

IN THE SUPREME COURT FOR THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Adverse Party,

v.

DAVID AYON-URBANO,  
Defendant-Relator.

Marion County Circuit Court  
Case Nos. 24CR31979 and 24CN05648  
(Consolidated)

SC S072084

MANDAMUS PROCEEDING

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DAVID AYON-URBANO,  
Plaintiff-Relator,  
META PLATFORMS, INC.,  
Defendant-Adverse Party.

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**DEFENDANT-ADVERSE PARTY'S  
ANSWERING BRIEF ON THE MERITS**

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Alternative Writ of Mandamus Issued to  
Honorable Jennifer K. Gardiner, Marion County Circuit Court Judge

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March 2026

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## INTRODUCTION

In this mandamus proceeding, Relator asks this Court to overturn the trial court's straightforward and well-reasoned ruling quashing an improperly served subpoena that plainly violates the federal Stored Communications Act (SCA). This Court should deny Relator's petition for the same reason it denied relief in a similar context, *State v. Bray*, 363 Or 226, 238, 422 P3d 250 (2018): Relator has not shown that "issuance of process to" Meta is "the only means available to [him] to obtain [the] evidence" at issue.

For forty years, the SCA has served as the cornerstone of federal privacy protection for electronic communications. Congress enacted it to ensure that individuals' most sensitive digital communications—their private messages, their location data, their search histories—would not be disclosed *to anyone* without appropriate legal process or consent. The SCA serves as a blocking statute, prohibiting service providers like Meta from disclosing user communications unless one of several narrow, enumerated exceptions applies. As courts across the nation have uniformly held, disclosing communications in response to a criminal defendant's subpoena is not one of the exceptions.

In this case, Relator served a subpoena on Meta, seeking to compel it to disclose the content of communications from, and other information regarding, the Instagram accounts of two individuals: the 16-year-old boy Relator is accused of murdering and a third-party witness of that alleged crime. Relator

does not dispute that the SCA, by its terms, prohibits Meta from complying with his subpoena. His sole argument is that the statute violates his constitutional right to compulsory process. Every court in the nation that has considered this constitutional challenge to the SCA has rejected it, and this Court should do the same.

The Sixth Amendment's Compulsory Process Clause guarantees criminal defendants a meaningful opportunity to present a complete defense. It does not guarantee them unlimited discovery rights to access every piece of evidence they desire, from any source they choose, and irrespective of a congressional statute expressly prohibiting disclosure. Nor does it grant them the kind of investigative powers conferred exclusively on the government, like search warrants and wiretap orders—investigative powers that come with important limitations and safeguards that would not apply to Relator's subpoena. Moreover, courts have long recognized that a defendant's compulsory process rights must bow to other legitimate interests, including the privacy rights of third parties whose communications electronic service providers store.

Relator cannot establish a constitutional violation when he has alternative avenues to obtain the evidence he seeks. He has made no showing—indeed, he has not even attempted to demonstrate—that he needs to obtain the communications at issue *from Meta*, as opposed to another source. The SCA does not preclude Relator from seeking the communications elsewhere: to the

contrary, it makes clear that when a criminal defendant wants to obtain the contents of stored communications, he can seek them directly from the user (or their estate).

The post-writ factual developments in this case bear out the alternative discovery avenues available to Relator. After the trial court quashed his subpoena, Relator belatedly began the process of obtaining communications directly from the users, and there is no indication that his efforts will fail. On the contrary, the record now indicates that Relator is in possession of the cell phones belonging to both the victim and the third-party witness. That is the right approach. Much as this Court did in *Bray*, courts across the country have rejected constitutional challenges like Relator's because they recognize that the SCA does not deprive defendants of evidence. It merely seeks to further online privacy by channeling requests to users rather than electronic service providers—just as a defendant seeking paper communications would obtain them. And in a case where a defendant has exhausted all other alternatives to obtaining evidence—a showing Relator has not come close to making here—Oregon law could obligate the State to use its investigative tools to obtain the evidence from a provider in a manner consistent with the SCA.

There are other fatal flaws in Relator's case. His subpoena fails to comply with Oregon law in multiple respects. His claim under Article I, section 11, of the Oregon Constitution overlooks the Supremacy Clause, which dictates

that the SCA take precedence over contrary state law. And he has made no showing that the evidence he seeks is likely to be material and favorable to his defense, nor that the SCA's prohibition on provider disclosure is arbitrary or disproportionate to the ends it serves—both of which Relator would need to establish to prevail on his compulsory process claim. These flaws foreclose mandamus relief here, particularly in light of the well-established principle that mandamus is a form of extraordinary relief available only where the relator lacks an adequate remedy at law.

All told, adopting Relator's view of the right to compulsory process here would mean that virtually *any* criminal defendant could subpoena *any* service provider for evidence in contravention of the SCA, on a much lower standard than is required of the government, and in a manner that eviscerates the privacy rights of crime victims and other users. Neither the Sixth Amendment nor basic principles of fairness require such an extreme result.

### **STATEMENT OF THE CASE**

Relator is on trial for the second-degree murder of a 16-year-old boy. Relator's Br at 1; ER-233.<sup>1</sup> Relator alleges that the decedent and a witness, communicated on Instagram in advance of the murder. Relator's Br at 6-7. In the trial court, Relator moved for the Early Production of Records

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<sup>1</sup> Except as otherwise specified, Meta accepts Relator's statement of the case. *See* ORAP 5.55(2).

(“Motion”) on September 18, 2024. ER-2-11. The Motion sought “an order authorizing criminal process to be served on [Meta Platforms] concerning” four Instagram accounts. ER-2. Relator asserted that two of the accounts belonged to the decedent and two belong to ER-7.

Relator sought the following categories of sensitive personal information from the four Instagram accounts:

- “Any location data, including dates, times, IP and street addresses, latitude and longitude data, or GPS data, associated with: accessing the account; uploading, downloading, transferring, storing, or creating digital files; or communications (e.g. mail, calls, messages, bulletins, etc.);”
- “Contents of communications (e.g. calls, mail, messages, bulletins, etc.), including text, and multimedia (e.g. audio, video, etc.) files, regardless of folder location (inbox, outbox, stored, sent, deleted, etc.);”
- “Search history information.”

ER-2-3. Relator also sought information identifying the account holders and the dates the accounts had been in service. *Id.* He asserted that the records either would “help formulate” his theory of the case, ER-6 ¶ 2, or alternatively, were a “crucial portion of [his] theory of the case, without which, he could not advance,” ER-9 ¶ 19.

Two days later, the trial court granted the Motion in a one-page order, which made no findings of fact or conclusions of law. ER-15. Relator then issued a subpoena duces tecum to Meta (“Subpoena”). ER-12. Meta received

Relator's subpoena, objected, and met and conferred with defense counsel on October 24, 2024. ER-16-21 (Meta's objection letter), ER-196.

Meta objected to the Subpoena on several grounds, including (1) that the SCA prohibits it from complying with the Subpoena; (2) that the Subpoena had not been domesticated in California and thus failed to comply with the Uniform Act to Secure the Attendance of Witnesses ("Uniform Act"); and (3) that Relator had alternative means to obtain the information in a manner consistent with the SCA. ER-18-20. Specifically, Meta explained Relator could issue a subpoena to [redacted] or other account holders; could seek consent of the account holders to allow Meta to disclose their information; could issue a limited request to Meta for basic subscriber information; or could work with the prosecutor to obtain the records sought and disclose those already in the government's possession. *Id.*

In response to these objections, Relator took no action for two months. ER-196. He did not issue a subpoena to [redacted] to obtain the contents of her account. He did not seek to obtain further information from the prosecution. He did not issue a limited subpoena to Meta to identify the account holders. Nor did he seek to obtain the consent of [redacted] or the decedent's estate for disclosure of the account contents during that two-month period.

