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IN THE SUPREME COURT OF THE STATE OF OREGON

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STATE OF OREGON,

Plaintiff-Adverse Party,

v.

DAVID AYON-URBANO,

Defendant-Relator.

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DAVID AYON-URBANO,

Third-Party Plaintiff-  
Relator,

v.

META PLATFORMS, INC.,

Third-Party Defendant-  
Adverse Party.

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SC S072084

Marion County Circuit Court  
Case Nos. 24CR31979 & 24CN05648  
(consolidated)

MANDAMUS PROCEEDING

BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, LEGAL AID SOCIETY, BRONX DEFENDERS, APPELLATE ADVOCATES, BROOKLYN DEFENDER SERVICES, THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, THE CALIFORNIA PUBLIC DEFENDER ASSOCIATION, THE CENTER FOR APPELLATE LITIGATION, THE FEDERAL DEFENDERS OF NEW YORK, THE FORENSIC EVIDENCE TABLE, THE INNOCENCE PROJECT, INC., THE NATIONAL ASSOCIATION FOR CRIMINAL DEFENSE LAWYERS, NEIGHBORHOOD DEFENDER SERVICE, NEW JERSEY OFFICE OF THE PUBLIC DEFENDER, NEW YORK COUNTY DEFENDER SERVICES, NEW YORK STATE DEFENDERS ASSOCIATION, OFFICE OF THE APPELLATE DEFENDER, SALT LAKE LEGAL DEFENDER ASSOCIATION, AND SAN DIEGO COUNTY PUBLIC DEFENDER'S OFFICE IN SUPPORT OF RELATOR DAVID AYON-URBANO

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

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## **IDENTITY AND INTEREST OF *AMICI CURIAE***

*Amici Curiae* are legal defense organizations that regularly litigate constitutional and statutory criminal discovery issues across the country. We are deeply committed to ensuring the vitality of the constitutionally protected rights to trial, confrontation, and compulsory process. Additionally, *amici* have an interest in the specific issues presented here, as we regularly need to obtain evidence from social media companies in order to defend our clients. When *amici* are barred from obtaining such evidence because of misinterpretations of the Stored Communications Act, our clients' constitutional rights are jeopardized. This Court's interpretation of the Stored Communications Act will have far-reaching implications, as more and more courts grapple with these same issues.

### ***Amicus Curiae Oregon Criminal Defense Lawyers Association***

(OCDLA) is a nonprofit organization based in Eugene, Oregon that represents Oregon's criminal defense community. OCDLA's mission statement is "Championing justice, promoting individual rights and supporting the legal defense community through education and advocacy." Its members are lawyers, investigators, and legal professionals dedicated to defending individuals who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education, and networking. OCDLA is concerned with legal issues presenting a substantial statewide impact to defendants in criminal cases.

*Amicus Curiae The Legal Aid Society* (LAS) is a nonprofit New York corporation. The organization has provided free legal services to low-income families and individuals since 1876. As the primary public defender in New York City, LAS employs over 800 public defenders and provides representation to thousands of people arrested and accused of crimes every year. In 2013, LAS established its Digital Forensics Unit in recognition of the growing use of digital evidence in the criminal legal system. LAS is a leading advocate for criminal defense attorneys' access to digital evidence in New York and nationally. LAS has appeared before the United States Supreme Court, the New York Court of Appeals, the New York Appellate Divisions, and other courts to represent its clients and as amicus curiae on issues that affect its clients and their communities.

*Amicus Curiae The Bronx Defenders* (BxD) is a nonprofit provider of innovative, holistic, client-centered criminal defense, family defense, civil legal services, and social work support to indigent people in the Bronx. Each year, BxD defends over 20,000 low-income Bronx residents in criminal, civil, family, and immigration cases and reaches hundreds more through outreach programs and community legal education. Through BxD's criminal defense work, BxD regularly represents people whose charges involve social media evidence. BxD has a vested interest in ensuring that these clients are treated equitably and not prevented from accessing material and potentially exculpatory evidence.

