4. An opinion from the U.S. District Court for the District of Columbia granting an application by the Republic of the Gambia pursuant to 28 U.S.C. § 1782 for production of content that had been deleted by Facebook for use in its litigation against the Republic of the Union of Myanmar at the International Court of Justice, notwithstanding objections raised under the SCA.

In *Republic of the Gambia v. Facebook, Inc.*, 2021 WL 4304851 (D.D.C. Sep. 22, 2021), Magistrate Judge Zia M. Faruqui granted in part and denied in part the Republic of the Gambia's (The Gambia) application pursuant to 28 U.S.C. § 1782 for production of content deleted by Facebook for use in its litigation against the Republic of the Union of Myanmar (Myanmar) at the International Court of Justice. *Id.* at *1.

The Gambia sought accounts and other content used by Myanmar government agents that sparked the genocide of the Rohingya, a religious minority in Myanmar. The United Nations Human Rights Council (U.N. Mission) found that Myanmar government officials relied on Facebook to credibly spread fake news to develop a negative perception of Muslims in Myanmar as early as 2012. *Id.* at *2. Facebook began deleting and banning accounts of key individuals and organizations in Myanmar in August 2018 but preserved the content it deleted.

At issue in this case were The Gambia's three document requests in connection with this deleted content: (1) public and private communications associated with the deleted content; (2) documents associated with Facebook's internal investigation on how it identified the content deleted; and (3) a Rule 30(b)(6) deposition regarding all of the above. *Id.* at *4. Facebook argued that the Gambia's request (1) violated the SCA and (2) was unduly burdensome. *Id.* at *1.

Magistrate Judge Faruqui began her analysis by setting forth the requirements under 28 U.S.C. § 1782, which provides that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." *Id.* at *4. Consideration of a § 1782 application requires a two-step inquiry: "A court must first consider whether it has the authority to grant the request and, second, whether it should exercise its discretion to do so." Magistrate Judge Faruqui noted that courts have broad discretion in deciding whether to grant or deny these applications if three statutory elements are met: (1) that the person resides or is found in the district, (2) that the discovery requested will be used in a proceeding before a foreign or international tribunal, and (3) that the request is made by an interested person.

Magistrate Judge Faruqui noted that in deciding whether to exercise its discretion, a court must evaluate four prudential guidelines: (1) whether the respondent is a participant in the international proceedings, (2) whether the tribunal is resistant to using this kind of discovery, (3) whether the application circumvents the tribunal's proof-gathering restrictions, and (4) whether the requested discovery is unduly intrusive or burdensome. *Id.* (citing *Intel Corp. v. Adv. Micro Devices, Inc.*, 542 U.S. 241, 255 (2004)). A court's discretion to grant or deny a § 1782 application is "considerable" and "may appropriately take into account the specific facts of the application to determine which factor or factors to weigh most heavily." *Id.* (cleaned up). "District courts must exercise their discretion under § 1782 in light of the twin aims of the statute, which have been described as providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *Id.* (cleaned up).

Magistrate Judge Faruqui next discussed the SCA, noting that civil subpoenas, including those issued pursuant to § 1782, are subject to the prohibitions of the SCA mandating that "a person or entity providing an electronic communication service [(ECS)] to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." *Id.* (citing 18 U.S.C. § 2702). Classification of an ECS is "context sensitive: the key is the provider's role with respect to a particular copy of a particular communication, rather than the provider's status in the abstract."

Magistrate Judge Faruqui next turned to The Gambia's argument that Myanmar officials were not "users" for purposes of the SCA. Magistrate Judge Faruqui rejected this argument, finding that Facebook was an "ECS" providing "users" the ability to send or receive wire or electronic communications. *Id.* at *6. She noted that the definition of "user" included "any person or entity who — (A) uses an [ECS]; and (B) is duly authorized by the provider of such service to engage in such use." *Id.* (citing § 2510(13)). Thus, the SCA defines "user" with the broadest possible language: "any person." *Id.* (citing § 2510(13)). The Gambia argued that the fact that U.S. government agents were defined separately from "individuals" in the SCA meant that officials were not considered "individuals." Magistrate Judge Faruqui, however, held that Myanmar officials were "individuals" and also that the fact that "user" included "entities" provided an independent basis to consider the Myanmar officials "individuals." *Id.* at *6.

Despite finding that the Myanmar officials' use of Facebook fell under the scope of the SCA, Magistrate Judge Faruqui rejected Facebook's argument that the discovery requests implicated SCA's prohibition on ECS providers divulging communications while in "electronic storage" by that service. She noted that the SCA prohibited an ECS provider from divulging communications "while in electronic storage by that" ECS, which can include "temporary" or "backup" storage. *Id.* (citing 18 U.S.C. § 2702). In addressing whether the deleted content was in "electronic storage," Magistrate Judge Faruqui first held that content deleted from a platform but retained by the provider was not "backup storage" when the provider was acting in its content moderation responsibility. *Id.* at *7. Magistrate Judge Faruqui reasoned that the SCA covers providers acting as "mail/package delivery services" and not content moderation. Magistrate Judge Faruqui additionally found that the deleted content could not be considered backup storage as any "archive of deleted messages that Facebook continues to maintain constitutes the only available record of these communications." *Id.* at *8 (internal quotations omitted).

