

# HORVITZ & LEVY

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March 4, 2020

## VIA TRUEFILING

Presiding Justice Barbara J. R. Jones  
Associate Justice Mark B. Simons  
Associate Justice Gordon B. Burns  
California Court of Appeal  
First Appellate District, Division Five  
350 McAllister Street  
San Francisco, California 94102-3600

Re: *Facebook, Inc. v. Superior Court of San Francisco (Hunter)*  
Court of Appeal No. A157143  
Request for Publication; Opinion filed February 13, 2020

Dear Presiding Justice Jones and Associate Justices:

Pursuant to California Rules of Court, rule 8.1120(a), Apple Inc., Google LLC, Verizon Media Group, and the Chamber of Commerce of the United States of America (U.S. Chamber), request that this court publish its February 13, 2020, opinion in *Facebook, Inc. v. Superior Court (Hunter III)*.

### Interests of amici curiae

Apple offers highly secure hardware, software, and servers to customers worldwide. Apple's business strategy leverages its unique ability to design and develop its own operating systems, hardware, application software, and services to provide customers products and solutions with superior security, ease of use, seamless integration, and innovative design. In addition to the iPhone, iPad, Mac computer, wearables such as Apple Watch, and home and accessories products such as Apple TV, Apple offers its users services such as iCloud—a cloud service for storing photos, contacts, calendars, documents, device backups, and more, keeping everything up to date and available to customers on whatever device they are using. Apple is committed to its users' privacy and to helping users understand how it handles their personal information.

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Google is a diversified technology company whose mission is to organize the world's information and make it universally accessible and useful. Google offers a variety of web-based products and services, including Search, Gmail, Maps, YouTube, and Blogger, that are used daily around the world. For example, more than 400 hours of YouTube videos are uploaded to Google every minute, and there are more than a billion monthly active users of Gmail. To use these and other services, users give Google information, including queries for Search, photographs for Photos, documents in Drive, emails in Gmail, and videos for YouTube. Google's Privacy Policy helps users understand what data Google collects, why it's collected, and what Google does with it.

Verizon Media, a division of Verizon Communications, Inc., houses a trusted media ecosystem of premium brands like Yahoo!, TechCrunch, and HuffPost, to help people stay informed and entertained, communicate and transact, while creating new ways for advertisers and media partners to connect. From extended reality experiences to advertising and content technology, Verizon Media is an incubator of innovation and is revolutionizing the next generation of content creation in a 5G world.

The U.S. Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of approximately 3 million companies and professional organizations of every size. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases that raise issues of concern to the nation's business community. The U.S. Chamber's membership includes many technology companies that are concerned about their users' privacy interests.

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### **Why publication should be ordered**

The *Hunter III* opinion provides much needed guidance on the type of good cause that must be shown before a trial court can compel a communications service provider to disclose its user's private communications, assuming such an order is ever permissible under the Stored Communications Act (SCA), 18 U.S.C. § 2701 et seq. The opinion should therefore be certified for publication because it “[i]nvolves a legal issue of continuing public interest” (Cal. Rules of Court, rule 8.1105(c)(6)), “[e]stablishes a new rule of law” (*id.*, rule 8.1105(c)(1)), and “[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions” (*id.*, rule 8.1105(c)(2)).

The opinion in *Hunter III* involves an issue of continuing public interest because it implicates the privacy interests of everyone who uses electronic communications services, which is nearly everyone in the state. The opinion clarifies the analysis a trial court must undergo before considering whether it can compel production of these individuals' believed-to-be-private information from the service providers they trusted to safeguard their information. Communications via email, social media, web-based communication services and platforms, and Internet-enabled mobile devices are ubiquitous. All these electronic communications are typically transmitted via service providers such as Facebook and Twitter, which store the communications in their facilities. (See *Riley v. California* (2014) 573 U.S. 373, 397 [134 S.Ct. 2473, 189 L.Ed.2d 430] [data stored on the “cloud” with “increasing frequency”]; Note, *Protections for Electronic Communications: The Stored Communications Act and the Fourth Amendment* (2009) 78 Fordham L.Rev. 349, 378-379 [email routinely held on provider servers for increasing periods of time, and third parties increasingly used for remote storage].) Nearly three-fourths of Americans say that it is “‘very important’ ” to be “‘in control of who can get information about them,’” and a clear majority say it is “‘very important’ ” to be able to control “‘what information is collected about them.’ ” (*The state of privacy in post-Snowden America* (Sept. 2016) Pew Research Center <<https://pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/>> [as of Mar. 3, 2020].) The opinion in *Hunter III* directs courts to consider multiple factors before deciding whether they can compel service providers to turn over electronic communications, thus protecting the privacy interests of millions of people.

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Relatedly, the opinion here also affects the development and adoption of new and important communications systems that benefit the public. In enacting the SCA, Congress was concerned that lack of privacy protections “may unnecessarily discourage potential customers from using innovative communications systems,” (H.R.Rep. No. 99-647, 2d Sess., p. 19 (1986)), and may “discourage American businesses from developing new innovative forms of telecommunications and computer technology,” (Sen.Rep. No. 99-541, 2d Sess., p. 5 (1986)). Assuming production of users’ private communications can ever be compelled from service providers in light of the SCA, the *Hunter III* opinion’s discussion of what efforts are required to first seek the information from other sources (typed opn. 14-15) is important to preserving the privacy expectations that are critical for new technologies to flourish.

The court’s opinion in *Hunter III* also establishes a new rule of law because it addresses many of the specific and novel issues explicitly left open by the Supreme Court in *Facebook, Inc. v. Superior Court (Hunter)* (2018) 4 Cal.5th 1245, 1290-1291 & fn. 47 (*Hunter II*), such as setting forth the factors a trial court should consider when a criminal defendant seeks to compel production of private stored communications from a service provider (typed opn. 12).

Finally, the opinion here considers a set of facts significantly different from those stated in the prior published opinions because it addresses how to evaluate a subpoena seeking the production of private stored communications at *trial*, as opposed to a subpoena seeking *pretrial* production. (See typed opn. 10 [noting that *Hunter II* addressed pretrial subpoenas]; *Hunter II, supra*, 4 Cal.5th at p. 1261 [noting that Court of Appeal may have applied a different analysis if it were assessing a trial subpoena].) Furthermore, the opinion here emphasizes the importance of reviewing public communications that had already been produced (typed opn. 8, 15), whereas in *Hunter II, supra*, 4 Cal.5th at pp. 1249-250, the public communications had not yet been produced.

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Accordingly, amici ask this court to order publication of its February 13, 2020,  
opinion.

Very truly yours,

**HORVITZ & LEVY LLP**  
ERIC S. BOORSTIN  
JEREMY B. ROSEN

By:



Eric S. Boorstin

Attorneys for Amici Curiae  
**APPLE INC.**  
**GOOGLE LLC**  
**VERIZON MEDIA GROUP**  
**CHAMBER OF COMMERCE OF THE**  
**UNITED STATES OF AMERICA**

ESB/caj

cc: Attached Proof of Service

**PROOF OF SERVICE**

**Facebook Inc. et al. v Superior Court of the City and  
County of San Francisco  
Case No. A157143**

**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 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On March 4, 2020, I served true copies of the following document(s) described as **LETTER REQUESTING PUBLICATION OF OPINION** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on March 4, 2020, at Burbank, California.

  
\_\_\_\_\_  
Cassandra Johnson

**SERVICE LIST**  
**Facebook Inc. et al. v Superior Court of the City and**  
**County of San Francisco**  
**Case No. A157143**

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