*Amicus Curiae Appellate Advocates* is a non-profit public defender organization that was formed by experienced criminal defense attorneys in 1995. For more than a quarter of a century, the organization has represented, primarily on appeal, individuals who have been convicted of crimes in Brooklyn, Queens, and Staten Island. Appellate Advocates is determined to ensure that each client it is assigned to represent receives superior legal representation. As such, the ability to thoroughly investigate defenses—which often involves obtaining social media evidence—is crucial to its mission.

*Amicus Curiae Brooklyn Defender Services* (BDS) is a public defender organization that provides multi-disciplinary and client-centered criminal defense, family defense, immigration, and civil legal services. BDS's Criminal Defense Practice currently represents approximately 46,000 people facing criminal prosecution in the criminal courts in Brooklyn and Queens. BDS's Forensics Unit is dedicated to confronting digital evidence used against BDS clients. Access to social media data from witnesses' accounts is a critical issue that BDS attorneys encounter when striving to provide effective assistance to clients in criminal cases.

*Amicus Curiae The California Attorneys for Criminal Justice* (CACJ) is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including “to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the

State of California and other applicable law.” CACJ is administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 1,700 members, primarily criminal defense lawyers practicing before federal and state courts. These lawyers are employed throughout the State both in the public and private sectors. CACJ has appeared before the United States Supreme Court, the California Supreme Court, and the California Courts of Appeal on issues of importance to its membership. CACJ’s appearance as an *amicus curiae* before California’s reviewing courts has long been recognized in a number of published decisions.

***Amicus Curiae* The California Public Defender Association (CPDA)** is a nonprofit California Corporation. The organization has a membership of nearly 4,000 public defenders and attorneys in private practice. CPDA is an important voice of the criminal defense bar in California and nationally. CPDA and its legal representatives have the necessary experience, collective wisdom, and interest in matters of constitutional rights, discovery, evidence law and appellate writ review to serve this Court as an *amicus curiae* in this case. CPDA has appeared before the United States Supreme Court, the California Supreme Court, and the California Courts of Appeal on issues of importance to its membership. CPDA’s appearance as an *amicus curiae* before California’s

reviewing courts has long been recognized in a number of published decisions to numerous to mention here.

*Amicus Curiae The Center for Appellate Litigation* (CAL) is a non-profit client-centered public defense law firm that represents indigent New Yorkers in criminal appeals and post-conviction proceedings in New York State's appellate courts. CAL's clients are among society's most disenfranchised: isolated by often lengthy prison terms, they are among those most urgently needing quality legal representation in their efforts to obtain equal justice under the law. CAL remains steadfast in its commitment to safeguarding our clients' constitutional rights. To that end, CAL has appeared as amicus curiae on several important criminal cases before the United States Supreme Court, New York appellate courts, and appellate courts in other states.

*Amicus Curiae The Federal Defenders of New York, Inc.*, ("FDNY") is the institutional public defender in the United States District Courts for the Southern and Eastern Districts of New York, and in the United States Court of Appeals for the Second Circuit. FDNY advocates on behalf of the criminally accused in federal court, with a core mission of protecting the rights of its clients and safeguarding the integrity of the federal criminal legal system. FDNY regularly seeks access to materials from social media companies when investigating and presenting defenses on behalf of its clients.

*Amicus Curiae The Forensic Evidence Table* is a nonprofit organization dedicated to reshaping how the criminal legal system understands and uses science and technology by making complex forensic and digital evidence accessible, intelligible, and contestable—particularly for defense counsel and the communities they serve. Its work focuses on two areas that increasingly define modern criminal investigations: forensic DNA analysis and artificial intelligence, including technology-enabled surveillance tools. Through investigation, education, convening, and publication, the organization brings together interdisciplinary expertise spanning law, science, technology, statistics, policy, and ethics and seeks to uncover and explain how these technologies operate, how they are deployed by law enforcement, and how disparities in access to technical knowledge and data can distort outcomes in the adversarial process. The Forensic Evidence Table has a strong interest in this case because it concerns defense access to social media data, a form of digital evidence that is frequently generated, collected, and interpreted through opaque investigative practices and surveillance mechanisms. Limits on defense access to such data—whether content, metadata, or context—undermine the ability of defense teams to understand, investigate, test, and meaningfully challenge the evidence used against accused persons. Ensuring fair and timely access to social media data directly aligns with the organization’s mission to prevent emerging technologies from being used as instruments of imbalance and control in the criminal legal

system, and instead to promote accuracy, transparency, and justice in the use of modern evidence.

