Case No. S286267

IN THE SUPREME COURT OF CALIFORNIA

SNAP, Inc., *Petitioner,*

v.

The Superior Court of San Diego County, *Respondent,*

Adrian Pina et al., *Real Parties in Interest.*

After a Decision by the Court of Appeal,
Fourth Appellate District, Division 1, Case Nos. D083446, D08375
San Diego Superior Court, Case No. SCN429787
Hon. Daniel J. Link, Judge Presiding

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

AMICI CURIAE BRIEF OF THE LGBT TECHNOLOGY INSTITUTE, THE NATIONAL QUEER ASIAN PACIFIC ISLANDER ALLIANCE, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, HACKING THE WORKFORCE, THE TREVOR PROJECT, AND ADVOCATES FOR TRANS EQUALITY IN SUPPORT OF PETITIONER

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Application to File Amici Curiae Brief

Amici curiae The LGBT Technology Institute ("LGBT Tech"), The National Queer Asian Pacific Islander Alliance ("NQAPIA"), Bay Area Lawyers for Individual Freedom ("BALIF"), Hacking the Workforce, the Trevor Project, and Advocates for Trans Equality ("A4TE") hereby apply pursuant to California Rule of Court 8.520(f) and this Court's inherent powers for leave of Court to file the attached amici curiae brief in support of the Petitioner. "Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties."[1]

As explained below, amici have a significant interest in the outcome of this case and believe that the Court would benefit from additional briefing on the issues addressed in the attached brief.[2]

Interest of Amici Curiae

The LGBT Technology Institute ("LGBT Tech") is a nonprofit organization dedicated to promoting technology adoption and advocacy within the lesbian, gay, bisexual, transgender, queer, and questioning (LGBTQ+) community. LGBT Tech encourages the continued early adoption and use of cutting-edge, new and emerging technologies by providing information, education, and strategic outreach. An important function of LGBT Tech is to advocate for policies that benefit the LGBTQ+ community. To that end, LGBT Tech files amici curiae, singularly or jointly, in cases like this which raise issues of concern to the LGBTQ+ community.

The National Queer Asian Pacific Islander Alliance ("NQAPIA") is a national leader in the LGBTQ+ Asian American and Native Hawaiian/Pacific Island ("AANHPI") community. NQAPIA serves as a convener of community leaders and

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[1] *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 405, fn. 14 (1992).

[2] No party or counsel for a party in the pending case authored the proposed amici curiae brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than the amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

groups, prepares leaders to challenge systemic injustices, and advocates for LGBTQ+ AANHPI liberation across the United States and its territories.

Bay Area Lawyers for Individual Freedom ("BALIF") is a community of legal professionals, including judges, lawyers, law students and legal workers, that envisions a world where lesbian, gay, bisexual, transgender, queer, questioning, and intersex (LGBTQI+) people live with dignity and equality under the law. BALIF's mission is to lead the LGBTQI+ legal community through advocacy, justice, community empowerment, and professional development and represent its members' interests in the wider San Francisco Bay Area. BALIF was founded in 1980 to encourage LGBTQI+ legal professionals to apply to become judges. As of at the time of BALIF's founding, there were no openly LGBTQI judges — today there are many. BALIF's mission has since expanded to take on questions of law and justice that affect the LGBTQI+ community.

Hacking the Workforce is dedicated to protecting the digital rights and privacy of all individuals, with a special emphasis on supporting LGBTQ+ communities. Hacking the Workforce's mission is to ensure that technology and law work in tandem to enhance, not erode, personal privacy. In the context of this case, the organization aims to advocate for the continued protection of online privacy under the Stored Communications Act, highlight the specific privacy concerns of the LGBTQ+ community, and work alongside legal professionals to influence decisions that uphold privacy rights in the digital realm. Hacking the Workforce firmly believes that a diverse, inclusive, and privacy-conscious workforce is key to creating a society where everyone can feel safe and be their authentic selves online.

