (*Pennsylvania v. Richie* (1987) 480 U.S. 39, 56; *People v. Hammon* (1997) 15 Cal.4th 1117, 1131 (conc. opn. of Mosk, J.)); that federal "privacy" statutes may not infringe, and in fact must bow to real parties' federal constitutional right to obtain such relevant, material, and potentially exculpatory discovery via subpoena (*Davis v. Alaska* (1974) 415 U.S. 308, 318; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536); that criminal defendants must have reciprocal avenues available to obtain relevant discovery post indictment that the prosecution has pre-indictment (*Wardius v. Oregon* (1973) 412 U.S. 470, 472); that the State's post (probable cause) indictment criminal subpoena duces tecum process under Penal Code § 1326 *et.seq.* requiring production directly to the trial court for *in camera* inspection for a relevancy, reasonableness, and privacy determinations before receipt by the defense is parallel to and provides the same adequate Court oversight as the State's pre indictment search warrant process (Penal Code § 1326; *Kling v. Superior Court* (2010) 50 Cal.1068, 1074); and finally that it is a specious argument that real parties must first seek the information from the social media users where one of the users is dead, the other cannot be found by any party, and it takes an advanced degree in computer programming to figure out how to download with any reliability the totality of someone's user profile in today's advanced and rich social media world.

But like fellow *amicus* California Public Defender's Association, CACJ and NACDL strives for focused advocacy, and as such, we will not rehash these already excellent arguments with our additional analysis. Instead, CACJ and NACDL will address what social media still is not

understanding as displayed by their latest Answer, that this State Supreme Court can rule on the federal constitutionality of a federal statute as applied in a state court criminal proceeding where the United States Supreme Court has yet to rule (Answer, p. 15), and that social media content does not rise to the level of privileged information protected until *trial* as defined by this Court ruling in *People v. Hammon* (1997) 15 Cal.4th 117.

Missing the significance of the lower court's findings regarding federal constitutional authority to compel discovery despite the federal Stored Communications Act's (hereafter "SCA") (18 U.S.C. § 2701, *et.seq.*) prohibition - albeit *at trial* (*Facebook v. Superior Court* (2015) 240 Cal.App.4th 203, 226, fn. 17, review granted December 16,, 2016),¹ social media continues to insistently argue that it is simply a matter of federal supremacy that respondent court must enforce the SCA's alleged ban on subpoenas to obtain digital communications in any court proceedings. (Answer, p. 9-13.) Falling down its own rhetorical rabbit hole, social media goes as far as to even suggest that State prosecuting agencies may be limited in the introduction of its evidence, be restricted by other undefined remedies, or pay the ultimate price of being forced to set aside the indictment and dismiss the case, all to maintain SCA's sanctity. (Answer, p. 10.)

However, as real parties correctly argue, it is not an issue of federal supremacy, because real parties do not invoke state law to defeat application of the SCA. (Reply, p. 4.) Rather, they invoke the federal constitution, which can and does prevail over a federal statute when that statute impedes the criminal defendant's federal constitutional rights while

¹ Amicus cites to the underlying case's official citation despite being depublished upon acceptance of Review by this Court to provide consistency, clarity, and ease of reference.

even in state court proceedings. (Reply, p. 5.) Indeed, respondent court – as do all state courts – has the legal authority, unfaltering duty, and ultimate responsibility to rule on the federal constitutionality of any federal statute that arising in the context of a state court proceedings, and that is precisely what respondent court did here when weighing real parties’ federal constitutional rights to due process, confrontation, and competent counsel against the nonparty witnesses/victims’ conflicting federal statutory protections under SCA.

Likewise, real parties correctly advocate that *Hammon's* ruling denying *pretrial* access to privileged psychotherapist-patient evidence should not apply to social media records, and if it does, real parties rightly question whether *People v. Hammon, supra*, should continue as precedent, because it just does not promote the orderly administration of justice. This review is eighteen years in the making, in that *People v. Hammon, supra*, has been and is simply unworkable in the real world of overwhelmed courts, stretched prosecution offices, and under-resourced public defender offices and/or private criminal defense attorneys, all with struggling budgets and limited manpower to get investigation completed and trial preparation done so that everyone may confidently announce ready for trial and actually have that trial go.