*Amicus Curiae The Innocence Project, Inc.* works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. To date, the Innocence Project has helped to free or exonerate more than 200 people who, collectively, spent more than 3,800 years behind bars. Integral to the Innocence Project's work are the questions about constitutional and discovery rights at issue in this case. The Innocence Project has appeared as amicus curiae in numerous state and federal courts – at all levels – across the country including the United States Supreme Court, the Ninth Circuit Court of Appeals, and the Oregon Supreme Court.

*Amicus Curiae The National Association for Criminal Defense*

*Lawyers* (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to

advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in cases that involve surveillance technologies and programs that pose new challenges to personal privacy. The NACDL Fourth Amendment Center offers training and direct assistance to defense lawyers handling such cases in order to help safeguard privacy rights in the digital age. NACDL has also filed numerous amicus briefs in this Court and the Supreme Court on issues involving digital privacy rights, including: *State v. De Witt Simons*, 372 Or 290, 550 P3d 396 (2024) (granting review), as well as *Carpenter v. United States*, 585 US 296, 138 S Ct 2206, 201 L Ed 2d 507 (2018); *Riley v. California*, 573 US 373, 134 S Ct 2473, 189 L Ed 2d 430 (2014); *United States v. Jones*, 565 US 400, 132 S Ct 945, 181 L Ed 2d 911 (2012).

***Amicus Curiae Neighborhood Defender Service*** is a community-based public defender office with offices in New York, Michigan, and Texas. Since 1990, NDS has sought to improve the quality and depth of criminal, family, and civil defense for those who cannot afford an attorney. NDS accomplishes this by providing holistic, cross-practice representation to our clients. The

constitutional and discovery issues in this case, including access to social media and digital evidence, are issues of significance for the Neighborhood Defender Service and our representation of indigent individuals in all of the communities we serve.

*Amicus Curiae the New Jersey Office of the Public Defender* was founded on July 1, 1967, to fulfill the promise of the right to counsel for indigent criminal defendants established in *Gideon v. Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963). In addition to providing legal counsel in criminal prosecutions and appeals, the OPD also appears as amicus curiae in cases that present issues that impact its clients.

*Amicus Curiae New York County Defender Services* (“NYCDS”) is a public defender office serving indigent clients in the borough of Manhattan since 1997. Every year NYCDS provides comprehensive legal advocacy for thousands of clients facing criminal charges. This includes fulfilling our constitutional obligation to fully investigate the evidentiary facts of each case, more and more of which are now found in the social media sphere.

*Amicus Curiae New York State Defenders Association* (“NYSDA”), founded in 1967, is a not-for-profit membership association of public defenders, legal aid attorneys, assigned counsel, and private practitioners throughout the state. NYSDA operates the Public Defense Backup Center, a centralized resource which offers legal consultation, research, and training to nearly 6,000

lawyers who serve as public defense counsel in criminal and family cases across New York State. In addition to providing training and legal support to public defenders, NYSDA advocates for causes critical to the missions of the public defense community.

*Amicus Curiae The Office of the Appellate Defender* (“OAD”) is one of New York City’s oldest providers of appellate representation to people experiencing poverty convicted of felonies before New York’s courts and a national model of effective, innovative, and client-centered representation. OAD represents New Yorkers on direct appeals and in post-conviction proceedings, regularly challenging the legality and constitutionality of their convictions on a wide array of grounds including the improper withholding of access to evidence critical to the defense. OAD has appeared on behalf of its clients in New York and federal appellate courts and as amicus curiae on issues that impact its clients and underserved communities across New York.

