IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff–Adverse Party, v. DAVID AYON-URBANO, Defendant–Relator.	SC S072084 Marion County Circuit Court Nos. 24CR31979 & 24CN05648 (Consolidated)
DAVID AYON-URBANO, Third-Party Plaintiff–Relator, v. META PLATFORMS, INC., Third-Party Defendant–Adverse Party.	MANDAMUS PROCEEDING

RELATOR'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Action and Relief Sought

Relator is accused of Murder in the Second Degree with a Firearm, ORS 163.115, and Unlawful Use of a Weapon with a Firearm, ORS 166.220. ER-1. In this mandamus proceeding, he challenges the trial court's order quashing a subpoena he served on Meta Platforms, Inc., seeking to have Meta produce social media records related to the decedent and an eyewitness. The matter is not stayed pending mandamus and is still proceeding in Marion County Circuit Court.

Nature of the Order to be Reviewed on Mandamus

Relator moved the trial court for an order commanding early production of records from Meta that relate to social media accounts associated with the decedent and an eyewitness. ER-2 to ER-11. The trial court granted relator's motion for early production, and relator served Meta with a subpoena following the procedures set forth in ORS 136.583. ER-12 to ER-15.

Meta did not produce the records and instead filed a letter objecting to compliance. ER-16 to ER-21. In that letter, Meta affirmed that it honors criminal process when the state asks for it but will not produce those same records when an identical request comes from a

criminal defendant. ER-16 to ER-17. Meta claims it is not choosing to prioritize the government over a criminal defendant; rather, Meta interprets the Stored Communications Act, 18 USC §§ 2702–2703, to require that result. ER-16 to ER-17.

Relator then filed a complaint for remedial contempt in the trial court, arguing that (1) the Stored Communications Act is not as broad as Meta believes, and (2) if Meta's reading is correct, the Stored Communications Act, as applied to relator, violates his right to compulsory process under the state and federal constitutions.[1] ER-22 to ER-48. Meta moved to dismiss the contempt action and the trial court heard oral argument on May 1, 2025. ER-168 to ER-195; ER-327. At that hearing, the parties and the court agreed that a contempt proceeding was premature and discussed ways to move forward. ER-262 (Tr. at 10:6–13:17). Ultimately, the court treated Meta's objection letter as a motion to quash the subpoena, and incorporated the briefing from the contempt action into their arguments on Meta's motion to quash. *Id.*

[1] Relator never advanced a facial challenge. Rather, his argument was that, if Meta's reading of the Stored Communications Act is correct, then the application of the Act, as applied to him, violates his rights to compulsory process under the state and federal constitutions.

After hearing the parties' arguments, the trial court sided with Meta and entered an order quashing the subpoena for early production of records. ER-322.

Relator timely petitioned this court for mandamus relief. Meta filed a brief in opposition. This court issued an alternative writ of mandamus and ordered the trial court to vacate the order quashing relator's subpoena within 14 days or to show good cause for refusing to do so. The trial court did not vacate the order.

Jurisdiction

This court has original jurisdiction of this mandamus proceeding under Article VII (amended), section 2, of the Oregon Constitution and ORS 34.120.

Timeliness of Mandamus Petition

The trial court entered an order quashing relator's subpoena to Meta on May 27, 2025. ER-322. Relator filed his mandamus petition on June 26, 2025. Because this mandamus was filed within 30 days of the entry of the challenged order, it is timely. ORAP 11.05(2)(C)(ii) n 4.

Question Presented

ORS 136.583 provides a procedure, available to both parties in a criminal action, to obtain early production of records from nonparties.

The issue here is whether there are special rules when the records sought are held by a social media company. Specifically, the question presented is whether, by virtue of the federal Stored Communications Act, only the state—and never the defendant—can obtain a court order commanding a social media company or other covered service provider to produce records.

If so, does a statutory scheme that permits the state—but never the defendant—to obtain relevant social media records, violate the compulsory process clauses under Article I, section 11, of the Oregon Constitution, or the Sixth Amendment to the United States Constitution, as applied to relator?

Summary of Argument

If the trial court is correct that the Stored Communications Act completely bars a criminal defendant, but not the state, from accessing electronic communications from service providers like Meta, then the Act, as applied to relator, violates his rights to compulsory process under the state and federal constitutions. Under the Stored Communications Act, a "governmental entity" has easy access to a person's social media records when the state believes that information

helps its case. 18 USC § 2703. The trial court, however, agreed with Meta that the Act completely bars criminal defendants and trial courts from accessing that same information, even when it would assist the defense investigation. ER-299 to ER-301.

The state and federal compulsory process clauses were designed to prevent that exact result. This court has recognized that each clause was designed to put defendants on equal footing with the government when it comes to investigating and presenting their own defense.

History also shows that the framers intended for compulsory process rights to attach pretrial, to apply to documents, and to grant no one—not even the President of the United States—blanket immunity from being subpoenaed when the evidence they hold is important to an accused's defense. If Meta's interpretation of the Stored Communications Act is correct, the Act violates those principles because it grants service providers like Meta a status above the presidency: total immunity from defense-issued subpoenas. That cannot be the law.

This court should hold that relator has the constitutional right, through the compulsory process clauses in the state and federal constitutions, to compel process of third-party social media records that

are relevant to investigating his defense. That holding will not open the floodgates of the mass release of social media records. Nor will it create any unnecessary risk that social media records will fall in the hands of unintended parties. A holding confined to constitutional compulsory process rights would provide relator limited access—equal to that of the state—under the court's supervision, to records that are relevant to his defense.

Finally, mandamus should lie because absent this court's intervention, relator has no plain, speedy, or adequate remedy at law to challenge the order quashing his subpoena.