Magistrate Judge Faruqui further rejected Facebook's attempt to analogize its deleted content to "delivered, undeleted content" and therefore in backup storage, finding Facebook's reliance on two Fourth and Ninth Circuit cases misplaced. Magistrate Judge Faruqui distinguished these cases by reasoning that "backup storage" could not encompass content deleted from the platform and that copies of the content remaining on Facebook's storage could not be construed as "backup storage" where Facebook itself caused the destruction of the original copies. *Id.* at *9. Magistrate Judge Faruqui also found that unlike in the Fourth Circuit case, the present circumstances did not implicate the policy concerns found in the legislative history of the SCA. She found that even under the Fourth Circuit case, "the purpose of backup storage must be to backup the original."

Magistrate Judge Faruqui then addressed Facebook's policy arguments regarding the privacy implications for providers, in particular that deactivation of a user's account would remove it from the protections of the SCA. *Id.* at *10. Magistrate Judge Faruqui reasoned that Congress wrote the

law such that once content was deleted from the platform, it was no longer protected by the SCA. Further, ample content urging the murder of the Rohingya remained on social media, so the privacy implications applied only to the limited volume of content that was deleted from the platform. Ultimately, she found that the privacy implications were "minimal given the category of requested content." *Id.* at *10.

Magistrate Judge Faruqui then found that exceptions to SCA protection applied to the documents requested by The Gambia, noting that courts were permitted to compel production of communications excepted from SCA protections, including "with the lawful consent of the originator." *Id.* at *11. She found the "consent exception" largely applicable because "much of the content The Gambia seeks was posted publicly before Facebook removed it." The SCA was designed to protect private posts only, and the "critical inquiry is whether Facebook users took steps to limit access to the information in their posts." *Id.* (internal quotations omitted). Magistrate Judge Faruqui stated that whether the consent exception is triggered is a "fact-intensive inquiry as to whether the posts had been configured by the user as being sufficiently restricted that they are not readily available to the general public" and that the court looks to the user's "intent as to the public versus private nature of the post." *Id.* at 12 (internal quotations omitted). Magistrate Judge Faruqui reasoned that it was undisputed that the content in question included inauthentic accounts and pages created with the intent of spreading hate speech, fake news, and misinformation for political gain and the accounts reached an audience of nearly 12 million followers. Magistrate Judge Faruqui found that ordering discovery was "particularly appropriate here because much of the requested content would have been publicly available to The Gambia had Facebook not deleted it."

Having completed her analysis under the SCA, Magistrate Judge Faruqui then conducted an analysis of the burden and scope of the discovery requests. In particular, she focused on the fourth factor under the prudential guidelines from *Intel*: whether the scope of the requested discovery was unduly intrusive or burdensome in light of the relevance of the requested discovery to the foreign proceeding.

Magistrate Judge Faruqui held that The Gambia's discovery requests sought "a discrete and known universe of records" and raised "at most the normal burdens of discovery — including for Section 1782 requests." *Id.* at *14. Magistrate Judge Faruqui disagreed with Facebook's contention that the discovery requests offered "no meaningful metric for identifying accounts and [were] overbroad," finding that The Gambia focused its request only on the most relevant documents to the International Court of Justice case related to hate speech and incitement to violence by identifying specific individuals, entities, and pages. *Id.* at *13. Further, The Gambia was not asking Facebook to conduct any additional searches. While Facebook argued that it was unduly burdensome to review documents for specific content, Magistrate Judge Faruqui was unconvinced, noting that Facebook's deplatforming process did not include a forensic review of account and page data, and Facebook had publicly touted its Myanmar language content-review capabilities.

Magistrate Judge Faruqui also rejected Facebook's attempt to limit The Gambia's request to a 2016 date range instead of 2012 as initially requested, finding that this case raised normal burdens of discovery, which Facebook could mitigate through the use of technology-assisted review. Magistrate Judge Faruqui determined that the 2012 data was highly probative of the instigation of the genocide and that Facebook had not demonstrated how the additional four years of data would

unduly expand the document production. Additionally, there was no evidence the request seeking data from 2012 was made in bad faith, for purposes of harassment, or as part of a fishing expedition. To the contrary, the records were highly relevant to the underlying proceeding, which balanced out "any incremental burden on Facebook."

Magistrate Judge Faruqui then held that courts need not consider whether other paths to collecting records exist so long as the requesting party meets the requirements of § 1782. Magistrate Judge Faruqui noted that the alternatives suggested by Facebook largely involved voluntary compliance as opposed to the compulsory production required by § 1782. Further, while Facebook requested The Gambia to obtain discovery through the U.N. Independent Investigative Mechanism for Myanmar (IIMM), with which it was already actively involved, it had provided only limited public postings to the IIMM based on its interpretation of the consent exception. Magistrate Judge Faruqui therefore determined that The Gambia had no reason to believe that the materials Facebook was providing to the IIMM would be sufficient to satisfy its discovery requests.

Finally, Magistrate Judge Faruqui turned to The Gambia's requests for records relating to Facebook's internal investigation of its role in the Rohingya genocide as well as its request for a 30(b)(6) deposition. Magistrate Judge Faruqui found that while normal prohibitions on privileged materials apply, Facebook had to produce nonprivileged documentation relating to the internal investigation, finding that these documents were likely to be highly important to the litigation. Magistrate Judge Faruqui then denied The Gambia's request for a 30(b)(6) deposition of Facebook, finding it "unduly burdensome and adding little in the way of concrete evidence given the Court's order for document production." *Id.* at *16.