The Trevor Project is the nation's leading LGBTQ+ youth suicide prevention and crisis intervention organization. Trevor offers 24/7 crisis services, connecting highly trained counselors with LGBTQ+ young people through nationwide accredited, free, and confidential phone, instant message, and text message services. These services are used by tens of thousands of youths each month. To

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drive suicide prevention efforts, The Trevor Project also operates robust research, advocacy, education, and peer support programs. The Trevor Project envisions a world where all LGBTQ+ young people feel safe, seen, and accepted exactly as they are. Through analyzing and evaluating data obtained from these services and national surveys, The Trevor Project produces innovative research that brings new knowledge, with clinical implications, to issues affecting LGBTQ+ youth.

Advocates for Trans Equality ("A4TE") fights for the legal and political rights of transgender people in America. Leveraging decades of experience on the frontlines of power, A4TE shifts government and society towards a future where transgender people are no less than equal. A4TE was founded in 2024 as the National Center for Transgender Equality ("NCTE") and Transgender Legal Defense and Education Fund ("TLDEF"), two long-time champions for the trans community, merged as one organization. A4TE builds on their successes to boldly imagine a world where trans people live their lives joyfully and without barriers. In a time of increased extremism against trans people and allies, protecting and expanding LGBTQ+ individual's freedom has never been more important.

Accordingly, amici respectfully request that this Court accept and file the attached amici brief.

DATED: February 24, 2025.

Respectfully submitted, MCDERMOTT WILL & EMERY LLP
By: /s/ Sagar K. Ravi
/s/ Katelyn N. Ringrose
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Counsel to Amici Curiae

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Introduction and Summary of Argument

The LGBTQ+ community has a significant interest in the continued protection of messages shared over social media under the Stored Communications Act (SCA). LGBTQ+ individuals are early adopters of technology and use social media at higher rates than their non-LGBTQ+ peers. The SCA provides significant protections to users of social media, prohibiting the disclosure of social media communications except in certain limited circumstances. Here, the Court of Appeal has attempted to abrogate those protections by severely limiting the application of the SCA, leaving users of social media platforms uniquely without safeguards over their private information. While social media users may expect platforms to access their data for certain disclosed purposes, they certainly do not expect platforms to disclose their data to other corporations for any reason, to parties in civil litigation, to foreign governments, or to the U.S. government without a warrant. If the California Supreme Court upholds this decision, hundreds of millions of social media users, including countless LGBTQ+ individuals, will lose substantial privacy protections.

I. LGBTQ+ Individuals Have a Significant Interest in this Case

The LGBTQ+ community has endured a long history of discrimination and social stigma, facing challenges ranging from legal persecution to social ostracization. This painful history underscores the importance of protecting the privacy and safety of LGBTQ+ individuals. Today, connected devices and services play a crucial role in fostering community, providing access to vital resources, and enabling self-expression for LGBTQ+ individuals. Online platforms, including social media sites, offer safe spaces for individuals to connect with others who share their identities, access information about LGBTQ+ issues and resources, and explore their gender identity and sexual orientation in a supportive environment. Research consistently shows that LGBTQ+ individuals utilize the internet and social media

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more than their non-LGBTQ+ peers, with LGBT Tech polling finding that 96% of LGBTQ+ adults access digital spaces at least once a day. LGBTQ+ individuals, and especially transgender members of the community, are more likely to be honest about their identity or sexual orientation online when compared to physical spaces.[3]

The data shared and stored online by LGBTQ+ individuals can be highly sensitive and personal, reflecting their identities, relationships, and personal beliefs. This data, when accessed and misused, can easily lead to discrimination, harassment, or even violence. Even absent misuse, such incredibly personal data should not be divulged absent compelling reasons and without adequate due process safeguards. Strong privacy protections, such as those afforded by the SCA, are crucial for safeguarding the well-being and safety of LGBTQ+ individuals in the digital age. The SCA plays a vital role in protecting the privacy of online communications and ensuring that individuals can express themselves freely and connect with others without fear of unreasonable intrusion, while allowing access to communications in certain justifiably narrow circumstances.