*Amicus Curiae The Salt Lake Legal Defender Association* (SLLDA) is a non-profit corporation formed in December 1964 “[t]o fulfill the constitutional and moral obligation to defend those accused of crime and involved in related proceedings who are financially unable to employ legal counsel.” (SLLDA Bylaws, Article II (1).) SLLDA employs 100 attorneys and 85 support staff. The felony team represents clients charged with felonies and class A misdemeanors in the District Court, the misdemeanor team represents

clients in the Salt Lake City and Salt Lake County Justice Courts, and the appellate team practices chiefly in the Utah Supreme Court and the Utah Court of Appeals. SLLDA is the largest public defender agency in Utah and handles approximately 40% of all indigent matters in the state. SLLDA lawyers are highly skilled in trial practice, application of rules of evidence and procedure, and constitutional law. SLLDA lawyers have appeared before the United States Supreme Court, the Utah Supreme Court, and the Utah Court of Appeals. SLLDA has appeared as *amicus curiae* on a number of important criminal cases before the United States Supreme Court, Utah appellate courts, and appellate courts in other states.

*Amicus Curiae San Diego County Public Defender's Office* represents over 90% of all indigent clients in criminal cases in San Diego County. The San Diego County Public Defender's Office was founded in 1988 with the mission to protect the rights, liberties, and dignity of all persons in San Diego County and maintain the integrity and fairness of the American Justice System by providing the finest legal representation in the cases entrusted to us. Given the prevalence and widespread use of social media, the San Diego County Public Defender's Office has a substantial interest in the defenses' constitutional right to obtain social media evidence. Without access to this vital information clients are being harmed and our mission threatened.

## SUMMARY OF ARGUMENT

No individual should be tried, convicted, or sentenced to prison before having an opportunity to investigate and present a defense. In the modern era, where more than 70% of adults use social media,<sup>1</sup> defending against the state's accusations often requires obtaining evidence from social media platforms. But access to such information is unconstitutionally uneven. While law enforcement can easily access social media evidence to prosecute crimes, defense attorneys are consistently barred from accessing social media evidence based on the same misinterpretation of the Stored Communications Act (SCA) advanced by Meta here: that the Act's prohibition on divulging the contents of electronic communications, 18 USC § 2702(a), prohibits service providers from complying with defense subpoenas.

Interpreting the SCA to bar the defense from subpoenaing social media companies for potentially exculpatory information when the government is able to access the same information by warrant creates an intolerably unfair system that puts people accused of crimes at an unconstitutional disadvantage. Specifically, this misinterpretation (I) inhibits *amici*'s ability to meaningfully

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<sup>1</sup> See Jeffrey Gottfried & Eugenie Park, *Americans' Social Media Use 2025*, Pew Research Center (Nov 20, 2025), <https://www.pewresearch.org/internet/2025/11/20/americans-social-media-use-2025/> (accessed Dec 21, 2025).

defend our clients; (II) violates defendants' due process rights, and (III) usurps the role of judges in balancing competing interests.

## ARGUMENT

### **I. Denying people accused of crimes access to social media evidence inhibits *amici's* ability to thoroughly investigate and meaningfully defend their cases.**

In today's world, evidence obtained from social media often features as the central—or only—evidence against the accused.<sup>2</sup> But while the government increasingly relies on such evidence to prosecute, defendants are regularly denied access to messages, photos, and videos essential to their defenses, because social media companies interpret the SCA to prevent them from