B. All State Court Judges, Including This State Supreme Court, Have the Authority, Duty, and Responsibility to Rule on the Federal Constitutionality of Federal Statutes Arising in State Court Proceedings.

Real parties have thoroughly presented the significant federal and state legal authority permitting all courts in this country to uphold the federal constitution in its proceedings. However, CACJ and NACDL would like to further accent the rich legal history in this State regarding this awesome responsibility.

“While decisions of the United States Supreme Court are binding on state courts on federal questions [U.S.Const. art. VI, cl. 2], ‘the decisions of the lower federal courts, while persuasive, are not binding on [state courts]. [Citation.] Thus, in the absence of a controlling United States Supreme Court opinion, [state court judges] make an independent determination of federal law.’” (*Wagner v. Apex Marine Ship Mgmt. Corp.*, (2000) 83 Cal.App.4th 1444, 1451, as modified on denial of reh'g (Oct. 27, 2000); *Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 782-83 [same and “the presence or absence of a decision by the Ninth Circuit on this issue is not determinative”]; *People v. Bradley* (1969) 1 Cal.3d 80, 86 [same and state courts “are not bound by the decisions of the lower federal courts even on federal questions”]; *Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 520, fn. 8 [same and “[w]here the federal circuits are in conflict, the decisions of the Ninth Circuit are entitled to no greater weight than those of other circuits”]; *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58 [“[w]here lower federal precedents are divided or lacking, state courts must necessarily make an independent determination of federal law [citation], but where the decisions of the lower federal courts on a federal question are ‘both numerous and consistent,’ [state courts] should hesitate to reject their authority”]; *Rohr Aircraft Corp. v. County of San Diego* (1959) 51 Cal.2d 759, 764 [“[a]ny rule which would require the state courts to follow in all cases the decisions of one or more lower federal courts would be undesirable, as it would have the effect of binding the state courts where neither the reasoning nor the number of federal cases is found persuasive. Such a rule would not significantly promote uniformity in federal law, for the interpretation of an Act of Congress by a lower federal court does not bind other federal courts except those directly subordinate to it. (citations)”]; *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 150

[same]; *Etcheverry v. Tri-Ag Serv., Inc.* (2000) 22 Cal.4th 316, 320-21 [same]; *Belshe v. Hope* (1995) 33 Cal.App.4th 161, 171[“federal precedents are lacking on this question and this court is free to adopt its own interpretation”]; *California Assn. for Health Servs. at Home v. State Dep't of Health Care Servs.* (2012) 204 Cal.App.4th 676, 684 [“[i]n the absence of controlling authority from the United States Supreme Court, [state courts] make an independent determination of federal law”].)

Likewise, in enacting a statutes where state courts possess jurisdiction to enforce it, the United States Congress may not at the same time foreclose state courts from considering the federal constitutionality of the act, because state court judges may not enforce federal statutes whose terms are clearly unconstitutional. (*Miller v. Municipal Court of City of Los Angeles* (1943) 22 Cal. 2d 818, 827-829.)

In *Miller v. Mun. Court of City of Los Angeles; supra*, at p.p. 827-29, the California Supreme Court considered whether “a state court upon which, if the contentions of the petitioner and the intervener are correct, has been conferred jurisdiction to pass upon consumer actions, be foreclosed by congressional mandate from considering the constitutionality of the act which it is to enforce.” The Supreme Court concluded that “if Congress, in enacting the Emergency Price Control Act, so intended to restrict the jurisdiction of the courts to which it delegated the duty to entertain such actions, there would be considerable doubt as to the statute’s validity, for the decisions indicate that, under the constitutional provision, the judge of a state court may not enforce a statute whose terms are clearly unconstitutional. See *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60; *People v. Western Union Tel. Co.*, 70 Colo. 90, 198 P. 146, 15 A.L.R. 326; cf. *State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 50 S.Ct. 228, 74 L.Ed. 710, 66 A.L.R. 1460.” (*Ibid.*) The Supreme