II. LGBTQ+ Persons are Deserving of Privacy Protections

A. The U.S. Supreme Court and federal courts recognize the importance of sexual and intimate privacy

While LGBTQ+ rights and protections are still lagging in many ways, the United States Supreme Court has long recognized the importance of sexual and intimate privacy. In 1965, in *Griswold v. Connecticut*, the U.S. Supreme Court recognized and affirmed the "freedom to associate and privacy in one's associations" in finding the idea of searching marital bedrooms for proof of contraceptive use repulsive.[4] In 2003, in *Lawrence v. Texas*,[5] the U.S. Supreme Court overturned its

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[3] *See* Kirby Phares & Rob Todaro, *ctrl+alt+lgbt: Digital Access, Usage, and Experiences of the LGBTQ+ Community*, LGBT Tech (May 29, 2024), at 4, https://www.lgbttech.org/post/ctrl-alt-lgbt-lgbt-tech-releases-groundbreaking-survey-on-digital-lives-of-lgbtq-adults.
[4] *See* Griswold v. Connecticut, 381 U.S. 479, 483—84 (1965).
[5] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

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1986 decision in *Bowers v. Hardwick*,[6] holding that same-sex couples have the right to enter into relationships in the confines of their homes, while retaining their dignity as free persons. In short, laws criminalizing sexual intimacy, including same-sex intimacy, infringed on the right to privacy in its most basic sense — the "right to be let alone."[7]

Over the past decade, given the rise of online communications, federal courts have grappled with how to both ensure personal privacy while allowing law enforcement and government access to online communications. In 2014, the Navy discharged Senior Officer Timothy McVeigh for engaging in "homosexual conduct," using his AOL account as proof of his sexuality. There, the U.S. District Court for the District of Columbia found that suggestions of sexual orientation in a private, anonymous email account did not give the Navy sufficient reason to investigate Officer McVeigh's sexuality.[8] The Court found that not only did the Navy violate its own "Don't Ask, Don't Tell" policy, but that it also likely acted illegally under the Electronic Communications Privacy Act of 1986 ("ECPA").[9] The Court noted that "In these days of 'big brother,' where through technology and otherwise the privacy interests of individuals from all walks of life are being ignored or marginalized, it is imperative that *statutes explicitly protecting these rights be strictly observed*."[10]

That same year, the U.S. Supreme Court held, in *Riley v. California*, that police must generally obtain a warrant before searching digital information on an arrestee's cell phone.[11] There, and in *United States v. Jones*, Justice Sotomayor noted that cell site location information "generates a precise comprehensive record of a person's public movements that reflects a wealth of detail about her familial,

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[6] *Bowers v. Hardwick*, 478 U.S. 186 (1986) (*overruled by Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003)).
[7] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
[8] *McVeigh v. Cohen*, 983 F. Supp. 215, 220 (D.D.C. 1998) (emphasis added).
[9] 18 U.S.C. § 2702.
[10] Supra, note 8, at 220.
[11] *Riley v. California*, 573 U.S. 373, 386 (2014) (*overruling United States v. Robinson*, 414 U.S. 218 (1973)).

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political, professional, religious, and *sexual* associations."[12] Alongside this recognition regarding the importance of privacy and autonomy in the bedroom as well as in devices and online accounts, courts have recognized the importance of allowing LGBTQ+ individuals to live their lives free of discrimination. In 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court not only recognized the right to same-sex marriage, but also the ability of LGBTQ+ individuals to enjoy liberties central to individual dignity and autonomy, including those intimate choices that define personal identity and beliefs.[13] Most recently, in 2019, in *Bostock v. Clayton County*, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 protects employees against discrimination on the basis of their sexuality or gender identity.[14]

Taken together, these cases show a rich history toward the U.S. Supreme Court recognizing greater protections for LGBTQ+ individuals, moving from protecting individuals in the bedroom and toward protecting their speech and expression at work, in their movements, and in their connected devices and services.