Instead, Relator notified Meta on December 20, 2024 that he intended to file a complaint seeking remedial sanctions ("Complaint") and served Meta

with that Complaint on December 30, 2024. ER-196; ER-205. The Complaint asserted that Meta had “willfully disobey[ed] [the trial court’s] September 20, 2024[] order” authorizing issuance of the Subpoena. ER-22. Relator’s counsel expressed no urgent need for the records, explanation for counsel’s own two-month delay, or rationale for seeking sanctions without conferring with Meta. Counsel simply stated they were “contemplat[ing] our next steps.” ER-205.

Meta moved to dismiss the Complaint and quash the Subpoena, advancing both procedural and substantive arguments. ER-168-193. Procedurally, Meta explained that the Subpoena was an improper discovery device that failed to satisfy the requirements of ORS 136.580 and had not been domesticated in California under the Uniform Act. ER-178-180; ER-183. Substantively, Meta pointed out that the Subpoena’s demands for the private communications of Instagram users violated the SCA; that Relator had failed to pursue alternative avenues for obtaining the information sought, as the SCA envisions; and that the court did not need to reach Relator’s constitutional arguments, but that Relator’s constitutional rights had not been violated in any event. ER-180-185; ER-190-193.<sup>2</sup>

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<sup>2</sup> Relator may have attempted to obtain the consent of the decedent’s estate *after* he filed his Complaint. *Compare* ER-232-233 (correspondence from victim’s mother dated January 20, 2025). For the purposes of Meta’s motion to dismiss and motion to quash the Subpoena, this attempt is irrelevant. *See Rogers v. Valley Bronze of Oregon, Inc.*, 178 Or App 64, 69 n 3, 35 P3d 1102 (2001) (“[D]ecisions on a motion to dismiss for failure to state a claim may not

In opposition, Relator argued that the SCA violated the Compulsory Process Clause of the Sixth Amendment to the United States Constitution (ER-34-46) and Article I, section 11, of the Oregon Constitution. ER-225-228.

Relator did not argue that there was an urgent need for the records, that there was risk of alteration or deletion, or that delay in production had or would harm him. ER-24-47; ER-215-230.

After oral argument, the trial court dismissed Relator's Complaint and quashed the Subpoena. *See* ER-253-324. The court first "assume[d] without deciding" that the procedural defects Meta had highlighted under Oregon law and the Uniform Act could be cured. ER-299. It then concluded that the SCA precluded disclosure of the information Relator sought, ER-299-300; ER-322-323, and proceeded to reject on the merits his constitutional claims. The court reasoned that "as in *State v. Bray* [363 Or at 251 n 18], issuance of legal process to Meta is not the only means available for [Relator] to obtain the evidence he seeks"—namely, "[h]e can issue legal process to the account holders." ER-323. "This holding follows 40 years of well-established precedent upholding the SCA as constitutional," and "aligns with precedent that compulsory process rights may be subordinated to other legitimate interests in the criminal trial process." *Id.*

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be granted on the basis of anything other than the body of the pleadings themselves.").

Relator did not raise the prospect of seeking the Instagram records from the State and                    until oral argument on Meta’s motion to dismiss— months after Meta explained that option to him. ER-301; ER-305. After oral argument, Relator began to seek the Instagram records from alternative sources for the first time while he pursued this mandamus petition. Relator says nothing in his brief about the status of this ongoing discovery, but it appears that he is now in possession of the cell phones belonging to both the victim and

*See* SER-112-113.<sup>3</sup>

### **ARGUMENT**

For several reasons, the trial court properly quashed Relator’s Subpoena. At the outset, the Subpoena is defective because it does not satisfy the requirements that Oregon law establishes on discovery in criminal cases, and because Relator did not properly domesticate the Subpoena in California. That is reason enough to deny relief in this mandamus proceeding.

But regardless, the trial court rightly determined that the Subpoena violates the Stored Communications Act. Indeed, Relator does not challenge that holding before this Court. He instead contends that the Compulsory Process Clause entitles him—and, under his theory, any other criminal defendant who asserts that electronically stored communications are material to his or her defense—to obtain communications and other user information directly from

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<sup>3</sup> SER citations refer to the State’s supplemental excerpts of record.

Meta in violation of the SCA. No court in the nation has endorsed that sweeping theory, and for good reason: it contravenes decades of United States Supreme Court precedent. If adopted, Relator's theory would disrupt the carefully crafted balance Congress struck between privacy rights and disclosure of stored communications when it enacted the SCA. And the relief Relator seeks is especially unwarranted in *this* case, where he has made no attempt to show that he lacks alternative means of obtaining the evidence he seeks. That consideration was dispositive in *Bray* and should be here as well.

**I. The Subpoena Is Invalid Under Oregon Law.**

Under Oregon's "first things first" doctrine, "any discussion of a potential federal constitutional violation is premature" until the court determines whether state law may resolve the case at hand. *State v. Robinson*, 310 Or App 644, 652, 486 P3d 28 (2021). Here, there is no need to reach Relator's federal constitutional claim because Relator's subpoena suffers from two independently dispositive state law defects.

**A. The Subpoena is an improper discovery device that does not satisfy the requirements of ORS 136.580.**

Relator's Subpoena was improperly issued as a discovery device that fails to adhere to the limits imposed by ORS 136.580(2). It is therefore invalid and should remain quashed.

Oregon criminal defendants are given limited ability to obtain documentary evidence from nonparties. *State v. Cartwright*, 336 Or 408, 416,

85 P3d 305 (2004); *State v. Running*, 336 Or 545, 561, 87 P3d 661 (2004) (“We reaffirm our conclusion in *Cartwright* that ORS 136.580 does not allow a criminal defendant to use the subpoena duces tecum as a discovery device.”).

One mechanism to obtain such evidence is a subpoena pursuant to ORS 136.580(2). But such subpoenas are subject to an important limitation: they only allow parties to seek early production of material that will be “available for evidentiary use at the proceeding to which they already have been subpoenaed.” *Running*, 336 Or at 561. Relator did not satisfy ORS 136.580(2) because his Subpoena to Meta sought production *without* an accompanying evidentiary proceeding where the materials would be introduced. In briefing and oral argument throughout this case, Relator has never responded to this contention, implicitly conceding, as he must, that no evidentiary hearing was set. ER-217-220 (Relator’s opposition to Meta Motion to Dismiss); *see generally* ER-253-312 (Hearing Transcript).

This Court discussed ORS 136.580(2) extensively in *Cartwright*, a case involving a criminal defendant who issued a subpoena seeking to compel a witness to disclose documentary material. 336 Or 408. As the Court explained:

[S]ubsection (2) presupposes the existence of a subpoena duces tecum issued in accordance with ORS 136.567 and ORS 136.580(1), i.e., one that properly summons documentary materials to trial or to some other court proceeding where they ‘are to be offered in evidence.’ The provision thus allows parties to ask for early production of material that, in the ordinary course and as a matter of right, will be available for evidentiary use at the proceeding to which they already have been subpoenaed.