Court was concerned that, “the question of whether the act, as applied to the individual, conforms to constitutional due process in giving the one regulated adequate notice of the existence of the order for which enforcement is sought and sufficient opportunity to be heard or to exhaust his administrative remedy, under the facts of the particular case, is one which a court, particularly in a criminal proceeding, would be reluctant to ignore.” (*Ibid.*)

Of course, at no point has social media offered any United States Supreme Court authority that directly addresses the federal constitutionality of the SCA as it relates to criminal defendants seeking social media content by way of subpoena, and any federal appellate and/or district court citations provided are all over the map on this novel and quickly growing phenomenon and legal conflict. The SCA itself was enacted over 29 years ago when no one even knew or could really contemplate how huge the social media way of life would become in the twenty-first century or what Facebook, Instagram, and/or Twitter were, and the United States Congress has done little to update a very dated and legally insufficient federal statute in light of how pervasive the digital world has become.

Faced with dead and/or vanished social media users who were of paramount importance to the prosecution and defense of real parties in a life top murder case, respondent court conducted a proper review of the corresponding federal and state case law, considered the federal statutory SCA privacy rights of these social media users, and weighed real parties’ federal and state constitutional rights to due process, compulsory evidence, competent attorneys, and a speedy trial to ultimately conclude that real parties should receive this information for presentation at the upcoming jury trial. Respondent court possessed the legal authority and took the responsibility to make this very reasonable and measured determination that

as framed by the facts of this case real parties had a federal constitutional right to this social media content despite what petitioners' argue the SCA prohibits. In no way did respondent court abuse its discretion in rendering this federal constitutional ruling of a federal statute, but instead invoked its constitutional authority as a member of the third branch to make such a ruling. The fact that it was a federal constitutional decision affecting a federal statute has no moment to its responsibility.

Social media continues to argue that cases like *Negro v. Superior Court* (2015) 230 Cal.App.4th 879 and *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, have already settled this issue in California, holding that the federal Stored Communications Act preempted civil discovery subpoenas served on e-mail service providers seeking e-mail documents identifying persons who supplied content. However, these lower court decisions involved only the civil subpoena process where other means of discovery to the parties existed – interrogatories and depositions – that do not exist in criminal prosecutions. Finally, these cases did not address any federal constitutional issues raised by this case and which are germane to all state criminal prosecutions. As such, *Negro v. Superior Court, supra*, and *O'Grady v. Superior Court, supra*, should be disregarded.

C. **People v. Hammon, Supra, Should Be Overturned or Limited to Just the Psychotherapist-Patient Privilege.**

Barely acknowledged by social media in its briefing, the lower court created seminal legal precedent when concluding that criminal defendants possess federal constitutional rights to social media's information regardless of SCA's potential statutory prohibition. (*Facebook v. Superior Court, supra*, at p. 226, fn. 17.) However, in granting social media's writ quashing real parties' duly issued subpoenas for relevant social media records, the lower court restricted this federal constitutional mandate to *trial* only

(*Ibid.*), believing the SCA has somehow created a privilege for social media information equal to that afforded sensitive mental health records acknowledged by this Court in *People v. Hammon, supra*.

In *People v. Hammon, supra*, this Court barred discovery prior to *trial* of information shielded by the psychotherapist-patient privilege: “the trial court was not required, at the pretrial stage of the proceedings, to review or grant discovery of privileged information in the hands of third party psychotherapy providers.” (*Id.*, at p. 1119.)

Real parties argue, and CACJ and NACDL agrees, that social media content should not be afforded the same privileged status as psychotherapist-patient records exalted in *People v. Hammon, supra*. Instead, criminal defendants should be constitutionally entitled to *pretrial* access of these ubiquitous records obtained through respondent superior court’s protective *in camera* subpoena review process which protects non-party users’ privacy concerns while ensuring criminal defendants receive fair and speedy trials, complete defenses, competent counsel, and full confrontation as guaranteed by Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

The lower court correctly described the SCA as creating a “zone of privacy” around protected material to prevent disclosure of private content or the divulging of personal communications. (*Facebook v. Superior Court, supra*, at p. 212.) Quoting *Theofel v. Farey-Jones* (9th Cir. 2004) 359 F.3d 1066, 1072-73, that the SCA “reflects Congress’ judgment that users have a legitimate interest in the confidentiality of communication in electronic storage at a communications facility,” the lower court expatiated this confidential protection to that of a legal privilege. The SCA, however, secures confidential information; it does not create any sort of privilege.