B. California law recognizes the privacy of LGBTQ+ persons, and sexual orientation and gender identity (SOGI) data

California law has often been at the forefront of legal protections for LGBTQ+ individuals, from then-Mayor Gavin Newsom issuing marriage certificates in San Francisco in 2004 in opposition to the Defense of Marriage Act ("DOMA"),[15] to more recently in 2024 when Californians voted to approve Proposition 3, reaffirming

[12] *United States v. Jones*, 565 U.S. 400, 415 (2012) (emphasis added) (Sotomayor, J. concurring).
[13] *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).
[14] *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).
[15] Dion Lim, *Same-Sex Couple Reflects on 20 Years of Marriage Equality in San Francisco*, ABC 7 News (Feb. 12, 2024), https://abc7news.com/same-sex-marriage-san-francisco-city-hall-gavin-newsom-20th-anniversary/14415511/#:~:text=SAN%20FRANCISCO%20(KGO)%20%2D%2D%20On,on%20the%20past%2020%20years (last visited Feb. 23, 2025).

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same-sex marriage in the California Constitution.[16] The California Constitution broadly states that "[a]ll people are by nature" entitled to a right to privacy.[17]

California's Online Privacy Protection Act of 2003 ("CALOPPA") requires operators of commercial web sites or online services that collect personal information on California consumers through a web site to conspicuously post a privacy policy on the site and to comply with its policy.[18] When the California Electronic Communications Privacy Act ("CalECPA"),[19] California's version of the federal ECPA, was drafted in 2015, 82% of California voters believed that law enforcement should get a warrant for digital information.[20] California Senator Leno noted that, "For too long, California's digital privacy laws have been stuck in the Dark Ages, leaving our personal emails, text messages, photos and smartphones increasingly vulnerable to warrantless searches… [that ends with] the Governor's signature of CalECPA, a carefully crafted law that protects personal information of all Californians. The bill also ensures that law enforcement officials have the tools they need to continue to fight crime in the digital age."[21]

The importance of protecting LGBTQ+ persons and their intimate information is also codified in the 2018 California Consumer Privacy Act ("CCPA"), which seeks to protect personal information collected and analyzed concerning a consumer's sex life or sexual orientation as "sensitive personal information."[22] California also, under Assembly Bill 1242 which was passed and signed in 2022, prohibits California companies from disclosing information to out-of-state law enforcement conducting an abortion-related investigation. It is apparent that

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[16] Proposition 3, 2024 CAL. CONST. A-5 (referendum approved Nov. 5, 2024, amending CAL. CONST. art. I, § 7.5 2023) https://voterguide.sos.ca.gov/propositions/3/.
[17] CAL. CONST., art. I, § 1.
[18] CAL. BUS. & PROF. CODE §§ 22575–79.
[19] CAL. PENAL CODE § 1546.
[20] *In Landmark Victory for Digital Privacy, Gov. Brown Signs California Electronic Communications Privacy Act into Law,* ACLU (Oct. 8, 2015), https://www.aclunc.org/news/landmark-victory-digital-privacy-gov-brown-signs-california-electronic-communications-privacy (last visited Feb. 23, 2025).
[21] *Id.*
[22] CAL. CIV. CODE § 1798.140(ae)(2)(C).

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California has not only applied those privacy protections offered by the Supreme Court and federal legislature, but has far exceeded them, affording individuals, including LGBTQ+ individuals, the autonomy to converse, move, and associate freely — all without fear of intrusion.

III. The Stored Communications Act (SCA) Offers Significant Protections to Social Media Users

A. The SCA protects online communications, including messages held by social media platforms

Congress passed the SCA to protect consumer communications amidst growing concerns regarding the rapid adoption of technology and a rise in government searches of stored communications, all in an effort to provide statutory privacy protections for stored electronic communications when such communications may not otherwise be protected by the Fourth Amendment.

