B248609

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION EIGHT

FACEBOOK, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,
Respondent,

DORIAN LEWIS
Real Party in Interest.

ON PETITION FOR WRIT OF MANDATE FROM THE LOS ANGELES COUNTY SUPERIOR COURT
LISA B. LENCH, JUDGE • CASE NO. BA399442

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFF AND PETITIONER FACEBOOK, INC.

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.200, amicus curiae Electronic Frontier Foundation (EFF) respectfully requests

permission to file the accompanying amicus curiae brief in support of Facebook, Inc.'s petition for an extraordinary writ.[1]

EFF is a non-profit, member-supported digital civil liberties organization working to protect legal rights in the digital world. Founded in 1990, EFF is based in San Francisco, California. EFF has over 17,000 members throughout the United States and internationally. As part of its mission, EFF has served as amicus curiae in key cases addressing user rights to privacy, free speech, and innovation as applied to the Internet and other new technologies.

EFF's interest in this case arises out of concern for the privacy rights of electronic social media users. Facebook's writ petition challenges an order by the superior court requiring Facebook to disclose the content of an alleged crime victim's Facebook communications in response to a subpoena issued by her alleged attacker, real party in interest Dorian Lewis. This court initially directed Lewis to file a preliminary response addressing the question whether there is any reason why he could not obtain the content he sought by way of an order directed to the alleged crime victim. Subsequently, after Lewis informed the court that he has withdrawn his subpoena, the court advised the parties that it

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[1] No party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).) EFF certifies that no person or entity other than EFF and its counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief.

intends to dismiss the petition as moot, but that Facebook may file a letter addressing whether there is any reason why the petition should *not* be dismissed as moot.

The accompanying amicus curiae brief by EFF argues that (1) Facebook's petition should not be dismissed as moot because it raises an issue of broad public interest that is likely to recur, (2) Lewis could indeed have obtained the content he sought by way of an order directed to the alleged crime victim to disclose that content, and (3) this court should hold that an order requiring the alleged crime victim to *consent to such disclosure by Facebook* would improperly erode federal law protecting the confidentiality of stored electronic communications.

May 28, 2013

ELECTRONIC FRONTIER FOUNDATION
CINDY COHN
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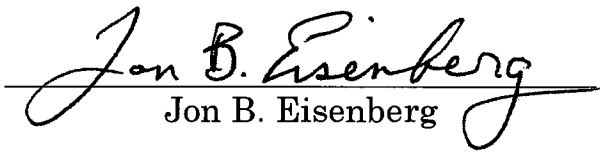
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

Facebook's petition in this writ proceeding challenges an order by the superior court requiring Facebook to disclose the content of an alleged crime victim's Facebook communications in response to a subpoena issued by her alleged attacker, real party in interest Dorian Lewis.

In an order dated May 13, 2013, this court ordered Lewis to file a preliminary response. The order directed: "Among other things, the response should discuss whether there is any reason why real party cannot obtain the content he seeks by way of an order directed to the alleged crime victim. (See *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854 [(*Juror Number One*)].)"

Lewis subsequently informed the court that he has withdrawn his subpoena. In a follow-up order dated May 22, 2013, this court advised the parties "it is our present intention to dismiss the petition as moot," but also stated: "If petitioner believes there is any reason the petition should not be dismissed as moot, petitioner should serve and file a letter, on or before May 29, 2013, explaining its position."

Amicus curiae EFF understands that Facebook intends to take the position that this court should not dismiss the petition because it raises an issue of broad public interest that is likely to

recur. EFF agrees with that position and submits this amicus curiae brief urging the court to rule that Facebook is entitled to writ relief because Lewis could have sought to obtain the alleged crime victim's Facebook communications directly from her. EFF also urges the court to decide an important sub-issue implicated by the court's order of May 13, 2013: Could an order by the superior court directed to the alleged crime victim properly require her to *consent to Facebook's disclosure* of the communications?