As aptly noted by amicus Los Angeles County Public Defenders

Office in its letter supporting review, privileges are created by statute in California. (Letter, p. 4.) Courts are not permitted to create privileges unless some constitutional provision requires them to: “the Legislature has determined that evidentiary privileges shall be available only as defined by statute. Courts may not add to the statutory privileges except as required by state and federal constitutional law.” (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373 [citations omitted].) “Furthermore, it is clear that the privileges contained in the Evidence Code are exclusive and the courts are not free to create new privileges as a matter of judicial policy.” (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 642, 656 [citations omitted].) Federal statutory enactments providing for confidentiality of information do not create privileges, and as such, the SCA does not create any privileges at all, but instead only zone of privacy or confidentiality.

Like medical records, not all personal information needs or deserves the same level of protection psychiatric records require where one’s deepest, darkest, and most vulnerable thoughts, feelings, and emotions are potentially exposed to harsh public ridicule, condemnation, and exclusion. Some Facebook posts may be potentially embarrassing and some level of privacy or confidentiality may be important to maintain when possible (even though Facebook does much to circumvent privacy settings and sell profile information to the highest advertisement bidder). But ubiquitous Facebook postings of one’s vacation or even more cute kittens videos simply do not rise to the same level of protection needed for psychiatric records.

Furthermore, *People v. Hammon*’s discovery at trial distinction was and has been a tenuous, unworkable, and untenable process for everyone involved, but most notably for the criminal defendant. To be forced to start trial without the most crucial evidence that could make or break the case,

then put a jury on hold while one seeks a subpoena, compels its physical production, conducts a hearing to determine its relevance, reviews the produced records, investigates its content, prepares it for trial, conducts in limine motions to determine admissibility, and then finally introduces it during trial to an unhappily delayed jury is completely inefficient and is an affront to true due process and a fair trial. As the Los Angeles County Public Defender's Office *amicus* further explained in its Review letter and as undersigned counsel can attest, trial courts facing the *Hammon* discovery request from the criminal defendant in the middle of trial may deny the motion, grant the motion and grant a mistrial, or grant the motion and continue the trial, but most often simply deny the motion or grant a short continuance to review the proffered material in the face of an impatient jury and the huge cost in resources to bring the trial to fruition. Neither actually promotes the ascertainment of the truth for the State nor a fair trial for the criminal defendant, leading to successive reversals on appeal for information the defense was ultimately able to obtain but effectively precluded from presenting given how late in the game it was finally produced.

Slavishly adhering to this form over function led to the absurd result in this case where the parties litigated the social media subpoena issue literally the day before the trial was to begin, but the lower court steadfastly held to the notion that the proceedings were still in the *pretrial* stage, and as such, real parties were not entitled to even begin serving subpoenas for the highly relevant social media content, let alone move for its production and ultimate introduction. This delay makes no sense where the lower court found real parties were constitutionally entitled to the social media content and they are represented by officers of the court who would have honored any protective orders issued by the trial court and professionally managed

these records to protect any nonparty privacy concerns in the lead up to and during trial.

As such, this Court should overrule *People v. Hammon, supra*, as applied to facts raised in this case or limit its holding to only that discovery relating to the Psychotherapist-Patient Privilege and not expand it to include contested social media content.

CONCLUSION

For all of the reasons advanced by real parties, fellow *amicus*, and discussed above, this Court should uphold respondent court's order and grant the Petition for Review.

Dated: April 7, 2016

Respectfully submitted,

DONALD E. LANDIS, JR.
State Bar No. 149006
Attorney for *Amicus 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 Writ of Mandate/Prohibition was prepared in Wordperfect X4, and according to that program's word count, it contains 4153 words.

I declare under penalty of perjury the above is true and correct.

Executed on April 7, 2016, in Salinas, California.

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