While the SCA generally prohibits providers of Electronic Communication Services (or "ECS," generally understood to include cell phone providers, email providers, or social media platforms) and Remote Computing Services (or "RCS," such as cloud computing providers) from knowingly divulging communications held in electronic storage, the Act does contain numerous exemptions. Those exemptions are intended to strike the balance between protecting individual privacy and protecting public safety. For example, under the SCA, communications may be divulged with the lawful consent of the originator or recipient, in event of an emergency involving danger of death or serious injury, or to law enforcement when a service provider has inadvertently obtained communications that appear to pertain to the commission of a crime. SCA's protections are broad, and its exemptions narrow, due to the critical importance of protecting private communications — including those communications that rely on the transmission and storage services offered by third-parties.

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B. The SCA occupies a significant place within Third-Party Doctrine, recognizing more privacy rights rather than less

The Third-Party Doctrine, a controversial legal theory, would strip individuals of their expectation of privacy when they entrust their communications to third parties. While this doctrine might have seemed reasonable in a time when communications were primarily held face-to-face or when personal effects, such as letters, were secured in physical spaces, its application has become more complex as technologies have evolved and individuals have continued to entrust private companies with more of their communications. In 1928, in *Olmstead v. United States*,[23] a case concerning the constitutionality of wiretapping operators of a Prohbition-era bootleg business, the U.S. Supreme Court failed to apply the Fourth Amendment's protections to then-novel telephone calls.[24] There, Justice Brandeis, in his dissent, recognized the "right to be let alone – the most comprehensive of rights, and the right most valued by civilized men." Over the years since *Olmstead*, courts have rejected strict interpretations of the Third-Party Doctrine in order to recognize more, rather than less, privacy interests in online communications.

Since *Olmstead*, the U.S. Supreme Court has understood privacy as the general rule, offering specific carveouts to the right to privacy. Although the Court held in *Maryland v. King* that an arrestee's privacy expectations upon being taken into custody are less than those of other persons, the Court there recognized the importance of protecting all individuals against unauthorized intrusion. When an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable

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[23] *Olmstead v. United States*, 277 U.S. 478 (1928) (Brandeis, J., dissenting).

[24] Albert Gidari, *Elise Olmstead: The Myth and Mystery of Seattle's Queen of the Bootleggers* (Gidari Publishing 2024) (covering the life of Elise Olmstead, wife of Roy Olmstead, a "gentlemen bootlegger" and subject of a U.S. Supreme Court battle that created precedent for numerous privacy suits in the nearly hundred years since).

cause or another similar instrument.[25] The Court has upheld this understanding when applying the Fourth Amendment to innovative technologies. For example, the Supreme Court upheld warrant requirements in the wake of two innovations: the creation of location data repositories allowing law enforcement to demand cell-site location information, and the invention of thermal-imaging techniques allowing law enforcement to examine areas of high heat in one's home.[26]

C. Significant amendments to the SCA and its interpretation would be best left to Congress

It is clear that Courts have long relied on a plain language reading of the SCA, namely that it bars the divulgence of any communications held in electronic storage, absent certain exemptions. Social media platforms, and other similar platforms, hold user messages in electronic storage — in the exact manner email providers have — for the purpose of backup protection, enforcement of safety or content policies, and to allow users to reflect on and continue stored conversations. Individuals have no reason to believe that their communications are subject to unauthorized disclosure merely because their social media platform of choice — whether that is Meta, Snap, or otherwise — reserves the right to access those messages in certain limited circumstances. In other words, individuals may expect that social media platforms access their messages for purposes as expressed in their corporate Terms of Service, but do not expect those platforms to voluntarily disclose the content of their users' communications to any other corporations for any reason, to parties in civil litigation, and to the government without a warrant.