Summary of Facts

I. The trial court gave relator permission to subpoena Meta pretrial for records that are key to investigating and presenting his theory of defense.

Relator is 19 years old and faces a life sentence for second-degree murder. ER-1. As part of his investigation into a potential self-defense claim, relator sought the trial court's permission to issue a subpoena to Meta requiring an early production of records. ER-2; ER-6 to ER-8.

Relator explained in detail why the records he sought were relevant to his investigation. ER-6 to ER-10. In short: The decedent was a member of the 18th Street Gang. ER-7. He colluded with a young

woman, , to arrange a surprise encounter with relator. ER-7 to ER-8. That surprise encounter resulted in the decedent's death. ER-8.

Relator also explained why he believed the records existed. ER-7 to ER-8. was observed communicating with the decedent through Instagram to arrange the encounter and using Instagram to communicate with others while sitting in a police interview room after the incident. ER-8.

Relator explained why he was seeking the records directly from Meta. ER-8 to ER-9. In discovery, relator received an extraction of data from phone. ER-8. It appears to be incomplete and, in any event, does not include the information he asked Meta to produce. ER-8. As for the information in decedent's social media accounts, the state is in possession of the decedent's phone but has not produced any evidence from that phone to relator. ER-8. Because the discovery from the state was lacking, relator concluded: "[T]hese Instagram records are a crucial portion of [relator's] theory of the case, without which, he could not advance." ER-9.

Relator narrowly tailored his requests to target the information he needs to prepare his defense. ER-9. He requested records from specific

Instagram accounts that he believes and the decedent used. ER-6 to ER-7. From those accounts, he sought information to verify the account holder's identity, as well as location data, contents of communications, multimedia files, and search history.[2] ER-12 to ER-14. He included date limitations. ER-9. In crafting his requests, relator copied the exact phrasing from a search warrant the state successfully used to obtain records from Meta in a different case. ER-9.

The trial court granted relator's request to issue a subpoena seeking an early production of records. ER-15. Relator served the subpoena on Meta according to the procedures set forth in ORS 136.583. ER-9 to ER-10; ER-51.

II. Meta refused to produce any records in response to the subpoena, claiming that the Stored Communications Act blocks criminal defendants (but not the government) from obtaining records that fall within its purview.

Meta received relator's subpoena but refused to comply with it. ER-16. It argued that the Stored Communications Act bars criminal defendants from ever receiving the contents of electronic

[2] Meta produced none of these records, even though many of them do not appear to fall within the definition of "electronic communications" under the Stored Communications Act. *Cf.* 18 USC § 2510(12).

communications directly from service providers like Meta.[3] ER-16 to ER-17. According to Meta, that bar holds not just in the face of a defense-issued subpoena; it applies even if a court expressly orders Meta to hand over records to a defendant or to the court itself. ER-17.

The state is not so stymied. ER-16 to ER-17. Meta will comply with court orders directing it to disclose electronic communications to the government. ER-16 to ER-17.

Though Meta refused to produce records in response to the subpoena, it confirmed that at least some of the requested records exist. *See* ER-20 (out of the four requested accounts, there was only one Meta could not find). It informed relator that someone has accessed one of the decedent's accounts since he died, "indicating that [he] shared or used" the account with someone who is still alive. ER-19. It also informed

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[3] Meta also objected that relator's service was defective. ER-17. Relator disagrees, because his service conformed to the directives in ORS 136.583. ER-9 to ER-10; ER-51; *see also State v. Rose*, 264 Or App 95, 101, 330 P3d 680 (2014) (noting ORS 136.583 was enacted to allow Oregon courts to issue criminal process "for electronic communications in accordance with the Stored Communications Act"). In any event, the trial court did not find Meta's service arguments persuasive because "any procedural defect can be cured." ER-268 (Tr. at 16:9–10). The court wanted to reach "the heart" of the issue: whether the Stored Communications Act works to block relator's subpoena and, if so, whether it violates his right to compulsory process. *Id.* at 16:12–14.

relator that Instagram account usernames are "not static" and can be changed, which can inhibit Meta's ability to find that account later. ER-20. In other words, Meta acknowledged that the records exist, that people still have access to at least some of the subject accounts, and that the records pertaining to those accounts can change in real time. ER-18 to ER-20.

III. Relator responded by arguing that the Stored Communications Act, as applied to him, violates his right to compulsory process, but the trial court disagreed and quashed his subpoena.

After Meta made clear that it would not comply with the subpoena or a court order requiring it to produce records directly to the court, relator filed a contempt action and sought to consolidate it with his criminal case. ER-22; ER-313. Meta moved to dismiss the contempt action. ER-168.

At a hearing on that motion, the parties and the court agreed that a contempt proceeding was premature and discussed ways to move forward. ER-262 (Tr. at 10:6–13:17). Ultimately, the court treated Meta's objection letter as a motion to quash the subpoena, and the

parties incorporated the briefing they had filed in the contempt action into their arguments on that motion to quash. *Id.*[4]

With the procedural matters resolved, the parties and court focused on the substantive issues about the Stored Communications Act, its applicability, and its interplay with relator's right to compulsory process. For its part, Meta repeated its argument that the Stored Communications Act imposes a blanket ban on criminal defendants obtaining electronic communications from Meta itself. ER-180. That sort of blanket ban does not violate a criminal defendant's right to compulsory process, Meta contended, because defendants can ask for the data some other way. ER-183. For instance, they can ask the account holder to give their consent to Meta to turn over the records (which the account holder does not have to grant). ER-185. Or they can

[4] The specific briefing and exhibits that relator understands the parties to have incorporated are: Defendant's Memorandum of Law, Declaration of Counsel, and Exhibits 1-5 in Support of Remedial Sanctions for Contempt of Court Related to Marion County Case No. 24CR31979 (ER-24; ER-45); Meta's Motion to Dismiss and Declaration of Counsel in Support (ER-168; ER-196); Defendant's Response to Meta's Motion to Dismiss (ER-215), and; Meta's Reply in Support of Motion to Dismiss (ER-234).

subpoena the account holder directly. ER-184.[5] Meta acknowledged that these possible alternatives are imperfect. ER-285. It is undisputed that the government does not have to avail itself of those other imperfect means to obtain social media records.

