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,

Plaintiff-Relator,

v.

META PLATFORMS, INC.,

Defendant-Adverse Party.

Marion County Circuit Court
No. 24CR31979, 24CN05648

SC S072084

**MANDAMUS PROCEEDING**

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# ADVERSE PARTY, STATE OF OREGON'S ANSWERING BRIEF

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# ADVERSE PARTY, STATE OF OREGON'S ANSWERING BRIEF

## STATEMENT OF THE CASE

Adverse Party, the State of Oregon ("the state"), accepts Defendant-Relator's ("defendant") statement of the case except as modified below.

**Nature of the Proceeding**

This is an original mandamus proceeding pursuant to ORS 34.250. Defendant was charged with several offenses, including second-degree murder, after he shot and killed the victim.[1] He seeks mandamus relief from a Marion County Circuit Court's refusal to order Meta Platforms, Inc. ("Meta") to produce pretrial the victim's and an eyewitness's social media records and associated geolocation data.

**Nature of the Order to be Reviewed on Mandamus**

Defendant issued a subpoena *duces tecum* to Meta, demanding pretrial production of the entirety of the victim's and an eyewitness's Instagram accounts over nearly four months preceding the shooting, as well as any associated geolocation data for each person's phone for a 72-hour period surrounding the homicide.

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[1] Defendant has never denied shooting and killing the victim. Rather, the dispute appears to be, at least at this juncture, whether defendant's conduct was justified as self-defense.

The trial court quashed that subpoena *duces tecum* after concluding that disclosure was barred by Title II of the Electronic Communications Privacy Act (ECPA), generally referred to as the Stored Communications Act (SCA), 18 USC § 2701–2712, and that the prohibition on disclosure did not violate defendant's rights under the compulsory process clauses of Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution.

**Questions Presented**

1. Does the SCA prohibit Meta from disclosing the contents of the victim's and the eyewitness's Instagram accounts and geolocation data?

2. The constitutional right to compulsory process allows a criminal defendant to subpoena witnesses and evidence for trial. Does it entitle a criminal defendant to enforcement of a pretrial subpoena issued solely for discovery and investigation purposes?

3. Should the court dismiss the alternative writ when defendant bases his arguments on an unsupported assumption about the meaning of a statute, and where discovery proceedings that may result in production of the records are ongoing?

**Summary of Argument**

Mandamus is an extraordinary remedy that is limited to cases in which the trial court violated a clear rule of law and there are no other adequate

remedies at law under the ordinary forms of legal procedure. Defendant fails to meet that high bar for relief, both on the merits and procedurally. He issued an exceedingly broad pretrial subpoena *duces tecum* to Meta, demanding production of social media records for general discovery and investigative purposes. Meta objected, and the trial court agreed, that production of the records was barred by the SCA, 18 USC § 2702. Defendant now argues that, *if* the SCA prohibits disclosure, the statute violates his rights under the compulsory process clauses of Article I, section 11, of the Oregon Constitution, and the Sixth Amendment to the United States Constitution. He provides no statutory analysis in support of that assumption and even acknowledges that it may be incorrect. This court should not accept defendant's invitation to invalidate a federal statute based on a questionable assumption. In the absence of a thoroughly developed argument, the court should dismiss the alternative writ of mandamus as improvidently granted.

But even assuming a categorical prohibition on disclosure, he has not established that, as applied to him, the SCA violates the state and federal compulsory process clauses. The Supremacy Clause of Article VI of the United States Constitution prohibits this court from invalidating federal law based on Article I, section 11. And defendant tacitly admits that his arguments under the Sixth Amendment are foreclosed by existing law, arguing only that it is "unclear whether" that caselaw "would survive" an historical analysis such as

that which the United States Supreme Court conducted in *New York State Rifle Ass'n v. Bruen*, 597 US 1, 142 S Ct 2111, 213 L Ed 2d 387 (2022). But whether existing caselaw should be overruled is a question for the United States Supreme Court, not this court.

Finally, defendant has a plain, speedy, and adequate remedy in the ordinary course of the law. He has not identified a special loss warranting mandamus relief in the discovery context, and, regardless, discovery proceedings are ongoing. The trial court issued an order permitting defendant to conduct a far-reaching forensic search of the victim's and the eyewitness's cellphones. He now has possession of those phones and either has obtained, or likely will obtain, the subpoenaed information through those alternative sources. Accordingly, the alternative writ should be dismissed.