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[25] *Maryland v. King*, 569 U.S. 435, 463 (2013); *but cf. Smith v. Maryland*, 442 U.S. 735 (1979) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)), *superseded by statute*, Electronic Communications Privacy Act of 1988, 18 USC § 2510, as recognized in *Southern Bell Tel. & Tel. Co. v. Hamm*, 409 S.E.2d 775, ("The Electronic Communications Privacy Act was passed to extend federal and state statutory protection to unwarranted intrusion through the use of pen registers and trap and trace devices because of the United States Supreme Court's holdings in *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979) and *Rathbun v. United States*, 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134 (1957) . . . .").

[26] *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018); *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

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Congress spoke clearly in its drafting of the SCA and significant amendments to the statute and its interpretation would be best left to the legislative branch. It is apparent through an examination of recent bipartisan legislation, much of which has passed significant votes in Congress, that the federal legislature is interested in strengthening rather than weakening Fourth Amendment protections. Recent bipartisan legislation, such as the Federal Non-Disclosure Order Fairness Act ("NDO Fairness Act"),[27] the Government Surveillance Transparency Act of 2022,[28] and The Fourth Amendment Is Not For Sale Act,[29] have focused on *strengthening* Fourth Amendment protections by shining light onto law enforcement demands, which are often shrouded in secrecy, and closing legislative gaps that allow the government and others to circumvent the Fourth Amendment by buying personal data. If there is a question here of whether the SCA should be gutted as to the protections it offers individuals, it should be left to the legislature.

IV. Eroding the Stored Communications Act Would Pose Significant Harms to all Social Media Users, Especially LGBTQ+ Users

A. Congress designed the SCA's privacy protections to be broad, with narrow exceptions

The SCA not only protects the individual user whose messages are subject to disclosure, but the many individuals that person communicates with. Users send messages to myriad individuals, and those messages may include sensitive, private information pertaining to third parties. These messages may or may not pertain to the criminal or civil issue that led to a request for disclosure, and too, unlike the Wiretap Act of 1968, the SCA is notable for imposing no minimization requirement. Under the SCA, a court order requires providers to disclose the entire contents of

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[27] NDO Fairness Act, H.R. 3089, 118th Cong. (2023).
[28] Government Surveillance Transparency Act, S. 3888, 117th Cong. (2022).
[29] Fourth Amendment is Not For Sale Act, H.R. 4639, 118th Cong. (2023).

the account. The recipient is then free to look through all of it.[30] This broad disclosure implicates the rights of a far broader array of individuals than the one person for whom user data has been compelled. In the case of social media, if the Court of Appeal decision stands, allowing for the disclosure of data absent the SCA's current protections, not only do the roughly 100 million North American users of Snap and the approximately 250 million users of Facebook have to worry about their private communications being divulged, but so do individuals off-platform whose data may be located in those messages.[31]

For LGBTQ+ persons living in unsupportive households, in states that criminalize same-sex behaviors or gender expression, or in countries that penalize individuals on the basis of their sexual orientation or gender identity — disclosure of private communications can be both life-ruining and life-compromising. These threats are not abstract. Today, within the U.S., ten states explicitly define "sex" in state laws to discriminate against transgender individuals; twenty-seven states still allow conversion therapy for minors (attempting to treat and "correct" the sexual orientation or gender identity of LGBTQ+ individuals); thirty states still allow gay or trans "panic" to be used as a defense in court; twenty-four states and territories either ban or make it a felony to offer medication or surgical care to transgender youth; and seventeen states do not recognize hate crimes based on sexual orientation and gender identity.[32]

B. Eroding the SCA would allow a wide array of providers to disclose user data, either voluntarily or due to pressure from governments

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[30] Orin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. PA. L. REV. 373, (2014).