Relator focused on his right to compulsory process.[6] In support of his argument, he exhaustively analyzed the history and tradition that led to the federal government and states adopting compulsory process clauses. ER-34 to ER-47; ER-222 to ER-230. That history and tradition, he concluded, showed that the framers intended for compulsory process to put defendants on equal footing with the government—to gather documents and evidence and to present witnesses so defendants can mount their own defense against the state's case. ER-34 to ER-47; ER-

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[5] It is unclear whether account holders can access the same trove of data that Meta maintains about them and produces in response to search warrants. Meta's letter describing the process for account holders to download their information says that the download "include[s] the contents of communications." ER-18. It is silent about whether the information users download would also include geolocation data, search history, and the information needed to verify the account holder's identity. ER-18.

[6] Below, relator made a subconstitutional argument that members of the Oregon State Bar qualify as "governmental entities" under the Stored Communications Act. He does not renew that argument before this court.

222 to ER-230. "And legislative actions saying one side gets it, the other side doesn't – definitionally does not put us on equal footing." ER-276 (Tr. at 24:6–8). Based on the text and purpose of the state and federal compulsory process clauses, relator concluded: "It cannot be the law that the [s]tate has access to this and the defendant does not." ER-296 (Tr. at 44:7–10).

The trial court rejected relator's argument and quashed the subpoena. ER-322. The court reasoned that compulsory process "is a right that can be subjugated, * * * it is not absolute and it can be trumped by competing interests." ER-300 (Tr. at 48:12–14). It agreed with Meta that relator should seek the data elsewhere. ER-300 (Tr. at 48:20–21). Later, the court "augment[ed] the record," stating that "even if the court were to entertain a compulsory process challenge, looking at the case law, the evidence and information before the court on this record is not sufficient to – to jump the hurdle of material and favorable." ER-302 (Tr. at 50:6–13).

The court then entered orders consolidating the criminal case and contempt action, dismissing the contempt action, and quashing relator's subpoena. ER-313; ER-314; ER-318; ER-322. In this mandamus

proceeding, relator challenges only the third of those orders—the order quashing his subpoena.

ARGUMENT

I. The right to compulsory process was designed to correct a history of unequal treatment between the government and the accused when it came to accessing witnesses and evidence.

The state and federal constitutions both guarantee criminal defendants the right to compulsory process. Article I, section 11, of the Oregon Constitution provides: "In all criminal prosecutions, the accused shall have the right * * * to have compulsory process for obtaining witnesses in his favor." The text of the Sixth Amendment's compulsory process clause is essentially identical.[7] The history and tradition that led to the creation of the right to compulsory process informs both the state and federal constitutional analysis. *Priest v. Pearce*, 314 Or 411, 415–16, 840 P2d 65 (1992); *New York State Rifle Ass'n v. Bruen*, 597 US 1, 17, 142 S Ct 2111, 213 L Ed 2d 387 (2022).

[7] "In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor."

A. Compulsory process was adopted in England in response to unfair procedural advantages reserved for the Crown.

Trials in the medieval period had no witnesses. Peter Westen, *The Compulsory Process Clause*, 73 Mich Law Rev 71, 78 (1974).[8] Jurors and witnesses were one and the same. Indeed, only those who had personal knowledge of the dispute were selected to serve as jurors and resolve the case based on their own knowledge. *Id.* at 78–80. For those trials, there were no witnesses and there was no evidence for anyone to compel. *Id.*

Trials changed in the sixteenth century. *Id.* at 80–81. By then, juries were independent and heard testimony from witnesses. *Id.* In those trials, the "prosecution had a marked advantage, both in preparing its case and in presenting its case at trial." *Id.* Before trial, the prosecution could interrogate the accused, interview other witnesses, and arrest witnesses to bind them over for trial. *Id.* at 82. At

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[8] Both this court and the court of appeals have relied heavily on Professor Westen's scholarship to understand the scope of both the state and federal compulsory process rights. *See State v. Mai*, 294 Or 269, 271–79, 656 P2d 315 (1982) (relying on Professor Westen's article for a "detailed summary of the compulsory process clause"); *State ex rel. Meyers v. Howell*, 86 Or App 570, 576–77, 740 P2d 792 (1987) (repeatedly citing Professor Westen's article for historical context surrounding the Sixth Amendment compulsory process clause).

trial, it could present its case through counsel, summon witnesses, and place them under oath. *Id.*

The defendant, by contrast, had "very few" rights and "was particularly hampered in preparing his defense." *Id.* He was denied counsel and, if incarcerated, was prohibited from interviewing witnesses. *Id.* The imbalance did not end there—he had no confrontation right, no right to summon favorable witnesses, and no right to present witnesses who agreed to testify voluntarily. *Id.* Though he could make a statement in his own defense, "it lacked weight because it was not made under oath." *Id.* In sum, the "most distinctive feature" of those trials "was the imbalance of advantage between the state and the accused." *Id.* at 81. Rather than being adversary proceedings, they were "one-sided inquests into the truth of the prosecution's charges." *Id.* at 82.