*Id.* at 415. In other words, “ORS 136.580(2) presupposes the existence of a proper subpoena duces tecum summoning documentary materials *to a proceeding at which the materials will or may be called into evidence.*” *Id.* at 416 (emphasis added). Because there was no such evidentiary proceeding, “the trial court acted properly in quashing the subpoena.” *Id.*

*Cartwright* is on all fours with this case and controls the outcome here. The defendant in *Cartwright* issued a subpoena that commanded a witness to bring audiotapes to court two weeks before trial even though no trial-related court proceedings were scheduled. *See* 336 Or at 413. Because the defendant was seeking production “on a date when no evidence would be taken” and “no proceeding relating to the criminal action was scheduled,” this Court held that “the trial court acted properly in quashing the subpoena.” *Id.* at 416. The statute did not allow the defendant “to use the subpoena as a discovery device to command the early production of the audiotapes, either to the court or to himself.” *Id.* The Court has reaffirmed that principle in multiple subsequent cases. *See Bray*, 363 Or at 250 (“[U]nder *Cartwright*, ORS 136.580 provides [that] \* \* \* a party is not entitled to use a subpoena *duces tecum* to compel production on a date prior to trial when no evidence will be taken \* \* \*.”); *Running*, 336 Or at 561 (“We reaffirm our conclusion in *Cartwright* that ORS 136.580 does not allow a criminal defendant to use the subpoena duces tecum as a discovery device.”).

Relator's Subpoena to Meta is infirm for the same reason as the *Cartwright* subpoena: Relator issued it to seek production of documentary evidence before trial on a date when no evidence would be taken. *See* ER-12-14 (Subpoena was issued on September 18, 2024, commanding production within 20 days); ER-207-210 (trial court docket at the time of Motion to Dismiss briefing, showing no evidentiary hearings scheduled). Relator's Subpoena to Meta therefore functions as precisely the sort of discovery device intended to allow Relator to review material to develop theories before trial discussed in *Cartwright*, as opposed to a subpoena for an evidentiary trial-related proceeding contemplated by ORS 136.580(2). *See* ER-6 (stating defense counsel has "a good faith belief that Instagram records \* \* \* contain materially favorable information that is likely to help formulate the defense's theory of the case").

Relator's only response is to assert that he complied with ORS 136.583 (*see* Relator's Br at 1, 8), but that is no answer to Meta's argument, which turns on an entirely different statutory provision, ORS 136.580(2). And as Relator himself acknowledged in the trial court, for the Subpoena to be valid, it must satisfy *both* ORS 136.583 (which sets forth certain general requirements for criminal process for the seizure of materials) *and* ORS 136.580(2) (which sets forth specific additional procedural requirements for materials to be "offered in

evidence”).<sup>4</sup> The statutory text confirms as much: ORS 136.583 explicitly acknowledges that the statute is “subject to ORS 136.580(2).” ORS 136.583(1). Both statutes’ requirements can be satisfied without contradiction, and there is no basis to conclude that one somehow supersedes the other. *Compare* ORS 136.583(3) (requiring criminal process to state that production should be made within 20 business days), ORS 136.583(7) (requiring a party that intends to offer documents into evidence to file written notice to the court and provide the adverse party an opportunity to challenge), *with Cartwright*, 336 Or at 416 (“ORS 136.580(2) presupposes the existence of a proper subpoena duces tecum summoning documentary materials to a proceeding at which the materials will or may be called into evidence.”). Because Relator concedes that he has failed to comply with ORS 136.580(2), his Subpoena is a “nullity” and should remain quashed. *See Cartwright*, 336 Or at 416.

**B. Relator did not properly domesticate the Subpoena in California and cannot enforce the Subpoena against Meta.**

It is undisputed that discovery requests to nonparty, nonresidents in criminal matters must comply with the Uniform Act. Meta’s corporate headquarters are in California, and its record custodians—the witnesses

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<sup>4</sup> Relator’s Motion for Early Production of Records to the trial court acknowledged that both ORS 136.580 and ORS 136.583 apply. ER-2 (Relator moving “for an Order authorizing the early production of records pursuant to ORS 136.580 and ORS 136.583”).

here—are located outside the state of Oregon. Yet Relator has failed to abide by the Uniform Act’s requirements.

The Uniform Act establishes the procedures for compelling an out-of-state witness to attend a criminal proceeding in Oregon. *See* ORS 136.627; *see also* ORCP 38 B (adopting similar requirements for civil proceedings). Those procedures dictate that an Oregon criminal defendant wishing to enforce a subpoena against Meta must first present an Oregon certification to the appropriate California court, schedule a hearing before the California court, and obtain a California subpoena for production if the California court determines that the Oregon certification is valid. *See* ORS 136.625; Cal. Penal Code § 1334 *et seq.*; *State v. Blount*, 200 Or 35, 40-41, 264 P2d 419 (1953) (noting application of the Uniform Act, as codified by Oregon statute, to secure testimony in Oregon of witnesses residing in California). Relator has not complied with this process, and his Subpoena is therefore invalid and cannot be enforced against Meta.

Relator’s only response is to mischaracterize Meta’s domestication argument as one addressing “service,” rather than the improper jurisdiction of Oregon’s courts over out-of-state nonparty Meta. Relator’s Br at 9 n 3; ER-27 n 2 (Relator’s Complaint for Sanctions). True, Meta objected that the Subpoena was improperly served by mail rather than personal service, which is required by California law. *See* Cal. Penal Code § 1328(a); ER-17-18 (Meta Objection

Letter). But Meta’s service objection springs from its jurisdictional objection, which Relator has not addressed.

## **II. The Stored Communications Act Prohibits Meta from Complying with the Subpoena.**

As this case comes before this Court, the parties agree that the SCA precludes Meta from complying with Relator’s Subpoena. While amici law professors advance a contrary interpretation of the SCA, this Court should not consider an argument not advanced by any party. Regardless, amici’s interpretation of the SCA is meritless and has been roundly rejected by every court to have considered it. Those repeated rejections are compelled by the SCA’s text, which specifies that service providers “shall not knowingly divulge to any person or entity the contents of a [stored] communication[.]” 18 USC § 2702(a)(1)-(2). The SCA sets forth a list of exceptions to that broad prohibition, *see id.* § 2702(b), but there is no exception for disclosure in response to a criminal defendant’s subpoena. Courts across the country have rightly recognized that the list of exceptions Congress crafted is exhaustive, with no room for manufactured or implied additions.

### **A. Because Relator does not contend that the SCA by its terms allows Meta to disclose the communications at issue, this Court need not and should not consider any such argument.**

For the purposes of this proceeding, Meta and Relator agree on one threshold matter: that the SCA prohibits Meta from complying with his Subpoena. Relator’s sole argument is 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.” Relator’s Br at 2 n 1. At no point does Relator argue that Meta’s interpretation of the SCA *is not* correct. Nor did he make such an argument in the trial court; there, like here, he asserted only that “if Meta’s interpretation of the SCA is correct,” it would violate his compulsory process rights. ER-222; *see also* ER-223 (arguing that “[f]or unknown reasons, Congress has failed to meaningfully update the act in light of an ever-expansive technological revolution”). Nor could Relator raise such an argument for the first time in his reply brief in this Court. *See* ORAP 5.45.<sup>5</sup>

While amici law professors dispute Meta’s interpretation of the SCA, that is no basis for this Court to take up the issue. Like federal courts, Oregon courts “function \* \* \* based on the ‘party presentation principle’—that is, ‘we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.’” *State v. Parra-Sanchez*, 324 Or App 712, 747-48, 527 P3d 1008 (2023) (en banc) (quoting *United States v.*

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<sup>5</sup> *See also, e.g., Strawn v. Farmers Insurance Co. of Oregon*, 350 Or 336, 369 n 23, 258 P3d 1199, *adh’d to on recons*, 350 Or 521, 256 P3d 100 (2011) (“Advancing such a new and different argument for the first time in a reply brief is not the proper way to preserve an argument.”); *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 379-80, 823 P2d 956 (1991) (holding that the Court of Appeals should not have reached argument that was presented for the first time in reply brief).