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<sup>2</sup> See, e.g., *Counterman v. Colorado*, 600 US 66, 70, 143 S Ct 2106, 216 L Ed 2d 775 (2023) (prosecution proposed to introduce Facebook messages as sole evidence of stalking); *United States v. Farrad*, 895 F3d 859, 864 (6th Cir 2018) (relying on Facebook photos without any physical evidence, eyewitness testimony, or inculpatory statements by defendant in gun possession trial); *United States v. Gonzalez-Barbosa*, 920 F3d 125, 130 (1st Cir 2019) (relying on social media posts as evidence); *United States v. Pierce*, 785 F3d 832, 840–41 (2d Cir 2015) (Facebook photos and video); *United States v. Stoner*, 781 Fed Appx 81, 86 (3d Cir 2019) (YouTube video); *United States v. Denton*, 944 F3d 170, 175 (4th Cir 2019) (Facebook messages); *United States v. Madrid*, 676 Fed Appx 309, 315 (5th Cir 2017) (Facebook photo); *United States v. Johnson*, 916 F3d 579, 588 (7th Cir 2019) (Facebook messages); *United States v. Rembert*, 851 F3d 836, 839 (8th Cir 2017) (Facebook video); *United States v. Barnes*, 738 Fed Appx 413, 416 (9th Cir 2018) (Facebook posts); *United States v. Branson*, 791 Fed Appx 33, 34–35 (11th Cir 2019) (social media images); *United States v. Smocks*, No. 22-3087, 2024 WL 2468022, at 1 (DC Cir May 24, 2024) (social media posts).

disclosing the contents of communications to criminal defendants—even pursuant to a court-ordered subpoena.

The government routinely uses screenshots of social media accounts as the basis of prosecutions for unlawful dissemination of intimate images and contempt, among other crimes. Law enforcement has the ability to apply for a search warrant to obtain account content from social media companies directly, *see* 18 USC § 2703, but it often declines to do so, choosing instead to proceed with screenshots alone.

To meaningfully defend our clients, *amici* need to fully investigate the source, context, and authenticity of the screenshots levied against them. But *amici* often have no reliable way to ascertain whether a screenshot came from a particular account, whether there was additional context favorable to the defendant, or whether the screenshot was fabricated.<sup>3</sup> While *amici* can search for publicly available content, doing so is often fruitless. And while *amici* can sometimes obtain limited amounts of data through a client’s account, the data generally does not include anything deleted from the account or posted by

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<sup>3</sup> The proliferation of generative artificial intelligence only makes this problem worse. Screenshots are increasingly easy to fabricate and modify. Obtaining content directly from social media companies is a far more reliable way to ascertain the content and timing of a post, as well as the account from which it was posted.

another user.<sup>4</sup> For example, Facebook allows users to export their own posts, information they provided when setting up their account, their search history, their interactions with advertisements, groups they belong to, and certain additional details.<sup>5</sup> But Facebook does not allow users to obtain content that was posted and subsequently deleted or information that another person shared,

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<sup>4</sup> The Stored Communications Act expressly permits disclosure “to an addressee or intended recipient” of the communication or “with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber.” 18 USC § 2702(b). However, in *amici*’s experience, some social media companies initially default to rejecting our subpoenas, even when they are submitted on behalf of the originator, intended recipient, or subscriber. *See also Facebook, Inc. v. Pepe*, 241 A3d 248, 251 (DC 2020) (Facebook moved to quash a subpoena for communications of which defendant was an addressee/intended recipient, lost, refused to comply with the subpoena nonetheless, was held in contempt for failure to comply, and then unsuccessfully appealed the contempt ruling).

<sup>5</sup> *Learn What Categories of Information Are Available to Export from Your Facebook Profile*, Facebook, [https://www.facebook.com/help/930396167085762/?helpref=related\\_articles](https://www.facebook.com/help/930396167085762/?helpref=related_articles) (accessed Dec 21, 2025).

such as photos that the user was tagged in.<sup>6</sup> Thus, without the ability to obtain social media evidence from social media companies directly, *amicus*'s investigations remain incomplete.

For example, *amicus* The Legal Aid Society had a client accused of posting an Instagram story that included a video of another person engaged in sexual activity. The client maintained that she had done nothing of the sort. She was able to download information from her own account, which showed no evidence that she had posted the content at issue. However, the client and her attorney could not definitively prove that she had not posted the content, because users cannot access content that they deleted from their account. While the prosecution could have obtained a warrant to seek whatever deleted content Instagram retained, it chose not to. The client—with no way to obtain the data