Trials evolved further in the seventeenth century, but court rules and procedures still granted advantages to the Crown and "tipp[ed] the balance against the defendant." *Id.* at 84–86. Though defendants gained the power to present witnesses, that power was hollow for two reasons. *Id.* First, defendants had to rely on willing witnesses and had no right

to compel recalcitrant ones. *Id.* at 84–85. Second, no defense witness could give sworn testimony. *Id.* at 85. Both advantages were reserved exclusively for the Crown. *Id.* at 84–86.

Near the end of the seventeenth century, following "often virulent treason trials accompanying the Restoration (1660-88)," the Solicitor General to William III delivered a "celebrated address," in which he "likened the abuses of the previous era in English procedure to the Inquisition." *Id.* at 89. He "specifically condemned the practice of denying the accused equal access with the prosecution to witnesses and counsel." *Id.* Parliament responded by giving defendants accused of treason the same subpoena power the Crown enjoyed, as well as the right to have their witnesses testify under oath. *Id.* at 89–90. A few years later, Parliament and the courts extended those rights to apply in all felony cases. *Id.* at 90.

B. The founders insisted on including compulsory process in the bill of rights to ensure that the accused had the right to present a defense.

The authors of the early state constitutions had heard about the great treason trials in England and the inequality in procedural advantages between the Crown and the accused. *Id.* at 93–94. As a

result, the "new states expressed the importance of allowing the defendant to present witnesses both in their own bills of rights and in their later pressure for a federal bill of rights." *Id.* at 94. Nine of the states specifically provided for the right to compulsory process in their constitutions. *Id.* Though their clauses were not uniform, "they all reflected the principle that the defendant must have a meaningful opportunity, *at least as advantageous as that possessed by the prosecution*, to establish the essential elements of his case." *Id.* at 95 (emphasis added).

The constitution as originally drafted by James Madison did not include any bill of rights. *Id.* at 96. The states insisted on one, with four of them specifically calling for the federal Constitution to include a right of the accused to present witnesses in his favor. *Id.* Madison added the clause, Congress adopted it, and the states ratified it "without substantive change." *Id.* at 98.

C. Shortly after the United States Constitution was adopted, Chief Justice John Marshall construed the right to compulsory process broadly to give effect to an accused's right to present a defense.

Just a few years after its adoption, Chief Justice John Marshall was asked to construe the compulsory process clause when he presided

over the trial of Aaron Burr. *Id.* at 101. (*citing United States v. Burr*, 25 F Cas 80 (No 14,692) (CCD Va 1807) ("*Burr I*"); *United States v. Burr*, 25 F Cas 187 (No 14,694) (CCD Va 1807) ("*Burr II*"). Marshall himself was a member of the Virginia Constitutional Convention. *Id.* at 102. "His two opinions in [Burr's] case deserve attention because they represent a contemporary construction of the clause by the preeminent constitutional jurist of the time." *Id.* at 101–02.

Burr was accused of plotting to set up a separate government in the western states by force. *Id.* at 102. General James Wilkinson in New Orleans wrote letters to President Thomas Jefferson detailing Burr's alleged plot. *Id.* President Jefferson took those letters to Congress, which led to Burr's arrest and charges. *Id.* at 102–03.

Burr moved, preindictment, to subpoena the Wilkinson letters directly from President Jefferson and to subpoena the United States attorney for a letter that included communications the government deemed privileged. *Id.* at 103. The motions resulted in two opinions from Chief Justice Marshall that construed the compulsory process clause broadly and "resolved all doubts in favor" of that right. *Id.* at 102–03.

The government objected to the subpoenas on four grounds: (1) the subpoenas were premature because no indictment had issued and the right to compulsory process is a trial right; (2) the subpoenas were too broad because the right to compulsory process applies only to witnesses and not to their papers or records; (3) Burr had not shown sufficient need for the letters because he had alleged only that they "*[m]ay be material* to his defence"; and (4) the President was immune from being subpoenaed. *Id.* at 103.

Chief Justice Marshall rejected every one of those arguments. First, Marshall concluded that the right to compulsory process applies preindictment. *Burr I*, 25 F Cas at 33. He acknowledged that the purpose of the right is to allow the accused to present a defense at trial. *Id.* But to give effect to that right, a defendant needs time to prepare his defense. *Id.* In other words, to "achieve [the right's] purpose at trial, it must be available before trial." Westen, *The Compulsory Process Clause*, at 105. As a result, Marshall concluded, the right attaches as soon as the defendant has an interest in preparing his defense. *Id.*; *see also Burr I*, 25 F Cas at 33.

Marshall then rejected the government's "literal distinction" between witnesses and their documents as "too much attenuated to be countenanced in the tribunals of a just and humane nation." *Burr I*, 25 F Cas at 35. He again construed the clause consistently with its purpose and concluded that, to give it effect, it must include the right to subpoena documents as well as witnesses. *Id.*

On materiality, Marshall believed it was sufficient for the defendant to show that "there exist[s] *any* reason for supposing that the subpoenaed testimony may be material * * *." *Burr I*, 25 F Cas at 38 (emphasis added). Because Wilkinson was expected to testify at trial and his prior correspondence might be useful to impeach his credibility, that reason was enough to justify the subpoena. *Id.* at 36. Marshall believed it unreasonable to require a greater showing when the defendant had not read the letters and did not "know[] positively what the witness will say" at trial. *Id.*

Finally, as for the President's assertion of immunity, Marshall concluded that nothing in the clause justified that sort of exception: "In the provisions of the constitution, and of the statute, which give to the

accused the right to the compulsory process of the court, there is no exception whatever." *Id.* at 34.