*Sineneng-Smith*, 590 US 371, 375 (2020)).<sup>6</sup> Consistent with the party presentation principle, this Court has repeatedly rejected attempts by amici to inject new issues not advanced by the parties. For example, in *State v. Link*, 367 Or 625, 482 P3d 28 (2021), this Court declined to address an argument advanced by amici because it went “beyond what is at issue,” as “framed” by the parties’ “briefing.” *Id.* at 642 n 18; *see also Harris v. Suniga*, 344 Or 301, 313, 180 P3d 12 (2008) (declining to address amici’s arguments because, while “important and interesting,” they “simply go beyond what is at issue here”). The Court should do the same here.

**B. In any event, the SCA applies here and prohibits Meta from complying with Relator’s Subpoena.**

Regardless, there is no merit to amici law professors’ argument that the SCA does not apply to criminal defense subpoenas. This Court has already reached that conclusion in *Bray*, where it explained that “[a] person like defendant, who is a nongovernmental entity, cannot require” an electronic service provider “to divulge the contents of communications.” 363 Or at 231 (citing 18 USC § 2703(b)). Amici law professors acknowledge that holding in

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<sup>6</sup> *See also, e.g., Clark v. Sweeney*, 607 US 7, 9 (2025) (per curiam) (“In our adversarial system of adjudication, we follow the principle of party presentation.” (citation omitted)); *Beall Transport Equipment Co. v. Southern Pacific Transportation*, 186 Or App 696, 700 n 2, 64 P3d 1193, *decision clarified on recons*, 187 Or App 472, 68 P3d 259 (2003) (“[It is not] our proper function to make or develop a party’s argument when that party has not endeavored to do so itself.”).

*Bray* but ask this Court to “revisit that interpretation.” Law Professors’ Amicus Br at 5. For several reasons, the Court should not do so. It was correct in *Bray*, and “considerations of stare decisis weigh particularly heavily” when the Court “interpret[s] a statute,” *State v. Murray*, 343 Or 48, 55, 162 P3d 255 (2007). It would be doubly inappropriate to revisit *Bray* in *this* case, given that only an amicus, and not Relator, has asked the Court to do so. *See supra* at 16-18. Even if the Court were to address the issue—which it should not—there is no reason to depart from *Bray*’s holding.

Congress enacted the SCA in 1986 as the foundational federal privacy law for online communication, a time when Americans’ sensitive and private conversations were increasingly moving online. *See* Pub L No 99-508, 100 Stat 1860 (Oct 21, 1986). The SCA’s legislative history reflects Congress’s concern that while mail and telephone communications had long enjoyed a variety of legal protections, there were no “comparable Federal statutory standards to protect the privacy and security of communications transmitted by \* \* \* new forms of telecommunications \* \* \* even though American citizens and American businesses are using these new forms of technology” with increasing frequency. S Rep No 99–541, at 5 (1986). Nor did it appear that constitutional protections would suffice, because at the time, it was “difficult for robust Fourth Amendment protections to apply online” under the third-party doctrine. *See* Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a*

*Legislator's Guide to Amending It*, 72 Geo Wash L Rev 1208, 1212 (2004).

Thus, Congress worried that if it did “not act to protect the privacy of our citizens, we may see the gradual erosion of a precious right.” HR Rep No 99–647, at 19 (1986).

To achieve Congress’s stated goals, the SCA functions as a blocking statute. It broadly prohibits service providers like Meta from “knowingly divulg[ing] to any person or entity the contents of a communication” stored by the provider. 18 USC § 2702(a)(1)-(2); *see also, e.g., O’Grady v. Superior Court*, 139 Cal App 4th 1423, 1445, 44 Cal Rptr 3d 72, 87 (2006) (SCA protects communications “against unwanted disclosure *to anyone*” (italics in original)).<sup>7</sup> The SCA carefully delineates the circumstances in which electronic service providers either *may*, or *must*, disclose customer communications or records. *See* 18 USC § 2702 (titled “[v]oluntary disclosure of customer communications or records”), § 2703 (titled “[r]equired disclosure of customer communications or records”). In other words, the SCA establishes a “general prohibition on disclosure” subject to exceptions specifically enumerated in the statute. *Facebook, Inc. v. Superior Court*, 4 Cal 5th 1245, 1267, 417 P3d 725, 740 (2018). Section 2702 sets forth nine exceptions to the general prohibition on disclosure. *See* 18 USC § 2702(b)(1)-(9). It is undisputed that disclosure in

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<sup>7</sup> To be clear, that prohibition applies only to service providers; the SCA does not impose any limitation on account holders’ ability to disclose their own communications.

response to a criminal defendant’s subpoena is not among the enumerated exceptions. Both the plain text and the broader statutory context of the SCA thus foreclose any argument that the SCA’s general prohibition on disclosure contains an implicit exception for criminal defense subpoenas.

Courts in other jurisdictions have uniformly reached the same conclusion this Court did in *Bray* regarding the proper interpretation of the SCA. “[E]very court to consider the issue has concluded that the SCA’s general prohibition on disclosure of the contents of covered communications applies to criminal defendants’ subpoenas.” *Facebook, Inc. v. Wint*, 199 A3d 625, 629 (DC 2019). As the D.C. Court of Appeals explained in *Wint*, “[r]ead together, [sections] 2702 and 2703 appear to comprehensively address the circumstances in which providers may disclose covered communications. Those circumstances do not include complying with criminal defendants’ subpoenas.” *Id.* at 628. Numerous decisions from courts across the country are in accord.<sup>8</sup> Conversely, there

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<sup>8</sup> *See, e.g., United States v. Pierce*, 785 F3d 832, 842 (2d Cir 2015) (“[t]he SCA does not, on its face, permit a defendant to obtain” stored communications absent an enumerated exception); *United States v. Wenk*, 319 F Supp 3d 828, 829 (ED Va 2017) (“[T]he Act does not contain a provision detailing the methods with which criminal defendants can require disclosure despite containing such a provision for governmental entities.”); *United States v. Nix*, 251 F Supp 3d 555, 559 (WDNY 2017) (the SCA “does not permit a defendant in a criminal case to subpoena the content of a Facebook or Instagram account”); *State v. Johnson*, 538 SW3d 32, 69 (Tenn Crim App 2017) (“[W]e easily conclude that the defendants cannot obtain the contents of the witnesses’ social media accounts from the social media providers \* \* \*.”); *United States v. Glenn*, 341 FRD 217, 222 (ND Ohio 2022) (“[T]he SCA does not permit Defendant to subpoena Meta for information related to Decedent.”);

appears to be *no court* that has endorsed the arguments amici law professors advance.<sup>9</sup>

Amici assert that “[t]he SCA is ambiguously silent as to its effect on” criminal defense subpoenas, Law Professors’ Amicus Br at 14, but as courts have concluded, “there is no pertinent ambiguity in the language of the statute,” *O’Grady*, 139 Cal App 4th at 1443. The SCA’s requirement that providers “shall not knowingly divulge *to any person or entity* the contents of a [stored] communication,” 18 USC § 2702(a)(1)-(2) (emphasis added), covers disclosure in response to defendants’ subpoenas. When, as here, “a statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Sebelius v. Cloer*, 569 US 369, 381 (2013) (alteration omitted) (citation omitted).