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<sup>6</sup> *Id.* Other social media companies similarly allow users to download some, but not all, information about their account. *See, e.g., Review and Export a Copy of Your Instagram Information*, Instagram, [https://help.instagram.com/181231772500920/?helpref=related\\_articles](https://help.instagram.com/181231772500920/?helpref=related_articles) (“Your export won’t include information that someone else shared, like another person’s photos that you’re tagged in”) (accessed Dec 21, 2025); *How to Access Your X Data*, X, <https://help.x.com/en/managing-your-account/accessing-your-x-data> (“While we believe that the data we’ve made available through these tools is the most relevant and useful to you, if you are located in the European Union or EFTA States, you may send a request for additional account information”) (accessed Dec 21, 2025); *Requesting Your Data*, TikTok, <https://support.tiktok.com/en/account-and-privacy/personalized-ads-and-data/requesting-your-data> (“Some data may not be available to download, such as data that affects the privacy of others.”) (accessed Dec 21, 2025).

herself—ultimately pled to disorderly conduct rather than risk a conviction by proceeding without all relevant evidence.

When evidence against a client allegedly lies in someone else’s social media account, the situation is even worse. For example, in one highly publicized case, Iraq sought extradition of Omar Ameen, an Iraqi refugee living in California and wanted for murder in his home country.<sup>7</sup> In discovery, the prosecution turned over a Twitter post announcing the killing for which Mr. Ameen was charged, but the disclosure contained no indication of who had posted it or when it was posted. Request for Authorization of Defense Subpoena to Twitter by Omar Abdulsattar Ameen, *In re Extradition of Ameen*, No. 2:18-MJ-152-EFB (E.D. Cal. Feb. 21, 2019), ECF No. 65. By the time Mr. Ameen’s attorneys received the disclosure, Twitter had deactivated the account. Mr. Ameen’s lawyers knew that Twitter would refuse to turn over content from the account to the defense even if they had a subpoena and even if the court held

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<sup>7</sup> Matt Stevens & Gabe Cohn, *ISIS Member Arrested in Sacramento, U.S. Says*, NY Times (Aug 15, 2018), <https://www.nytimes.com/2018/08/15/world/middleeast/sacramento-al-qaeda-isis-arrest.html> (accessed Dec 21, 2025).

Twitter in contempt for failing to comply with it.<sup>8</sup> Without time to litigate the subpoena issue through the appellate process, Mr. Ameen’s attorneys were unable to access potentially pivotal evidence about the murder with which their client was charged.<sup>9</sup>

Similarly, The Legal Aid Society represented a client charged with criminal contempt for violating orders of protection by allegedly messaging the

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<sup>8</sup> See generally Ethan Baron, *Facebook and Twitter in ‘inexcusable’ contempt of court over refusal to hand over private messages in murder case*, Mercury News (Aug 2, 2019), available at <https://www.mercurynews.com/2019/08/02/facebook-and-twitter-in-inexcusable-contempt-of-court-over-refusal-to-hand-over-private-messages-in-murder-case/> (describing an unrelated case in which Facebook refused to comply with trial court’s order despite contempt finding) accessed Dec 21, 2025. *Amici* are well aware that, even when we obtain favorable lower court rulings, mammoth social media companies often have the resources to outspend and outwait our clients throughout the appellate process.

<sup>9</sup> The court ultimately denied the government’s extradition request, finding their version of the events “simply not plausible.” Memorandum and Order Declining to Certify Extradition at 17, *In re Ameen* (Apr 21, 2021), ECF No. 298. However, upon Mr. Ameen’s release, Immigration and Customs Enforcement took him into custody and initiated removal proceedings against him based on allegations similar to those rejected by the court. David Manoucheri, *Judge Says Omar Ameen’s Deportation on Hold Due to Likelihood He Could Be Tortured*, KCRA (Mar 28, 2022), <https://www.kcra.com/article/judge-omar-ameens-deportation-hold/39554319> (accessed Dec 21, 2025). Mr. Ameen was reportedly deported to Rwanda in April of 2025. Humeyra Pamuk et al., *US departs Iraqi man at centre of debate on refugee policy*, Reuters (Apr 24, 2025), <https://www.reuters.com/world/us-deports-iraqi-man-centre-debate-refugee-policy-2025-04-24/> (accessed Dec 21, 2025).