The President complied with the subpoena. Westen, *The Compulsory Process Clause*, at 105. He also gave more documents to the United States attorney, instructing him to withhold portions he considered privileged. *Id.* at 105–06. Burr found out about the other documents and requested a second subpoena. *Id.* at 106. The United States attorney produced a redacted version, claiming that the withheld portions had been written to the President in the strictest confidence and did not bear on the issues at trial. *Id.* He offered to give an unredacted copy to the court and counsel. *Id.* In response, the defense moved to postpone the case indefinitely until an unredacted copy was produced personally to Burr and the public. *Id.*

Burr's continuance motion prompted the second opinion from Marshall. *Id.* Marshall agreed that the President may have a qualified privilege to withhold information that "the public interest required * * * to be kept secret," but concluded that the privilege must be asserted by the President himself, and not through his lawyer. *Burr II*, 25 F Cas at 192. Marshall therefore agreed with the defendant that the proceedings

must be halted until the letter was produced, in full, for Burr's personal inspection. *Id.*

Marshall then explained that, if the President were to invoke the privilege properly, the court would apply a balancing test weighing the President's need for secrecy against the defendant's need for disclosure. *Id.* The balance, however, would be tipped in the defendant's favor: It would be "a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it." *Id.* As a result, no matter how strong the President's interest in secrecy, the defendant would be entitled to any information "absolutely necessary in the defence" or "essential to the justice of the case." *Id.*

The need for the court to apply that test never came to pass. Westen, *The Compulsory Process Clause*, at 107. Burr dropped his request for the documents and proceeded to trial, where he was acquitted. *Id.* In all, Chief Justice Marshall's contemporaneous interpretation of the compulsory process clause was sweeping, for "the right given by this article must be deemed sacred by courts, and the

article should be so construed as to be something more than a dead letter." *Burr I*, 25 F Cas at 33.

D. When the Compulsory Process Clause was substantively litigated again 170 years later, the Supreme Court confirmed that no law can arbitrarily deny a defendant's constitutional right to compulsory process.

After Burr's case, there was a "170-year blackout" on compulsory process litigation. Westen, *The Compulsory Process Clause*, at 108–11. During those years, the Supreme Court mentioned compulsory process five times but did not substantively address its meaning. *Id.* at 108.[9] The blackout ended with the Supreme Court's decision in *Washington v. Texas*, 388 US 14, 22, 87 S Ct 1920, 18 L Ed 2d 1019 (1967).

The Texas law at issue in *Washington* rendered accomplices incompetent to testify for one another. 388 US at 15. The defendant and one other person were charged with the murder of a young man. *Id.* at

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[9] *United States v. Reid*, 53 US 361, 363–65, 13 L Ed 1023 (1851) (mentioned in dictum), *overruled in Rosen v. United States*, 245 US 467, 38 S Ct 148, 62 L Ed 406 (1918); *Ex parte Harding*, 120 US 782, 7 S Ct 780, 30 L Ed 824 (1887) (declining to address); *United States v. Van Duzee*, 140 US 169, 173, 11 S Ct 758, 35 L Ed 399 (1891) (dictum that compulsory process does not require defense subpoenas to issue at government expense); *Blackner v. United States*, 284 US 421, 442, 52 S Ct 252, 76 L Ed 375 (1932) (declining to address); *Pate v. Robinson*, 383 US 375, 378 n 1, 86 S Ct 836, 15 L Ed 2d 815 (1966) (same).

15–16. The defendant testified in his own case that the other person pulled the trigger, the defendant had tried to persuade him not to, and the defendant had fled the scene before the other person even fired the gun. *Id.* The other person was prepared to testify consistently with the defendant. *Id.* at 16. Relying on Texas law, the trial court ordered that he could not do so. *Id.* at 17.

On review, the Supreme Court began by addressing whether the Sixth Amendment right to compulsory process "is so fundamental and essential to a fair trial" that it applies to the states through the Fourteenth Amendment Due Process Clause. *Id.* at 17–18. The Court held that it is, reasoning:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Id. at 19.

Turning to whether the Texas statute offended that fundamental right, the Court framed the question presented as whether a defendant

has the right "under any circumstances to put his witnesses on the stand, as well as the right to compel their attendance in court." *Id.* The Court reviewed the common law and observed that "the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court[.]" *Id.* at 22. It reasoned: "[I]t could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law," so it was "difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying[.]" *Id.*

The Court declined an invitation to interpret the clause narrowly, to guarantee only the right to coercive means to secure a witness's attendance in court: "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.* at 23. The Court thus held that Texas "arbitrarily denied" the defendant's compulsory process right to offer a witness whose testimony would have been "relevant and material to the defense." *Id.*

E. If Meta's interpretation of the Stored Communications Act is correct, then the Act, as applied to relator, violates his state and federal rights to compulsory process.

The state and federal rights to compulsory process are textually similar. That similarity, however, does not stop this court from analyzing the state and federal claims separately under Oregon's "first things first" methodology. *State v. Copeland*, 353 Or 816, 821, 306 P3d 610 (2013) ("As part of the 'first things first' methodology, we consider state constitutional issues before we consider federal claims"). Indeed, this court has analyzed state and federal compulsory process claims separately even when the parties relied "predominantly on federal cases" and "appear[ed] to assume that the result under [both constitutions] would be the same." *State v. Weaver*, 367 Or 1, 21 n 5, 472 P3d 717 (2020). Relator thus analyzes the claims separately in accordance with this court's methodology.

But first, this court should draw upon history when construing both the state and federal constitutional rights to compulsory process. *Priest*, 314 Or at 415–16; *Bruen*, 597 US at 17. The animating purpose of the right to compulsory process is to eliminate procedural imbalances that were once reserved for the government alone, and to give

defendants "the right to present evidence *on an equal basis with the prosecution*." *State v. Mai*, 294 Or 269, 276, 656 P2d 315 (1982) (*citing* Westen, 73 Mich L Rev at 95, 99) (emphasis added).