Because Congress enumerated nine explicit exceptions to the SCA’s non-disclosure rule, fundamental principles of statutory interpretation counsel

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*United States v. Meintzschel*, 2020 WL 7340017 at \*3 (EDNC, Dec 14, 2020) (same).

<sup>9</sup> In one case, the California Court of Appeal held that the SCA did not bar social media companies from complying with a criminal defendant’s subpoena because the companies did not qualify as either electronic communication service providers or remote computing service providers under the statute. *Snap, Inc. v. Superior Court*, 103 Cal App 5th 1031, 1057-66, 323 Cal Rptr 3d 576, 597-605 (2024). Neither Relator nor his amici advance that argument here. Moreover, the California Supreme Court has granted review in that case to consider whether the Court of Appeal’s analysis—which other courts have not adopted—is correct. *See Snap, Inc. v. Superior Court*, No. S286267 (Cal), review granted Sept. 18, 2024.

strongly against adding implicit exceptions to the list. “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied \* \* \*.” *TRW Inc. v. Andrews*, 534 US 19, 28 (2001). And given the context here—“rapidly developing new technologies profoundly affecting not only commerce but countless other aspects of individual and collective life”—“[f]ew cases have provided a more appropriate occasion to apply” that canon of statutory construction. *O’Grady*, 139 Cal App 4th at 1443.

Amici further contend that if a blocking statute like the SCA does not *expressly* mention legal process, it should be construed to contain an implicit exception for judicial proceedings. *See* Law Professors’ Amicus Br at 14-15. The case law does not support that theory either. Courts have rejected “the theory that general language precluding disclosure will never suffice to preclude disclosure in response to subpoenas, and that only a specific statutory reference to subpoenas will suffice.” *Wint*, 199 A3d at 632. For example, in *Baldrige v. Shapiro*, 455 US 345 (1982), the Supreme Court held that a statute directing the Department of Commerce not to “permit anyone” to examine raw census data precluded discovery of that data via subpoena because the “unambiguous language of the confidentiality provisions” barred discovery. *Id.*

at 355, 361. Other cases are to the same effect.<sup>10</sup>

Congress included an exception to the SCA's prohibition on disclosure in response to legal process, but opted to expressly limit that exception to governmental entities. *See* 18 USC §§ 2702(b)(2), 2703. Congress could have, but chose not to, create an exception for disclosure in response to criminal defense subpoenas. Adopting amici's theory would usurp the role of Congress and cast a shadow over the critical privacy protections that have allowed electronic communications to flourish in the 40 years since it enacted the SCA.

### **III. The Stored Communications Act Does Not Violate Relator's Compulsory Process Rights.**

Relator's state constitutional challenge to the SCA overlooks the Supremacy Clause and basic principles of federalism. And his federal constitutional challenge fails because he has not been deprived of a "meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 US 319, 324 (2006) (citation omitted). Relator has not come close to establishing that the SCA's prohibition on provider disclosure of communications has barred

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<sup>10</sup> *See, e.g., In re England*, 375 F3d 1169, 1177-78 (DC Cir 2004) (Roberts, J.) (holding that a statute providing that records of promotions for Navy chaplains "may not be disclosed to any person" precluded disclosure in discovery); *Cazorla v. Koch Foods of Mississippi, L.L.C.*, 838 F3d 540, 551 (5th Cir 2016) (holding that a statute prohibiting "use by or disclosure to anyone" precluded disclosure in discovery because "as a purely textual matter, it is unclear why a provision broadly barring any 'disclosure' would have to specify 'including in discovery' in order to have effect").

him from access to material, favorable evidence that cannot be obtained by other means. *See Bray*, 363 Or at 238-39.

**A. The Supremacy Clause forecloses Relator’s argument that the SCA violates the Oregon Constitution.**

Relator’s contention that the SCA violates Article I, section 11, of the Oregon Constitution (*see* Relator’s Br at 4) is foreclosed by the Supremacy Clause of the United States Constitution. That clause establishes that federal law—including federal statutes like the SCA—is “the supreme Law of the Land \* \* \* any [t]hing in the Constitution or Laws of any State to the Contrary notwithstanding.” US Const, Art VI, § 2. It follows that when a valid federal statute conflicts with a state constitutional provision, the federal statute preempts and renders the state provision unenforceable. *See, e.g., Murphy v. National Collegiate Athletic Association*, 584 US 453, 471 (2018) (“[W]hen federal and state law conflict, federal law prevails and state law is preempted.”); *U.S. Term Limits, Inc. v. Thornton*, 514 US 779, 837 (1995) (holding that federal law preempted a provision of the Arkansas Constitution). Thus, Relator’s argument that the SCA somehow “violates his Article I, section 11, right to compulsory process” under the Oregon Constitution, Relator’s Br at 29, makes no sense. If there is any conflict between the SCA and the Oregon Constitution, the SCA takes precedence under the Supremacy Clause.

Regardless, there is no need for any separate state constitutional inquiry here because this Court has “construe[d] the state compulsory process clause in

the same way as the Supreme Court construed the virtually identical federal counterpart[.]” *State v. Mai*, 294 Or 269, 272, 656 P2d 315 (1982). So even if it were not preempted by the SCA, Article I, section 11, does not provide Relator with any additional protections above and beyond the federal Constitution’s Compulsory Process Clause. *See id.* (concluding that exclusion of evidence based on reciprocal discovery statutes did not violate the defendant’s right to compulsory process, in part because “constitutional rights must accommodate other legitimate interests in the criminal trial process”).

As discussed further below (*see infra* at 43-44), it is possible that in certain circumstances, the state compulsory process right in Article I, section 11, could obligate *the State* to seek to obtain evidence from a service provider on a criminal defendant’s behalf upon an adequate showing of materiality and necessity. So long as the State’s warrant, subpoena, or court order complies with the requirements of the SCA, *see* 18 USC § 2703, that approach would not conflict with the federal statute. Indeed, this Court has already contemplated that very scenario. *See Bray*, 363 Or at 238-39. Here, however, Relator has neither requested this form of relief nor made any showing that would justify it. He contends only that Article I, section 11, can override the SCA’s disclosure prohibition in response to *his own* Subpoena, which is plainly wrong under the Supremacy Clause.

**B. Relator’s federal constitutional claim fails because he has not shown that the SCA deprives him of a meaningful opportunity to present a complete defense.**

Relator cannot establish that the SCA violates the Sixth Amendment’s Compulsory Process Clause, either on its face or as applied to the particular facts of this case. Relator’s opening brief confirms that he has “never advanced a facial challenge” to the SCA. Relator’s Br at 2 n 1. That is not surprising, because to prevail on such a challenge, Relator would have had to “establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 US 739, 745 (1987). Given the many lawful applications of the SCA, such a showing would have been impossible to make.