mother of his child on Facebook. The District Attorney produced screenshots of the messages that the client was alleged to have sent, but the defense attorney's investigation provided reason to believe that the messages were not sent from the client's account. Without the ability to subpoena Facebook for the original messages, the defense was unable to challenge the messages' authenticity, establish their true authorship, or identify the actual owner of the account from which they were sent. While the case was eventually dismissed, similar cases arise every day, and defendants suffer prolonged periods of fear and uncertainty, all because they are wrongly barred from obtaining exculpatory social media evidence.

## **II. Categorically barring people accused of crimes from subpoenaing social media evidence violates their due process rights**

Interpreting the SCA to prohibit defendants from accessing an entire category of relevant and potentially exculpatory information that is readily available to the prosecution violates defendants' due process rights. Due process is, "in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 US 284, 294, 93 S Ct 1038, 35 L Ed 2d 297 (1973). A "fair opportunity" includes the right to present evidence in the defendant's favor. *Id.*; *Holmes v. South Carolina*, 547 US 319, 319, 126 S Ct 1727, 164 L Ed 2d 503 (2006) ("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.’” (quoting *Crane v. Kentucky*, 476 US 683, 690, 106 S Ct 2142, 90 L Ed 2d 636 (1986))). Thus, where information is material to the defense, it is “a very serious thing \* \* \* to withhold from the accused the power of making use of it.” *United States v. Burr*, 25 F Cas 187, 192 (CCD Va 1807) (considering a letter belonging to the President of the United States). Indeed, withholding evidence “that is demonstrably relevant in a criminal trial” cuts “deeply into the guarantee of due process of law.” *United States v. Nixon*, 418 US 683, 712, 94 S Ct 3090, 41 L Ed 2d 1039 (1974).

Defendants must sometimes compel third parties to produce exculpatory evidence in their possession, so that the jury can assess “the defendant’s version of the facts as well as the prosecution’s” and decide, on a complete record, “where the truth lies.” *Washington v. Texas*, 388 US 14, 19, 87 S Ct 1920, 18 L Ed 2d 1019 (1967); *see also Nixon*, 418 US at 709 (“To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.”). “The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.” *Nixon*, 418 US at 709.

If the defense is barred from obtaining favorable evidence that exists on social media, then the presentation of the record will undoubtedly be speculative and incomplete. To be sure, the prosecution is obligated to turn over exculpatory evidence in its possession. *Brady v. Maryland*, 373 US 83, 87, 83 S Ct 1194, 10 L Ed 2d 215 (1963). But, as the examples in Section I illustrate, the prosecution routinely evades this obligation by choosing not to obtain the information in the first place. Since the defense cannot access the information itself, jurors are left with only a partial account of what happened and without a presentation of the most compelling defense—creating a serious risk of wrongful conviction.

This Court should decline to interpret the SCA to categorically bar defendants from subpoenaing evidence relevant to their defense. In *Washington v. Texas*, the United States Supreme Court noted that a statute could not constitutionally “prevent whole categories of defense witnesses from testifying” on the basis that they were unworthy of belief. 388 US at 22. And in *Holmes v. South Carolina*, the Court recognized that the right to present a defense is “abridged by evidence rules that ‘infring[e] upon a weighty interest of the accused’ and are ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” 547 US at 319–20 (quoting *United States v. Scheffer*, 523 US 303, 308, 118 S Ct 1261, 140 L Ed 2d 413 (1998)). Barring defendants from obtaining social media evidence is akin to preventing whole categories of

defense witnesses from testifying in their favor, and it produces the same unconstitutional result. If due process rights are more than theoretical, then defendants must be able to access the same types of potentially exculpatory evidence as the prosecution.

**III. Judges are well-equipped to balance and protect privacy interests without violating compulsory process rights.**

Courts are more than capable of weighing a defendant's interest in relevant and potentially exculpatory social media evidence against third-parties' interests in keeping that evidence private. Indeed, such balancing acts are a routine part of judicial work. Categorically barring defendants from ever obtaining such evidence is unnecessary, as well as unconstitutional.

