S286267

August 15, 2024

Honorable Chief Justice Patricia Guerrero
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Snap, Inc. v. Super. Ct. of San Diego County and Adrian Pina et al.,* No. D083446*; Meta Platforms Inc. v. Super. Ct. of San Diego County and Adrian Pina et al.,* No. D083475
Request for Depublication, No. S286267

Dear Chief Justice Guerrero and Associate Justices of the Court:

The American Civil Liberties Union of Northern California, American Civil Liberties Union of San Diego and Imperial Counties, and American Civil Liberties Union respectfully request depublication of the above-referenced opinion.[1]

The Fourth District's decision implicates significant issues related to privacy rights protected by the federal Stored Communications Act (SCA) and criminal defendants' rights to obtain information necessary to their defense. In resolving these issues, however, the Fourth District employed faulty statutory analysis and failed to address the Ninth Circuit's contrary interpretation of the SCA's disclosure provisions. To address this error, offer other courts the opportunity to address these weighty issues more directly on a case-by-case basis, and allow for further percolation, this Court should depublish the decision below.

The undersigned are nonprofit, nonpartisan organizations dedicated to the principles of liberty and equality embodied in the federal and California Constitutions, and our nation's and state's civil rights laws, including the right to privacy. They have engaged in legislative efforts related to both the federal SCA and the California Electronic Communications Privacy Act, and they have frequently appeared as counsel to the parties and *amici* before this Court and the United States Supreme Court in cases implicating the right to privacy. (See, e.g., *In re Ricardo P.* (2019) 7 Cal.5th 1113; *Sheehan v. S.F. 49ers* (2009) 45 Cal.4th 992; *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1; *White v. Davis* (1975) 13 Cal.3d 757;

[1] Snap, Inc. and Meta Platforms Inc. filed petitions for review of the decision below on August 2 and August 5, 2024 (Case No. S286267).

Carpenter v. United States (2018) 585 U.S 296; *Riley v. California* (2014) 573 U.S. 373; *Herring v. United States* (2009) 555 U.S. 135.)

In several cases, this Court has recognized some tension between the federal SCA's disclosure restrictions and criminal defendants' right to obtain information necessary to their defense. (See, e.g., *Facebook, Inc. v. Super. Ct. of San Diego County* (2020) 10 Cal.5th 329; *Facebook, Inc. v. Super. Ct.* (2018) 4 Cal.5th 1245.) That tension is not cleanly presented by the decision below. Instead of addressing these specific criminal-defense-related concerns, the decision below held, as a matter of statutory interpretation, that user communications stored with Snap and Meta are categorically outside the SCA's protection—either because the platforms are not "electronic communications service" (ECS) providers within the meaning of the statute or because the users' communications are not "in electronic storage." (*Snap, Inc. v. Super. Ct. of San Diego County* (July 23, 2024, D083446) __ Cal.App.5th __ [2024 WL 3507024, *16–*20]; see 18 U.S.C. § 2510(15), (17).)

The Fourth District's holding is contrary to federal precedent interpreting the SCA. The statute's definition of ECS is extremely broad, including "*any* service which provides to users thereof the ability to send or receive wire or electronic communications." (18 U.S.C. § 2510(15), italics added.) Federal courts have repeatedly held that companies like Meta and Snap qualify as ECS providers. (See *Crispin v. Christian Audigier, Inc.* (C.D. Cal. 2010) 717 F.Supp.2d 965, 982; accord *Viacom Internat. Inc. v. YouTube Inc.* (S.D.N.Y. 2008) 253 F.R.D. 256.) In fact, we are unaware of any federal case which has held otherwise.

Additionally, the SCA protects these user communications because they are held in "electronic storage" as that term is defined in the statute. Electronic storage means "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and any storage . . . for purposes of backup protection of such communication." (18 U.S.C. § 2510(17)(A)–(B).) Multiple federal courts, including the Ninth Circuit, have held that this definition applies to *any* user communications held as stored backup or archival copies by the service provider that facilitated the communications, regardless of what additional purpose those copies may serve to the providers themselves. (See *Theofel v. Farey-Jones* (9th Cir. 2004) 359 F.3d 1066, 1075 [holding that e-mail messages stored by an internet service provider, even after transmission to their intended recipients, were "in electronic storage" for purposes of SCA]; *Quon v. Arch Wireless Operating Co., Inc.* (9th Cir. 2008) 529 F.3d 892, 900–901, *revd. on other grounds*, (2010) 560 U.S. 746 [holding that archived copies of temporary messages on a service provider's platform qualified as ECS content].)

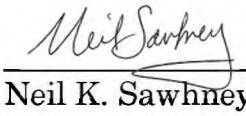
The Fourth District's analysis did not consider or address how its interpretation can be reconciled with federal precedent. In fact, the Fourth District didn't even *cite* the Ninth Circuit's contrary decisions. Simply put, while the fact that Snap and Meta Platforms may "retain and utilize user communication content for

their own business purposes and to enhance services offered on the platforms" may be bad for user privacy, it does not transform the fundamental nature of user communications stored by the service providers for purposes of SCA coverage. (*Snap, Inc.*, *supra*, 2024 WL 3507024 at p. *16.) The user communications are still stored as backup on the platforms' servers, regardless of what other purposes storage may serve, and are therefore covered by the SCA. (*Theofel*, *supra*, 359 F.3d at p. 1075.)

We are aware that Snap and Meta have filed petitions for review in this case. (*See* fn. 1, *supra*.) Although this Court could grant plenary review, we urge the Court to consider depublication in the alternative. Depublication would mitigate the potential consequences of the Fourth District's faulty statutory analysis, while permitting other California courts to directly confront the tensions at the heart of this case and encouraging further percolation of these important legal questions.

For the foregoing reasons, we respectfully ask this Court to depublish the Court of Appeal's opinion.

Respectfully submitted,



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I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On August 15, 2024, I served the attached:

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

Executed on August 15, 2024, in Fresno, CA.

Sara Cooksey

Sara Cooksey, Declarant