Relator instead advances an as-applied challenge to the SCA—one that depends on the “particular circumstances” of his case. *Id.* at 751. But it is a curious kind of as-applied challenge, because Relator says almost nothing about the particular circumstances of his case. His theory, apparently, is that anytime a criminal defendant serves a subpoena on an electronic service provider for communications that meet the “materiality” threshold—a standard Relator insists is “a low bar,” Relator’s Br at 28—the Compulsory Process Clause requires disclosure of the communications, even though the SCA would prohibit it. If this Court were to accept that sweeping proposition, it would open the door to untold numbers of criminal defendants serving subpoenas for stored electronic communications in violation of the carefully crafted scheme

Congress designed to protect privacy rights. Relator’s theory finds no support in the Supreme Court’s Compulsory Process Clause jurisprudence, and so far as Meta is aware, no court has endorsed it. This Court should not be the first to do so.<sup>11</sup>

1. *The SCA’s prohibition on provider disclosure is not arbitrary or disproportionate, and alternative avenues are available for Relator to obtain any material and favorable evidence for his defense*

“There is no general constitutional right to discovery in a criminal case \* \* \*.” *Weatherford v. Bursey*, 429 US 545, 559 (1977). The Sixth Amendment guarantees criminal defendants the right “to have compulsory process for obtaining witnesses in [their] favor,” US Const, Amend VI, but it “does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses” or other evidence. *United States v. Valenzuela-Bernal*, 458 US 858, 867 (1982). Rather, the Compulsory Process Clause guarantees only a “meaningful opportunity to present a complete

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<sup>11</sup> Relator invokes only the Compulsory Process Clause and does not advance any separate due process claim. See Relator’s Br at 38-41. While amici advance certain due process arguments, see Public Defenders Amicus Br at 19-22, Relator has not preserved any due process claim or argument himself. Regardless, the two doctrines are closely related and courts often do not expressly distinguish between the two sets of rights as applied to criminal defendants in Relator’s position. See, e.g., *Crane v. Kentucky*, 476 US 683, 690 (1986) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (citations omitted)).

defense.” *Holmes*, 547 US at 324; *see also, e.g., United States v. Scheffer*, 523 US 303, 308 (1998) (a “defendant’s right to present relevant evidence is not unlimited,” but instead is “subject to reasonable restrictions” and must “bow to accommodate other legitimate interests”).

In applying the Compulsory Process Clause, the Supreme Court has not applied a rigid test, but instead has identified several factors for courts to assess when determining whether a criminal defendant’s right has been violated. Those factors include: (1) whether the evidentiary rule at issue “infringe[s] upon a weighty interest of the accused,” *Holmes*, 547 US at 324 (alteration omitted), (2) whether the rule is “arbitrary or disproportionate to the purposes [it is] designed to serve,” *id.* (internal quotation marks omitted), and (3) whether “the evidence lost would be both material and favorable to the defense,” *Valenzuela-Bernal*, 458 US at 873. Here, an analysis of all three of those factors confirms that Relator’s constitutional claim is not viable.

**“Weighty Interest.”** The Compulsory Process Clause is triggered only where evidentiary rules or restrictions “infringe[] upon a weighty interest of the accused.” *Scheffer*, 523 US at 308. In other words, the rule must “significantly impair[]” the challenger’s defense. *Id.* at 317. In *Scheffer*, for instance, the Supreme Court concluded that a military rule of evidence making polygraph evidence inadmissible in court-martial proceedings did not significantly impair the defendant’s ability to present a defense because it “did not preclude him

from introducing any factual evidence” or testifying on his own behalf; “[r]ather, respondent was barred merely from introducing expert testimony to bolster his own credibility.” *Id.*

The situation here is analogous. The SCA does not preclude Relator from introducing any evidence, presenting any witnesses, or testifying on his own behalf. It only impairs his ability to obtain certain evidence *from Meta*, but Relator has no interest—much less a weighty one—in obtaining evidence from Meta because he can get the exact same evidence elsewhere. While Relator asserts that the SCA “make[s] an entire category of information completely unavailable to criminal defendants,” Relator’s Br at 40, he overlooks the obvious alternative of obtaining the evidence directly from users. Relator has not even attempted to make any showing that he has no alternative means of obtaining the evidence at issue. Nor could he, as he was actively pursuing such alternative means by the time he filed his writ petition. *See infra* at 32.

*Bray* is directly on point. There, this Court explained that the defendant’s constitutional claim failed in part because “issuance of process to [the service provider] was not the only means available to defendant to obtain” the evidence at issue. *Bray*, 363 Or at 238. Rather, the victim’s own “computer may contain that evidence.” *Id.* Thus, the defendant could not show that “the trial court’s failure to order the district attorney to issue process to obtain that information”

from the service provider “prevented a fair trial.” *Id.* at 238-39 (citing *Valenzuela-Bernal*, 458 US at 872). So too here.

*Bray* is far from the only decision to have recognized that point. Several other courts have likewise cited the defendant’s ability to obtain evidence directly from users in rejecting constitutional challenges to the SCA. In *United States v. Glenn*, 341 FRD 217 (ND Ohio 2022), for instance, the federal district court reasoned that the SCA “[did] not leave [the defendant] without alternative methods for the information he seeks,” because he could “obtain the information” directly from “individual[] users,” by subpoena if necessary. *Id.* at 222; *see also, e.g., Wint*, 199 A3d at 633 (rejecting a Compulsory Process Clause challenge to the SCA because “covered communications can be sought through subpoenas directed at entities other than providers, such as recipients and senders”); *United States v. Pierce*, 785 F3d 832, 842 (2d Cir 2015) (rejecting constitutional challenge to the SCA where the defendant “failed to subpoena” the user, who was the “direct potential source[] for the contents of the account”); *United States v. Johnson*, 2018 WL 3496100 at \*11 (ND Ill, July 20, 2018) (holding that Sixth Amendment requirements were fulfilled where defendant independently captured third party’s social media posts without a court order and cross-examined third party at trial). While it may sometimes be more “cumbersome” and “time-consuming” to obtain communications directly

from users, *Wint*, 199 A3d at 633, inconvenience alone does not establish a violation of the Compulsory Process Clause.

Here, not only has Relator failed to make any showing that it would be infeasible to obtain the evidence he seeks by alternative means, the record strongly suggests that he *can* do so—namely, by accessing the devices and accounts of the victim and witness. After filing his petition for mandamus, Relator followed the trial court’s instructions and has begun to seek records from alternative sources. *See* SER-86-89 (June 16, 2025, order directing release of victim’s phone to Relator for testing); SER-106-108 (June 25, 2025, defense subpoena to \_\_\_\_\_ Those efforts have apparently borne fruit; Relator is now in possession of the phones belonging to both the victim and \_\_\_\_\_ *See* SER-112-113. To the extent the record before this Court may be somewhat unclear, that merely confirms that Relator has not carried his burden of showing that he has exhausted other avenues for obtaining this evidence and that the SCA is poised to deprive him of a fair trial.