Chief Justice Marshall's construction of the federal compulsory process clause in the prosecution of Aaron Burr shows just how sweeping and powerful the framers intended the right to be. *Supra*, Part II.A.3. These core principles can be drawn from his opinions:

> The right to compulsory process applies pretrial. *Burr I*, 25 F Cas at 33.
>
> It also includes a right to subpoena documents. *Id.* at 35.
>
> Showing materiality is a low bar, at least when defendants have not seen the documents they seek and do not know what the related witnesses will say when they testify. *Id.* at 36, 38.
>
> There is no blanket immunity from being subject to compulsory process. *Id.* at 34.
>
> When privileges are at issue, courts should balance the competing interests, but with a thumb on the scale in favor of protecting the right. If the evidence is "absolutely necessary" to

the defense or "essential to the justice of the case," even a Presidential privilege must yield. *Burr II*, 25 F Cas at 192. To the extent that state or federal jurisprudence has strayed away from those animating principles, this court should right the path.

II. Meta's interpretation of the Stored Communications Act, as applied to relator, violates his Article I, section 11, right to compulsory process.

Article I, section 11, of the Oregon Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right * * * to have compulsory process for obtaining witnesses in his favor[.]" That right "refers most obviously to the right to obtain the presence of a witness by subpoena[.]" *Weaver*, 367 Or at 21. But "[t]he right to subpoena a witness into the courtroom is an empty right absent the related right to obtain the testimony of the witness." *Mai*, 294 Or at 272. As a result, this court "had no hesitation in concluding that the clause protects both the right to the attendance of the witness and the testimony of the witness." *Id.*

This court in its compulsory process jurisprudence has distinguished between rules of evidence and procedure that condition the right, on the one hand, and laws or state actions that deny the right

entirely, on the other. Beginning with the permissible conditions, this court in *Mai* upheld a trial court's exclusion of a defense witness when the defendant used his compulsory process right as a sword and a shield, refusing to comply with his reciprocal discovery obligations because he had an "absolute right to call witnesses." 294 Or at 271. When the trial court tried to remedy the late disclosure by giving the prosecutor time to interview the defense witnesses midtrial, defense counsel "interposed himself, insisting that his witnesses answer no questions." *Id.* at 277–78. As a sanction for the defense conduct, the trial court excluded one defense witness and allowed the other to testify. *Id.* at 278.

On appeal, the defendant challenged as unconstitutional the statute allowing courts to exclude defense witnesses from testifying as a sanction for a discovery violation. *Id.* at 273. This court began its analysis by observing that "it is doubtless permissible to establish reasonable procedures which must be followed in order to exercise a right guaranteed by the constitution." *Id.* at 274. Contrary to the defendant's assertion, Oregon's reciprocal discovery statutes "do not

deny the right to call witnesses." *Id.* at 275. Rather, they "merely set forth a procedure that must be followed in the trial process[.]" *Id.*

Turning to the specific discovery sanction statute at issue, ORS 135.865, the court concluded that it did not violate the defendant's right to compulsory process because it "is evenhanded" and "provides for reciprocal discovery and for sanctions against both the state and the defense." *Id.* at 276. That evenhandedness mattered to the court because of the framers' intent when enacting the clause: "Compulsory process constitutional clauses arose because of inequality between the prosecution's unrestricted right to call witnesses and the defendant's limited or nonexistent right to call witnesses. The framers perceived a need for the defendant to have the right to present evidence *on an equal basis with the prosecution*." *Id.* (*citing* Westen, 73 Mich L Rev at 95, 99) (emphasis added).

But that conclusion did not end the analysis, because "there could be no denying" that the statute burdened the defendant's right to present a defense. *Id.* at 277. Consequently, when trial courts impose discovery sanctions under ORS 135.865, they must do so "in a reasonable manner" by selecting the sanction that "will infringe the

least upon the defendant's rights," while achieving the goal of the statute. *Id.* Because the trial court in that case had tried to impose a lesser sanction, which the defendant then "thwarted," exclusion of a defense witness was justified under Article I, section 11. *Id.* at 278.

State action that outright denies the right to compulsory process meets a different fate. *Weaver*, 367 Or at 22. While the defendant in *Weaver* was awaiting trial for murder, the state entered a plea agreement with his codefendant, Orren. *Id.* at 3. The plea agreement required Orren to invoke his Fifth Amendment privilege if the defendant called him to testify. *Id.* It also prohibited Orren from "cooperat[ing] in any way" with the defense. *Id.* at 7.

This court had no trouble concluding that the state's actions violated the defendant's Article I, section 11, right to compulsory process. *Id.* at 22. Two points that informed the court's decision bear discussion here. First, the state had "articulated no legitimate interest" in the plea agreement's blanket prohibition on Orren testifying for the defendant or cooperating with him "in any way." *Id.* The court acknowledged that "the fundamental right that the compulsory process clause aims to protect is the right to present a defense, the right to

present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Id.* at 29 (citations omitted). The state could not deny the defendant that fundamental right "for no reason." *Id.* at 28–29.

Second, "the plea agreement itself barred defendant from investigating what Orren's prospective testimony would be." *Id.* at 29. The defendant, therefore, could not interview Orren or subpoena him to testify at any pretrial hearings to investigate what Orren's testimony would be. *Id.* at 30. That impediment mattered because the defendant could not be expected to make a showing of materiality if he could not access the witness to learn why his testimony was material to the defense. *Id.* Thus, the court concluded that the defendant had "made a sufficient showing that his rights were implicated by showing that Orren was a defense witness, that he was competent to testify, and that he could offer material—*meaning relevant*—testimony." *Id.* at 30–31 (emphasis added).