Criminal discovery nearly always involves the disclosure of information that is private or sensitive in nature. To support our clients' defenses, *amici* regularly subpoena myriad sensitive and private records regarding physical health, mental health, substance abuse treatment, education, bank information, financial services, cell-site location information, cell phone calls, taxes, and disciplinary information, as well as surveillance videos. The fact that some of this information, like social media evidence, is held by third parties, does not preclude defendants from obtaining it. *See, e.g.*, HIPAA, 45 CFR 164.512(e)(1)(ii)-(vi) (permitting disclosure of protected health information in response to subpoenas); 34 CFR § 99.31(a)(9) (authorizing disclosure of

personally identifiable information from educational records in response to judicial order or lawfully issued subpoena); 18 USC § 986 (permitting subpoenas for bank records).

But defendants' ability to obtain private information is not boundless. State and federal law both restrict the scope of subpoenas in order to protect privacy interests while also protecting defendants' right to compulsory process. *See, e.g., Nixon*, 418 US at 699–700 (requiring a party seeking a subpoena to show “(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general ‘fishing expedition.’”); *State v. Davis*, 317 Or App 794, 801, 505 P3d 1057, *rev den*, 370 Or 56 (2022) (“In addition to witness privacy concerns, two conceptual limitations bear on a witness’s duty to accommodate a defendant’s right to compel the production of evidence: relevance and privilege.”).

Courts can and do quash subpoenas that fail to conform to applicable standards. Oregon courts have “inherent authority” to rule on motions to quash, with the caveat that “[this] authority ‘cannot permit trial courts to violate a criminal defendant’s broad right under the subpoena statutes to compel

witnesses to attend his or her trial (and to bring along any books, papers or documents that the defendant has identified in the subpoena).” *Davis*, 317 Or App at 796–97 (quoting *State v. Cartwright*, 336 Or 408, 417, 85 P3d 305 (2004)). And under the Federal Rules of Criminal Procedure, courts may quash subpoenas where “compliance would be unreasonable or oppressive.” Fed R Crim P 17 (c)(2).

Moreover, not all information produced in response to a subpoena becomes public; judges may review the material *in camera*, redact personal information, or even impose protective orders limiting its use. *Amici* have been bound by protective orders that limit which attorneys within a defense office may view the protective materials or specify security measures to be taken in the office storing the materials. In some of *amici*’s cases, courts have required that protected materials be returned or destroyed at the conclusion of the case.

This country’s judicial system depends on courts’ careful balancing of competing interests. Judges have long been charged with ensuring adequate protection for the most sensitive evidence while simultaneously upholding defendants’ compulsory process rights. The SCA does not provide social media companies with a special privilege to skip this balancing process. Courts can and should continue to use time-tested tools and rules to safeguard privacy interests without depriving defendants of their constitutional rights.

## CONCLUSION

Allowing the prosecution to compel social media companies to turn over the contents they seek while blocking the defense from doing the same is unconstitutional, unjust, and undermines the integrity of the judicial system. For the reasons described above, this Court should hold that the Stored Communications Act does not categorically bar defendants from subpoenaing social media companies for information relevant to their defense.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

### Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 5,582 words.

### Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Brief on the Merits of *Amicus Curiae* to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on January 6, 2026.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this brief will be eServed pursuant to ORAP 16.45 on Rian Peck, # 144012, Zachary Stern, #134967, and Ginger Mooney, # 031261, attorneys for defendant-relator; on Leigh Salmon, #054202, attorney for Adverse Party State of Oregon and; on Sarah Crooks #971512 and Matthew Mertens, #146288, attorneys for Adverse Party Meta Platforms, Inc.

I further certify that this motion will be served to Honorable Jennifer K. Gardner, Circuit, Judge, via U.S. Mail delivery to the following address:

Hon. Jennifer K. Gardiner  
Marion County Circuit Court  
PO Box 12869  
Salem OR 97309.

Dated January 6, 2026.

Respectfully submitted,

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