***“Arbitrary or Disproportionate.”*** Nor is the SCA’s prohibition on service-provider disclosure of user communications “‘arbitrary’ or ‘disproportionate’ to the purposes [it is] designed to serve.” *Holmes*, 547 US at 324. A law meets this standard only if it “exclude[s] important defense evidence but [does] not serve any legitimate interests.” *Id.* at 325; *accord State v. Weaver*, 367 Or 1, 28, 472 P3d 717 (2020) (“We have also emphasized that the

right [to compulsory process] cannot be denied for no reason.”). For example, in *Crane v. Kentucky*, 476 US 683 (1986), a state rule prohibiting the defendant from “attempting to show at trial that his confession was unreliable because of the circumstances under which it was obtained” was arbitrary where “neither the State Supreme Court nor the prosecution ‘advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence.’” *Holmes*, 547 US at 326 (quoting *Crane*, 476 US at 691). And in *Washington v. Texas*, 388 US 14 (1967), a state law arbitrarily prohibited a person who had been charged as a participant in a crime from testifying in defense of another alleged participant unless the witness had been acquitted. The Supreme Court reasoned that “the absurdity of the rule is amply demonstrated” by its exceptions, for instance, allowing the witness to testify for the prosecution but not the defense, or following the witness’s acquittal. *Id.* at 22-23. Thus, the rule could not “even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury.” *Id.* at 22.

The SCA has nothing in common with this kind of “arbitrary[.]” and “absurd[.]” state evidentiary rule. *Id.* at 22-23. It was designed to—and does—protect the privacy rights of users of electronic communications services, *see supra* at 18-24, which is unquestionably a valid and legitimate legislative purpose. *Cf. Michigan v. Lucas*, 500 US 145, 149-50 (1991) (rejecting

Compulsory Process Clause challenge to state rape-shield law, which “represent[ed] a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy”).<sup>12</sup> Indeed, far from being arbitrary, the SCA serves the laudable goal of ensuring that all users of electronic communications services—including, as relevant here, victims of and witnesses to crimes—can rest assured that their sensitive communications and other data will not be disclosed except in accordance with the statutory exceptions Congress enacted.

Nor is the SCA’s prohibition on disclosure disproportionate. It restricts evidence gathering from *only one source* of electronic communications—service providers. As just discussed, *supra* at 30-32, nothing in the SCA stops criminal defendants from obtaining the same communications from other sources, including directly from account holders themselves—the same way parties have obtained evidence of non-digital communications for decades. Congress could reasonably have believed that “channeling such discovery to senders or recipients, rather than providers, increases the chances that affected

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<sup>12</sup> Relator asserts that “[i]t is unclear whether *Lucas* would survive today.” Relator’s Br at 38. But Relator can cite no cases that have cast doubt on *Lucas*’s holding. The precedents he cites—from contexts as far afield as the Second Amendment, abortion rights, and presidential immunity, *id.* at 38-39—shed no light on the current state of Compulsory Process Clause jurisprudence. See *United States v. Crater*, 93 F4th 581, 588 (1st Cir), *cert den*, 145 S Ct 218 (2024) (rejecting argument that the Supreme Court’s Second Amendment analysis in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 US 1 (2022) abrogated Compulsory Process Clause precedent).

individuals can assert claims of privilege or other rights of privacy before covered communications are disclosed to criminal defendants in response to subpoenas.” *Wint*, 199 A3d at 631; *see also O’Grady*, 139 Cal App 4th at 1446 (“[I]t would be far from irrational for Congress to conclude that one seeking disclosure of the contents of email, like one seeking old-fashioned written correspondence, should direct his or her effort to the parties to the communication and not to a third party who served only as a medium and neutral repository for the message.”).

Requiring criminal defendants to avail themselves of that alternative in the first instance may be debatable as a policy matter—just as states could “reasonably reach differing conclusions as to whether polygraph evidence should be admitted,” *Scheffer*, 523 US at 312. But where reasonable minds may differ about the policy justification for a rule, it is not arbitrary for purposes of the Compulsory Process Clause. *See id.*

**“Material or Favorable.”** Finally, there can be no Compulsory Process Clause violation absent a showing that the evidence would likely be “both material and favorable to the defense.” *Valenzuela-Bernal*, 458 US at 867, 873 (explaining that “respondent cannot establish a violation of his constitutional right to compulsory process merely by showing that” deportation of potential witnesses “deprived him of their testimony”); *see also Bray*, 363 Or at 238-39 (“The Court has been clear that, to prove a due process violation based on a

deprivation of evidence, a defendant must demonstrate that the loss of evidence was so material and favorable that it prevented a fair trial.”). To be sure, in many instances, a defendant “cannot be expected to render a detailed description” of what the evidence in question would show, but “some showing” of materiality and favorability is nonetheless required. *Valenzuela-Bernal*, 458 US at 873; *see also Weaver*, 367 Or at 30 (requiring “a sufficient showing” from the defendant that the witness “could offer material—meaning relevant—testimony” before finding a Compulsory Process Clause violation).

Relator makes no effort to meet this standard. He seeks social media records related to the decedent and an eyewitness who allegedly arranged a surprise encounter via Instagram. ER-2-3. He baldly asserts that the records “are a crucial portion of [his] theory of the case,” Relator’s Br at 7, but offers no further explanation or detail as to why that is so.

Where, as here, a defendant advancing a constitutional challenge to the SCA “has made no showing as to what” evidence the user’s account “might have contained, or how it might have been helpful to him,” the claim cannot succeed. *Pierce*, 785 F3d at 842. For good reason: if Relator were correct that a criminal defendant could subpoena service providers for users’ communications merely by asserting at a general level that the records are important to his defense, it is difficult to envision a single case where that standard would not be met. The practical effect would be to create an additional statutory exception for

criminal defense subpoenas that Congress declined to enact. Courts have rightly refused to do that.

2. *Relator's and amici's contrary arguments are unavailing*

Relator and the two amicus briefs supporting him advance a variety of arguments, but none of them disturb the analysis set forth above. Perhaps most tellingly, neither Relator nor amici can identify *a single case* in which any court has held that the SCA's prohibition on disclosure in response to criminal defense subpoenas violates the Compulsory Process Clause or due process. And Relator makes no effort to show that the particular facts and circumstances of his case render application of the SCA uniquely unfair or oppressive.

*First*, Relator devotes more than half of the argument section of his brief to a historical analysis of the right to compulsory process. *See* Relator's Br at 14-29. But that analysis sheds little light on the parties' dispute here. Relator does not identify any specific respect in which existing precedent is at odds with the historical principles he discusses, and at least one federal court of appeals has rejected an argument that a history-focused mode of analysis upends modern Compulsory Process Clause case law. *See United States v. Crater*, 93 F4th 581, 589 (1st Cir 2024) ("*Bruen* concerned only the Second Amendment, and we do not interpret it to alter the Supreme Court's Sixth Amendment jurisprudence \* \* \*"). Relator's recitation of history notwithstanding, this Court remains bound by the Supreme Court's existing

jurisprudence.

Relator and amici do not develop any viable argument that the SCA's prohibition on provider disclosure in response to criminal defense subpoenas is unconstitutional under current law. The closest they come to doing so is their suggestion that it would violate the Compulsory Process Clause to "make an entire category of information completely unavailable to criminal defendants[.]" Relator's Br at 40 (citing *Washington*, 388 US at 22); see Public Defenders Br at 21-22. But as discussed above, *supra* at 32, the SCA does no such thing, because criminal defendants can seek to obtain the information at issue directly from users, just as Relator is doing in this case.