A two-to-one decision in *Juror Number One* upheld an order requiring a juror to consent to Facebook's disclosure of communications the juror had posted to his Facebook account while a criminal trial was in progress. (See *Juror Number One, supra,* 206 Cal.App.4th at pp. 864-865.) EFF submits that *Juror Number One* was wrongly decided in this respect, because such an order erodes the Stored Communications Act (SCA) (18 U.S.C.A. § 2701 et seq.), which protects the confidentiality of stored electronic communications. EFF urges this court to issue a published opinion in this case, crafted to make clear that a superior court order directed to the alleged crime victim could require her to disclose her Facebook communications directly to Lewis, but could not properly require her to provide *consent to Facebook's disclosure* of the communications.

LEGAL DISCUSSION

I. THE COURT SHOULD DECIDE FACEBOOK'S PETITION, DESPITE ITS MOOTNESS, BECAUSE IT PRESENTS AN ISSUE OF BROAD PUBLIC INTEREST THAT IS LIKELY TO RECUR.

Electronic social media like Facebook have become ubiquitous with astonishing speed. The number of active monthly Facebook users now stands at some 1.11 billion; that number for Twitter is more than 200 million; for LinkedIn it is 225 million. (Smith, *How Many People Use the Top Social Media, Apps & Services?* (May 18, 2013) Digital Marketing Ramblings <http://expanded ramblings.com /index.php/resource-how-many-people-use-the-top-social-media/> [as of May 23, 2013].)

Not surprisingly, with such an immense amount of active monthly use, internet service providers like Facebook are frequently served with subpoenas that, like the one in the present case, require them to disclose their customers' internet communications for submission in legal proceedings. Such demands threaten to erode the SCA's protection of stored electronic communications. (See *post* pp. 7-9.) Yet there is currently only one published California case addressing the propriety of such demands—*Juror Number One*—and it is a split decision, in which members of the court disagreed as to whether a superior court may order a non-party to litigation

before the court to consent to an internet service provider's disclosure of the non-party's internet communications.

That issue is presented here. Facebook's petition has been mooted by Lewis's withdrawal of his subpoena, but the issue is one of broad public interest that will certainly recur in future cases. This court should therefore decide the issue in the present case despite its mootness. (See, e.g., *Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1086.)

II. A LITIGANT WHO DESIRES ACCESS TO A THIRD PARTY'S INTERNET COMMUNICATIONS SHOULD SEEK TO OBTAIN THEM FROM THAT PERSON, NOT FROM THAT PERSON'S INTERNET SERVICE PROVIDER.

Congress passed the SCA in 1986 to protect the confidentiality of communications in electronic storage with an internet service provider or other electronic communications facility. (*Theofel v. Farey-Jones* (9th Cir. 2004) 359 F.3d 1066, 1072-1073.) Its purpose is "to protect internet subscribers from having their personal information wrongfully used and publicly disclosed by 'unauthorized private parties.'" (*In re Subpoena Duces Tecum to AOL, LLC* (E.D.Va. 2008) 550 F.Supp.2d 606, 610, quoting Sen. Rep. No. 99-541, 2d Sess., p. 3 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News, pp. 3555, 3557.)

The SCA creates a set of statutory Fourth Amendment-like privacy protections limiting the government's ability to compel

providers to disclose customer information and the ability of providers to disclose such information voluntarily. (See Kerr, *A User's Guide to the Stored Communications Act, And a Legislator's Guide to Amending It* (2003-2004) 72 Geo. Wash. L.Rev. 1208, 1212-1213.) A federal district court has held that the SCA protects Facebook postings. (*Crispin v. Christian Audigier, Inc.* (C.D.Cal. 2010) 717 F.Supp.2d 965, 981-982, 988-990; but see generally *Juror Number One, supra,* 206 Cal.App.4th at p. 863 [assuming that "*Crispin* was correctly decided" but noting that, given insufficiency of factual record, "we are unable to determine whether or to what extent the SCA is applicable to the information at issue in this case"].)

In *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423 (*O'Grady*), the court observed that, in adopting the SCA, "it would be far from irrational for Congress to conclude that one seeking disclosure of the contents of e-mail, like one seeking old-fashioned written correspondence, should direct his or her effort to the parties to the communication and not to a third party who served only as a medium and neutral repository for the message." (*Id.* at p. 1446.) "Congress could quite reasonably decide that an e-mail service provider is a kind of data bailee to whom e-mail is entrusted for delivery and secure storage, and who should be legally disabled from disclosing such data in response to a civil subpoena without the subscriber's consent. This does not render the data wholly unavailable; it only means that *the discovery must be directed to the owner of the data,* not the bailee to whom it was entrusted." (*Id.* at p. 1447, emphasis added.)