This court reached a similar decision decades earlier, when it analyzed whether a statute that barred imprisoned felons from being subpoenaed to testify in court violated a defendant's right to compulsory

process. *State ex rel. Gladden v. Lonergan*, 201 Or 163, 269 P2d 491 (1954). In concluding that it did, this court instructed:

> "The right to compulsory process for necessary and material witnesses on his behalf is a valuable right guaranteed to an accused. It is *a right that cannot be denied by legislative act* or failure to act. In the interests of justice, i*t is the duty of courts to enforce the right*. When all is said and done, in every criminal proceeding, as well as in the trial of all other cases, the primary aim of the law is to arrive at the truth of the matter in controversy, and *no obstacle should be sanctioned that would deny the presence of a competent witness who has knowledge of material facts*."

Id. at 189 (emphases added).

If Meta's interpretation of the Stored Communications Act—which the trial court adopted—is correct, the Act is not the sort of procedural condition that this court approved in *Mai*. Under Meta's interpretation, there is no procedure or set of procedures that relator could follow to call Meta as a witness or subpoena its documents, either at trial or pretrial. *See State v. Bray*, 363 Or 226, 231, 422 P3d 250 (2018) ("A person like defendant, who is a non-governmental entity, cannot require a remote computing service, such as Google, to divulge the contents of communications. *See* 18 USC § 2703(b)."). Thus, what saved the discovery sanctions statute in *Mai* cannot save the Stored Communications Act here. *See Mai*, 294 Or at 274 ("[I]t is doubtless

permissible to establish reasonable procedures which must be followed in order to exercise a right guaranteed by the constitution.").

There is also nothing "evenhanded" about the trial court's interpretation of the Stored Communications Act. *Mai*, 294 Or at 276. Under the trial court's rationale, the procedure to obtain social media records is denied to a criminal defendant but is afforded to the state, and to the state alone. 18 USC § 2703.

That denial is important for two reasons. First, the state has previously taken the position before the Court of Appeals that a compulsory process violation exists when a "statute is unequal in its treatment of the defendant" and the state. *State ex rel. Meyers v. Howell*, 86 Or App 570, 576, 740 P2d 792 (1987). Relator agrees with the state's position in *Howell* because the framers included the right to compulsory process in our constitutions because they "perceived a need for the defendant to have the right to present evidence *on an equal basis with the prosecution*." *Mai*, 294 Or at 276 (*citing* Westen, 73 Mich L Rev at 95, 99) (emphasis added).

Second, another consequence of the trial court's rationale is that a court cannot even order Meta to produce communications for an *in*

camera review or to preserve the records for appellate review. Rather, the only instance in which it is authorized to issue criminal process on social media companies like Meta is when the state makes the request. *See* 18 USC § 2703 (only "governmental entities" can obtain records from service providers; no provision allowing "courts of competent jurisdiction" to do so). The pretrial subpoena process outlined in *State v. Cartwright* is therefore unavailable to relator in the context of the Stored Communications Act. *See State v. Cartwright*, 336 Or 408, 415, 85 P3d 305 (2004) (ORS 136.580 does not authorize defendants to "command" early production of documentary material "*directly*"; it instead authorizes "*the court*" to command early production).

The trial court erred when it adopted Meta's interpretation of the Stored Communications Act as imposing a complete bar on process served by a criminal defendant. Whatever the goal of the Act, it cannot be said that a total bar on defense subpoenas achieves that goal "in a reasonable manner" that "infringe[s] the least upon the defendant's rights." *Mai*, 294 Or at 277. To the contrary, that sort of categorical bar represents maximal infringement on a defendant's rights.

Just like the plea agreement in *Weaver*, Meta's interpretation of the Stored Communications Act prohibits relator from compelling Meta's testimony (through its documents and a custodian of records) at trial. Also just like the plea agreement in *Weaver*, Meta's interpretation of the Stored Communications Act forecloses relator from investigating Meta's testimony pretrial. Consequently, the trial court erred when it found that there was no constitutional violation because relator had not shown that the requested records were material and favorable. Relator explained that the records he sought were relevant to show a plan, on the part of the decedent and , to set relator up for a violent confrontation. ER-7 to ER-8. Under *Weaver* and *Burr I*, that was all he needed to show. *Weaver*, 367 Or at 30–31 (when state action bars defendant from investigating, materiality standard is satisfied by demonstrating relevance); *Burr I*, 25 F Cas at 36, 38.

The trial court erred in concluding that Meta's interpretation of the Stored Communications Act, as applied to relator, does not violate his right to compulsory process under Article I, section 11.

III. Meta's interpretation of the Stored Communications Act, as applied to relator, violates his Sixth Amendment right to compulsory process.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor[.]" Relator acknowledges that the Supreme Court has held that a defendant's Sixth Amendment right to compulsory process is not absolute: "[T]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Michigan v. Lucas*, 500 US 145, 149, 111 S Ct 1743, 114 L Ed 2d 205 (1991) (citations omitted). But those restrictions on the right "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 151.

It is unclear whether *Lucas* would survive today. Under current federal law, courts analyze the scope of constitutional rights, and what burdens may be imposed on those rights, by looking to history and tradition. *See, e.g.*, *Bruen*, 597 US at 17 (when party challenged constitutionality of gun law, government must show the restriction "is consistent with the Nation's historical tradition of firearm regulation"); *Dobbs v. Jackson Women's Health Org.*, 597 US 215, 142 S Ct 2228, 213

L Ed 2d 545 (2022) (analyzing whether, at time of founding, abortion rights were "rooted in the Nation's history and tradition"); *Trump v. United States*, 603 US 593, 144 S Ct 2312, 219 L Ed 2d 991 (2024) (analyzing scope of presidential privileges and immunities in light of "history" and "tradition").