[31] *See Snapchat Statistics*, Analyzify, https://analyzify.com/statsup/snapchat (last updated Jan. 3, 2025) (noting 100 million daily active users in North America); *Number of Facebook Users in the United States From 2019 to 2028*, Statista, https://www.statista.com/statistics/408971/number-of-us-facebook-users/ (last visited Jan. 22, 2025).

[32] Shae Gardner, *Beyond the Binary: LGBTQ+ Rights in the Digital Landscape*, LGBT Tech 9 (Jan. 2025), https://www.lgbttech.org/_files/ugd/4e5b96_c804f63254ea45c5aee434864773d884.pdf.

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LGBTQ+ women, transgender people and non-binary people are equally as likely, if not more so, than their cisgender and heterosexual peers to have experienced intimate partner violence at some point in their lifetimes. [33] For those individuals, having their communications disclosed absent due process and the protections of the SCA makes it only more likely for courts to serve as a tool for increased violence. Without the protections afforded by the SCA, individuals who have been accused of crimes, even the most violent crimes, would be able to obtain their victim's personal communications with a simple subpoena rather than a court order, something law enforcement cannot do absent a warrant. Those victims, and all users whose data is at issue, may not even know about the disclosure to exercise their right to object and limit any disclosure that may be appropriate as the SCA, even when applicable, does not strictly require that providers give timely notice to the users whose communications are being disclosed. And given the lack of judicial oversight associated with a subpoena, which in most jurisdictions any party can issue without court approval, courts will not be able to ensure that any disclosure by the provider is narrowly tailored to only what is necessary, nor will courts be able to protect the private information and privacy rights of innocent third parties whose information may be responsive to the subpoena.

The ECPA was drafted in an era when electronic storage was costly and uncommon. Consequently, its protections focused primarily on real-time wiretapping as the primary privacy concern, and access to stored data was considered less of an issue. However, electronic storage, used for purposes of backup and more, is now incredibly affordable and, as such, providers routinely store vast amounts of user data, much of which can be incredibly intimate and revealing. Individuals use Snapchat and Facebook as direct means of communication with their loved ones, to communicate with friends abroad, and even to find romantic

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[33] *Understanding Intimate Partner Violence in the LGBTQ+ Community*, Human Rights Campaign, https://www.hrc.org/resources/understanding-intimate-partner-violence-in-the-lgbtq-community (last updated Nov. 4, 2022).

partners.[34] If this decision stands, social media companies could be compelled to disclose their users' private communications to third parties absent judicial oversight and the legislatively mandated due process set forth in the SCA. Outside of the compelled context, without the SCA operating as a blocking statute, there is nothing outside of their own commitments to their users barring social media companies from voluntarily disclosing user content with whomever they choose, including other companies, private litigants, the U.S. government, and even foreign governments. While the Court of Appeal's decision applies to social media, the same illogic of the decision could result in untold consequences if applied to online spaces that similarly offer users the ability to communicate their innermost experiences and share content, such as therapy chatrooms and dating sites.

C. The data of LGBTQ+ persons, including SOGI data, is particularly vulnerable to the harms associated with disclosure and deserves continued protections, including those afforded under the SCA

The Court of Appeal's decision is not limited to the criminal context. LGBTQ+ individuals often face significant challenges in matters such as custody, inheritance, and succession planning within families and communities that do not recognize or respect their family structures. LGBTQ+ individuals can be discriminated against in their own homes. The Court of Appeal decision would allow for the personal data of LGBTQ+ persons to be shared in such common cases as private party-initiated divorce, custody or other civil suits without appropriate judicial oversight. This creates real risk and opportunity for harassment and intimidation of LGBTQ+ individuals and the invasion of their personal privacy in civil suits, which will only exacerbate existing inequalities when it comes to personal family matters.

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[34] *Facebook Dating*, Facebook, https://www.facebook.com/dating (last visited Jan. 22, 2025).