O'Grady reasoned quite correctly that to force providers to comply with routine subpoenas seeking customers' internet communications "would impose severe administrative burdens [on providers], interfering with the manifest congressional intent to encourage development and use of digital communications." (*O'Grady, supra,* 139 Cal.App.4th at p. 1446.) "Further, routine compliance might deter users from using the new media to discuss any matter that could conceivably be implicated in litigation—or indeed, corresponding with any person who might appear likely to become a party to litigation." (*Ibid.*) Thus, to place a burden of production on the provider instead of the user would have a chilling effect on internet use and would contravene the public policy underlying the SCA.

This court should accordingly conclude in the present case that if Lewis desires access to the alleged crime victim's Facebook communications, he should seek to obtain them *directly from her*, not from Facebook. Facebook's writ petition describes various tools, made generally available by Facebook, that enable users to obtain their Facebook account content and information for voluntary disclosure in litigation. (See Petn. 18.) If necessary, a civil litigant can issue a subpoena to the user, requiring production of the user's account content as being "under the witness's control." (Code Civ. Proc., § 1985, subd. (a).) A criminal defendant can do the same. (Pen. Code, § 1326, subd. (c).) And the court may use its contempt power to punish disobedience to such a subpoena. (Code Civ. Proc., § 1991; Pen. Code, § 1331.)

Here, the alleged assault victim's Facebook communications are under her control and she can easily obtain them. The SCA tells us that Lewis should seek to obtain them from her, not from Facebook.

III. JUDICIALLY-COERCED CONSENT CANNOT INVOKE THE DISCLOSURE PROVISIONS OF THE STORED COMMUNICATIONS ACT.

In *Juror Number One, supra,* 206 Cal.App.4th 854, a two-to-one decision endorsed an end run around the SCA's forced disclosure prohibition, which this court should reject.

An exception to the SCA's disclosure prohibition is that a provider may divulge the contents of a communication "with the *lawful consent* of the originator or an addressee or intended recipient of such communication . . . ." (18 U.S.C.A. § 2702(b)(3), emphasis added.) In *Juror Number One,* the trial court purported to invoke the SCA's "lawful consent" exception by ordering the juror to consent to Facebook's disclosure of his postings. The Court of Appeal upheld the superior court's order.

The majority opinion in *Juror Number One* explained: "[E]ven assuming Juror Number One's Facebook postings are protected by the SCA, that protection applies only as to attempts by the court or real parties in interest to compel Facebook to disclose the requested information. Here, *the compulsion is on Juror Number One, not Facebook.*" (*Juror Number One, supra,* 206 Cal.App.4th at p. 864, emphasis added.) The opinion added: "[T]he

question here is not whether respondent court can compel Facebook to disclose the contents of Juror Number One's wall postings but *whether the court can compel Juror Number One to do so.* If the court can compel Juror Number One to produce the information, it can likewise compel Juror Number One to consent to the disclosure by Facebook. The SCA has no bearing on this issue." (*Id.* at pp. 864-865, emphasis added.)

The majority's reasoning in *Juror Number One* raises the question whether judicially-coerced consent can legitimately invoke the SCA's "lawful consent" exception. There is a dearth of legal authority on point. A few courts have addressed this question within the context of consent by a *party* to litigation, and have reached conflicting conclusions, either summarily or in dicta. (See *O'Grady, supra,* 139 Cal.App.4th at p. 1446 ["Where a party to the communication is also a party to the litigation, it would seem within the power of a court to require his consent to disclosure on pain of discovery sanctions"]; *Flagg v. City of Detroit* (E.D.Mich. 2008) 252 F.R.D. 346, 366 ["there is very little case law that confirms the power of a court to compel a party's consent to the disclosure of materials pursuant to a third-party subpoena"]; *J.T. Shannon Lumber Company, Inc. v. Gilco Lumber Inc.* (N.D.Miss. Oct. 29, 2008, No. 2:07-CV-119-SA-SAA) 2008 WL 4755370, at p. *1 [nonpub. opn.] ["By requiring the defendant and its employees to consent to the disclosure of such information by subpoena of the internet service provider, the court would undermine the [SCA's] intent to create a zone of privacy around that medium. There is no exception in the statute for civil discovery, and the court declines to

create one by allowing an end run around the statute."]; *Romano v. Steelcase Inc.* (N.Y. Sup. Ct. 2010) 30 Misc.3d 426, 435 [907 N.Y.S.2d 650, 657] [ordering plaintiff to consent to disclosure, without addressing whether court had power to do so].)