Lucas could be read to impose only a minimal burden on states to articulate *some* legitimate interest in restricting a criminal defendant's right to compulsory process. If that is what *Lucas* stands for, it is difficult to reconcile with the historical understanding of the compulsory process right reflected in *Burr* and *Washington*. *See Burr II*, 25 F Cas at 192; Westen, *The Compulsory Process Clause*, at 106–07. A burden on a defendant's right to compulsory process is "a very serious thing." *Burr II*, 25 F Cas at 192. The scale should be tipped in favor of the right to compulsory process, with only the most serious government interests justifying an intrusion on that right. *Id.* Any justified intrusion must be narrowly circumscribed. *Id.* Intrusions are not justified if the evidence is "necessary to the defense" or "essential to the administration of justice." *Id.*

The Supreme Court's decision in *Washington v. Texas* is instructive. 388 US 14. There, state law barred alleged accomplices from testifying in support of one another. *Id.* at 16–17. There was no bar, however, to their testifying for the state. *Id.* at 17. The state argued that the law was justified because the state had an interest in preventing perjury in criminal trials. *Id.* at 22. The Court rejected that argument, reasoning that the law was both arbitrary and overbroad. *Id.* It was arbitrary because it allowed the state to call witnesses whom the defense could not, even though witnesses charged with crimes would have plenty of incentive to testify favorably for the state. *Id.* And it was overbroad because it foreclosed "whole categories of defense witnesses" from testifying. *Id.*

Meta's interpretation of the Stored Communications Act, as applied to relator, violates his Sixth Amendment right to compulsory process. There can be no question that it significantly burdens his right to compulsory process: It would make an entire category of information completely unavailable to criminal defendants, even though that same information is fully available to the state. If any government interests

justify such a wholesale denial of the right to process, they can only be the most serious of those interests. Those interests are not present here.

The trial court erred in concluding that Meta's interpretation of the Stored Communications Act, as applied to relator, does not violate his right to compulsory process under the Sixth Amendment.

IV. A peremptory writ should issue because there is no plain, speedy, or adequate remedy at law.

Absent mandamus, relator has no plain, speedy, or adequate remedy at law to correct the trial court's error. Electronic data is fleeting. Meta itself recognizes that the accounts that relator seeks to examine are "not static," because the account holders can access and change them—or even delete them. ER-20.

There is no assurance that the information relator needs to investigate and present his theory of defense will exist after a lengthy appeal process. What happened in *Bray* is a perfect example. There, by the time this court exercised it discretion to review the due process questions presented in that case, no one disputed that Google had already deleted the records. *See Bray*, 363 Or at 240 ("[T]his is a case in which the state failed to take court-ordered action to obtain information that a third party—Google—may once have had but no longer retains.").

Had this court ruled that the defendant in *Bray* had the right to the records he sought, it would have been a right without a remedy (short of dismissing the case entirely).

The same would be true here. Meta takes the position that it can disclose its records only to "governmental entities," and that trial courts are not "governmental entities" under the Stored Communications Act. ER-16 to ER-17. In other words, Meta argues that not only is relator foreclosed from obtaining the requested records; the trial court is, too. ER-17. The trial court agreed with that position and quashed the subpoena entirely. ER-322. Under that reading of the Stored Communications Act, the requested records are not—and cannot be—part of the trial court file, cannot be preserved for appellate review, and may not be preserved at all. *Cf. State v. Crenshaw*, 307 Or 160, 169, 764 P2d 1372 (1988) (defendants entitled to have disputed records filed under seal in trial court to preserve appellate rights).[10]

[10] Relator acknowledges Meta's representation to this court that it has internally preserved the subpoenaed records. Opp. to Petition for Writ of Mandamus, at 10. While that voluntary act is commendable, it does not solve the problem that, under Meta's interpretation of the Stored Communications Act, no court can order Meta to make those records part of the court file for appellate review. And Meta is under no court

Every day that goes by is a day that the records relator seeks—records that are key to his theory of defense—can be altered or deleted. Thus, this is not a case where relief would merely "come too late." *HotChalk, Inc. v. Lutheran Church-Missouri Synod*, 372 Or 249, 257, 548 P3d 812 (2024). Rather, without this court's intervention, relator may never get relief. As this court instructs, mandamus is appropriate when a legal error would force the "petitioner to suffer an irretrievable loss of information and tactical advantage which could not be restored to them on direct appeal." *Longo v. Premo*, 355 Or 525, 532, 326 P3d 1152 (2014) (cleaned up). Relator therefore requests that this court exercise its original jurisdiction and grant a peremptory writ of mandamus.

CONCLUSION

The state and federal rights to compulsory process guarantee relator the right to subpoena witnesses and inspect their documents to ensure that he can present a defense at trial. No law can arbitrarily deny relator that right, and when restrictions are justified, they must

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order or other legal obligation to preserve those records until this case is completely resolved.

be the least restrictive measures possible. Meta's interpretation of the Stored Communications Act imposes a complete bar on relator's ability to subpoena Meta (a competent witness) for records and testimony that are favorable to his defense. A bar like that is arbitrary and its burden on relator's right to compulsory process is absolute. It is therefore unconstitutional as applied. The trial court erred as a matter of law when it quashed relator's subpoena.

For the reasons above, relator asks this court to grant a peremptory writ of mandamus, as described in his petition.

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Respectfully submitted,

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