*Second*, Relator complains that under the SCA, the government supposedly has "easy access to a person's social media records," while criminal defendants do not. Relator's Br at 4; see *id.* at 5 (contending that the Compulsory Process Clause "was designed to put defendants on equal footing with the government when it comes to investigating and presenting their own defense"). As an initial matter, it is not an accurate characterization to say that the government has "easy access" to communications or records under the SCA. Generally, the government must obtain a search warrant supported by probable cause to obtain the contents of communications. See 18 USC § 2703(a), (b)(1)(A). While the SCA allows the government, with prior notice to the user, to access the contents of certain communications with a subpoena or

court order, *see id.* § 2703(b)(1)(B), courts have held that under the Fourth Amendment the government typically must obtain a search warrant, suggesting that these alternative mechanisms are unconstitutional. *See United States v. Warshak*, 631 F3d 266, 288 (6th Cir 2010) (holding that the Fourth Amendment may require a warrant even in circumstances where the SCA does not); *Carpenter v. United States*, 585 US 296, 319 (2018) (citing *Warshak* approvingly for the view that “the third-party doctrine does not apply to the modern-day equivalents of an individual’s own papers or effects” (internal quotation marks omitted)).

It is true, of course, that there is an asymmetry between the government’s ability to obtain communications under the SCA and a criminal defendant’s ability to do so. But Relator cites no authority for the proposition that such an asymmetry, standing alone, violates the Compulsory Process Clause. No such authority exists, because it is commonplace for the government to have access to investigative tools that ordinary citizens and criminal defendants lack. *See, e.g.*, Fed R Crim P 41(b) (authorizing “a federal law enforcement officer or an attorney for the government” to request that a magistrate judge issue a search warrant, but giving criminal defendants no analogous authority); ORS 133.545(5) (“Application for a search warrant may be made only by a district attorney, a police officer or a special agent employed under ORS 131.805.”); 18 USC § 2516(1) (authorizing the Attorney General and other government

officials to authorize federal law enforcement agencies to submit wiretap applications to federal judges, but giving criminal defendants no analogous authority). Just as defendants' inability to execute search warrants or wiretaps poses no constitutional problem, the fact that they cannot subpoena electronic communications from service providers like Meta without the account holder's consent does not violate the Sixth Amendment either.

Moreover, the practical effects of this asymmetry are significantly ameliorated by *Brady v. Maryland*, 373 US 83 (1963), and other federal and state rules requiring the prosecution to turn over evidence where there is "any reasonable likelihood" it would "affect[] the judgment of the jury" at a criminal trial. *Wearry v. Cain*, 577 US 385, 392 (2016) (per curiam) (citation omitted); *see also* ORS 135.815(1)(g) (requiring the disclosure of "[a]ny material or information" that tends to "[e]xculpate the defendant," "[n]egate or mitigate the defendant's guilt or punishment," or impeach a prosecution witness). If the government uses the SCA's procedures to obtain information from a service provider, the defendant will have access to it pursuant to these authorities if it is material to his defense.

Relator contends (Relator's Br at 35) that in *State ex rel Meyers v. Howell*, 86 Or App 570, 576, 740 P2d 792 (1987), the State argued that "a compulsory process violation exists when a 'statute is unequal in its treatment of the defendant' and the state." But the court *rejected* that view, holding

instead that “evidence for which compulsory process is sought must be material and favorable before a constitutional problem is presented.” *Meyers*, 86 Or at 577. As noted above, Relator here has made no such showing. Moreover, it would be unwise to read too much into a one-line judicial characterization of the State’s position in a nearly 40-year-old case. It appears the State was arguing that there was no compulsory process violation in *Howell* in part because there was no asymmetry in the media shield law at issue there, *see id.* at 572—not that every asymmetry in access to investigative tools is automatically unconstitutional. That position would be very difficult to square with the many federal and state statutes authorizing the government, but not private persons or entities, to execute search warrants or wiretaps. *See supra* at 39-40.

*Third*, amici public defenders argue that the SCA “creates an intolerably unfair system” that puts criminal defendants “at an unconstitutional disadvantage.” Public Defenders Amicus Br at 12. Amici then list several examples of situations where the SCA has supposedly complicated criminal defense investigations in other cases. *Id.* at 16-19. Concerns about the application of the SCA in other cases would have little relevance to whether Relator has established an as-applied violation of the Compulsory Process Clause in *this* case. But even on their own terms, amici’s concerns are misplaced.

Two of amici's three examples involve criminal defendants who were supposedly unable to obtain information regarding their "own account." Public Defenders Amicus Br at 16, 18-19. But the SCA allows for disclosure "with the lawful consent of the customer or subscriber[.]" 18 USC § 2702(c)(2); *see also id.* § 2702(b)(3) (similar exception for consent for communications). Thus, the SCA would not have obstructed the defendants in those cases from subpoenaing Meta for their own account records, had they sought to do so. The third example involves a criminal defendant who apparently chose not to subpoena Twitter for the contents of another account after recognizing that the SCA precludes Twitter from complying. Public Defenders Amicus Br at 17. But like Relator here, the Public Defenders fail to offer any explanation why the contents of that account contained "potentially pivotal evidence" that could not be obtained by subpoenaing the account holder. *Id.* at 18.

#### **IV. Relator Has Not Satisfied the Standard for Mandamus Relief in this Court.**

This case comes before the Court on mandamus review. "Mandamus is an extraordinary remedy and serves a limited function." *HotChalk, Inc. v. Lutheran Church—Missouri Synod*, 372 Or 249, 255, 548 P3d 812 (2024) (citation omitted). To obtain relief, Relator must show that there is no "plain, speedy and adequate remedy in the ordinary course of the law." ORS 34.110; *see State ex rel Anderson v. Miller*, 320 Or 316, 322, 882 P2d 1109 (1994). He cannot do so for at least two reasons.

*First*, as discussed above (*supra* at 9), Relator has not shown that he will be unable to access the evidence he seeks directly from the devices and social media accounts belonging to the victim and the witness. On the contrary, all indications are that he will be able to do so. Mandamus relief is unwarranted in light of that ongoing discovery and the possibility for relief in the trial court and, if need be, on direct appeal. *See HotChalk*, 372 Or at 257 (explaining that “mandamus in the discovery context is generally inappropriate because ‘direct appeal is a plain, speedy and adequate remedy’”). That is especially true given that Relator raises a Sixth Amendment challenge, where principles of constitutional avoidance come into play. “It is a well established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” *Escambia County v. McMillan*, 466 US 48, 51 (1984) (per curiam).

*Second*, there is another potential avenue of relief available to Relator short of an order deeming the SCA unconstitutional. State law—such as, for example, the compulsory process protections set forth in Article I, section 11, of the Oregon Constitution—could obligate the State to use its investigative tools to obtain the evidence from a service provider and then turn it over to the defendant. This Court discussed this possibility in *Bray* and confirmed that it could be accomplished consistent with the SCA. 363 Or at 237-38 (explaining

that the trial court “issued an order requiring the district attorney to take action permitted by the SCA to obtain” information from Google).

The SCA requires service providers to disclose the contents of communications or records in compliance with (among other things) a “warrant \* \* \* issued using state warrant procedures[.]” 18 USC § 2703(a), (b)(1)(A). In Oregon, a search warrant may be obtained for “[e]vidence of or information concerning the commission of a criminal offense.” ORS 133.535(1); *see* ORS 133.555(2) (describing probable cause standard). If a defendant can show that material, favorable evidence in the possession of an electronic service provider cannot be obtained in any other way, then Article I, section 11, may well obligate the State to seek a search warrant for the material and turn it over to the defendant. Based on the record here, Relator has not come close to satisfying that standard, but in an appropriate case, that approach would enable criminal defendants to obtain needed evidence in a manner that comports with the SCA and respects the privacy rights of crime victims and other users of electronic communications services.

### **CONCLUSION**

Relator is entitled to no relief, and the alternative writ of mandamus should be dismissed.

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