Except for *Juror Number One*, however, no published decision, in California or elsewhere, has addressed the question whether judicially-coerced consent by a *non-party* can invoke the SCA's "lawful consent" exception. The answer should be "no," for the simple reason that *coerced* consent cannot be *lawful* consent. "Where there is coercion there cannot be consent." (*Bumper v. State of North Carolina* (1968) 391 U.S. 543, 550 [88 S.Ct. 1788, 20 L.Ed.2d 797].) " '[T]he absence of official coercion is a *sine qua non* of effective consent.' " (*Hubbard v. Haley* (11th Cir. 2003) 317 F.3d 1245, 1253.)

A separate concurring opinion in *Juror Number One* took issue with the majority's reasoning that " 'the compulsion is on Juror Number One, not Facebook.' " (*Juror Number One, supra,* 206 Cal.App.4th at p. 869 (conc. opn. of Mauro, J., quoting *id.* at p. 864).) Justice Mauro disagreed with the proposition that coerced consent can be lawful consent:

> In essence, the trial court's order is an effort to compel indirectly (through Juror Number One) what the trial court might not be able to compel directly from Facebook. This is arguably inconsistent with the spirit and intent of the protections in the SCA. *Compelled consent is not consent at all.* (See, e.g., *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 228, 233 [parallel citations] [coerced consent is merely a pretext for unjustified intrusion].)

(*Id.* at p. 869, emphasis added; see *In re Facebook, Inc.*, ___ F.Supp.2d ___ (N.D.Cal. Sept. 20, 2012, No. C 12-80171 LHK (PSG)) 2012 WL 7071331, at p. *1 ["Under the plain language of [the SCA], while consent may *permit* production by a provider, it may not *require* such a production"].)

The majority opinion in *Juror Number One* indulged a legal fiction which threatens to undermine the privacy rights conferred by the SCA. The analogy to constitutional law is obvious. A coerced confession cannot pass constitutional muster; nor can coerced consent to an unlawful search or seizure. Likewise, coerced consent should not be effective to invoke the disclosure provisions of the SCA. It is an end run around the SCA, which the law should not countenance.

The majority opinion in *Juror Number One* posited: "If the [superior] court can compel Juror Number One to produce the information, it can likewise compel Juror Number One to consent to the disclosure by Facebook." (*Juror Number One, supra,* 206 Cal.App.4th at p. 865.) That proposition is itself dubious, given the illegitimate legal status of coerced consent. In any case, however, if the superior court can compel a third party to produce internet communications, then *that* is what the superior court should compel, rather than indulging the legal fiction of coerced consent to disclosure by the provider.

EFF urges this court to grant Facebook's petition and to heed Justice Mauro's concurring opinion in *Juror Number One.* This court should conclude, in a published opinion, that the superior court in this case could have ordered the alleged crime victim to

disclose the content Lewis sought but could not have properly ordered her to consent to such disclosure by Facebook.

CONCLUSION

For the foregoing reasons, the court should grant the petition in a published opinion that delineates the proper scope of relief available to the real party in interest.

May 28, 2013

ELECTRONIC FRONTIER FOUNDATION
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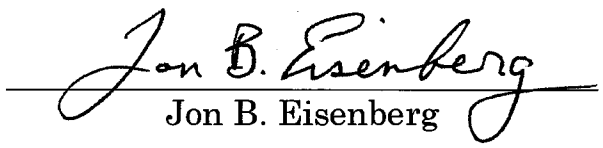
By: 
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 2,890 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: May 28, 2013

Jon B. Eisenberg

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On May 28, 2013, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFF AND PETITIONER FACEBOOK, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 28, 2013, at Encino, California.

Jan Loza

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Facebook, Inc. v. Superior Court of Los Angeles County et al.
B248609

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