An estimated 13.9 million American adults identify as lesbian, gay, bisexual, or transgender. Additionally, reports of individuals that acknowledge that they have engaged in same-sex sexual behavior or acknowledge at least some same-sex sexual attraction are much higher.[35] However, while individuals within the United States population are becoming more likely to identify as LGBTQ+ and more accepting of same-sex attraction and behaviors, civil rights protections, including the right to privacy, are under attack and still lag when it comes to protecting LGBTQ+ individuals.[36]

Although all individuals face the privacy risks posed by the Court of Appeal's decision in this case, we urge a heightened focus on those communities, like the LGBTQ+ community, who would be most severely impacted by a lapse in privacy protections. As constitutional and privacy scholar Professor Scott Skinner-Thompson explains, "even assuming that privacy violations were evenly distributed across society (they are not), any such intrusion disproportionately impacts members of marginalized communities who are unable to absorb the social costs that flow from a privacy violation or vindicate the privacy loss in courts."[37]

Conclusion

The text of the SCA as enacted into law by Congress and as interpreted by every court so far other than the Court of Appeal protects social media communications from disclosure except in very limited circumstances. There is no legal basis—nor any other basis—to disturb the SCA's careful attention to

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[35] Jeffrey M. Jones, *LGBTQ+ Identification in U.S. Now at 7.6%*, Gallup (Mar. 13, 2024) https://news.gallup.com/poll/611864/lgbtqidentification.aspx (last visited Feb. 23, 2025).
[36] Chris Wood, et al., *Role of Data Protection in Safeguarding Sexual Orientation and Gender Identity Information,* Future of Privacy Forum (June 2022), https://fpf.org/wp-content/uploads/2022/06/FPF-SOGI-Report-R2-singles-1.pdf.
[37] Daniel Solove, *Privacy at the Margins: An Interview with Scott Skinner-Thompson on Privacy and Marginalized Groups*, TeachPrivacy (Feb. 24, 2021), https://teachprivacy.com/privacy-at-the-margins-an-interview-with-scott-skinner-thompson-on-privacy-and-marginalized-groups/ (last visited Feb. 25, 2025).

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protecting individual privacy and protecting public safety. The harms from doing so will be felt nationwide but are most likely to be magnified when suffered by vulnerable and marginalized populations, including the LGBTQ+ community. California has long been a leader in enshrining LGBTQ+ rights, from legalizing same-sex marriage to banning discrimination based on sexual orientation and gender identity. California's highest court should therefore reverse the Court of Appeal's decision.

DATED: February 24, 2025.

Respectfully submitted, MCDERMOTT WILL & EMERY LLP
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CERTIFICATE OF COMPLIANCE

Under rule 8.5209(c) of the California Rules of Court, I, KATELYN N. RINGROSE, hereby certify that, based on the software in the Microsoft Word program used to prepare this document, that this reply brief uses Century font and contains 4,229 words, excluding the cover page, tables of content and authorities, signature block and this certification.

DATED: February 24, 2025.

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PROOF OF SERVICE

I am over the age of 18 years and not a party to the within action. I am employed in the County of Los Angeles, State of California. My business address is 2049 Century Park East, Suite 3200, Los Angeles, California 90067.

On February 24, 2025, I served the foregoing document:

☑ **BY ELECTRONIC SERVICE VIA TRUEFILING:** I caused the foregoing to be electronically filed with the court using the court's e-filing system. The following parties and/or counsel of record are designated for electronic service in this matter on the TrueFiling website:

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☑ **BY FIRST CLASS MAIL.** I placed the foregoing document in a sealed and post paid envelope addressed as indicated below for collection and mailing following our ordinary business practices. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary court of business with the United States Postal Service:

Clerk of the Superior Court
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For: Hon. Daniel F. Link
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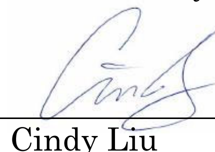
I declare under penalty of perjury under the laws of the State of California that foregoing is true and correct. Executed on February 24, 2025, at Los Angeles, California.



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