**Supplemental Statement of Facts**

Defendant was charged with second-degree murder and unlawful use of a firearm based on allegations that he shot and killed the victim on or about June 23, 2024. (ER 1). The state provides the following supplemental statement of facts, clarifying the factual basis for the subpoena to Meta and informing this court of ongoing discovery proceedings in the trial court that are relevant to the question of whether mandamus relief is appropriate.

### A. Defendant issued a subpoena *duces tecum* to Meta requesting records from Instagram accounts of the victim and an eyewitness.

In September 2024, defendant filed a motion for early production of records under ORS 136.580 and ORS 136.583. (ER 2–4). Specifically, he sought information from four Instagram accounts, two of which he believed were associated with an eyewitness, and two of which he believed were associated with the victim. (ER 6–7). Defense counsel submitted a declaration, outlining the information he believed justified early production.

Specifically, counsel averred that, on the night of the shooting, defendant, his girlfriend, and had been "hanging out, driving around in defendant's truck," and drinking alcohol. According to counsel, believed that defendant and the victim were members of rival gangs and that defendant was mourning the loss of a close friend who had been killed in March 2024 in Bush Park. and the victim were close friends, and she wanted defendant to pick up the victim so that "they could all hang out." Defendant did *not* know about the victim's purported gang status but nonetheless did not want to hang out with the victim. (ER 7).

At some point in the evening, defendant and his girlfriend went inside a store while waited in the truck. When defendant and his girlfriend returned, " was heard telling [the victim] that she would drive to his location." (ER 7–8). According to counsel, defendant then allowed to

drive because he was intoxicated, and he fell asleep on the way to pick up the victim. Counsel asserted that, when defendant woke up, "he realized he was in an unfamiliar location," noticed the victim standing outside of the truck, and "believed that he was being set up." The shooting occurred shortly thereafter. (ER 8). Finally, counsel averred that communicated "with others" through Instagram, Snapchat, and text messages when she was at the police station following the shooting. (ER 8). No other factual information was presented to the trial court.

Based on counsel's declaration, defendant sought a significant amount of information from two Instagram accounts that he believed were associated with and two other Instagram accounts that he believed were associated with the victim. (*See* ER 2–4). His request broadly fell into three categories: subscriber information, geolocation data, and account content, and he proposed different timeframes for each category. First, his request for subscriber information had no date restrictions:

> 1. The account holder's: full name, birth date, e-mail address(es), physical and mailing addresses, phone numbers, any other profile information, and information META Platforms, Inc., received from the account holder to verify the identity of the account holder;
>
> 2. The length of service[.]

(ER 2–3). For geolocation data, he limited the request to a 72-hour period, from June 22, 2024, to June 24, 2024:[2]

> 3. 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.)[.]

(ER 3). Lastly, defendant sought the entire content of and the victim's Instagram accounts for a nearly four-month period preceding the homicide, March 6, 2024, through June 24, 2024:

> 4. 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.);
>
> 5. Multimedia files from any source related to the account, including all EXIF data related to the multimedia files; and search history information;
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> 6. Search history information.

(ER 3; *see also* ER 12–14). Counsel stated that March 6, 2024, was the date of the Bush Park shooting and that the "Instagram records are a crucial portion of

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[2] The indictment alleges that the homicide took place "on or about June 23, 2024." (ER 1).

[his] theory of the case." (ER 9). He provided no other explanation for why he needed such a broad swath of information for such an extended period.

The trial court authorized the subpoena *duces tecum*, which directed Meta to provide the records. The subpoena did not direct a representative from Meta to appear at a hearing; rather, it directed Meta to provide the requested documents to the court for *in camera* review. (ER 12–15). Defendant mailed a copy of the subpoena to Meta's headquarters in California. (ER 12, 17–18). Meta objected, and the trial court ultimately quashed the subpoena.[3] (*See generally* Op Br 8–14).

### B. Defendant has the victim's and cellphones and intends to search them for the same material sought from Meta.

Before defendant filed his petition for a writ of mandamus, he sought an order compelling the state to release the victim's cellphone for a forensic examination largely based on the same information he had submitted in support

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[3] In its objection, Meta provided a list of alternative means of obtaining the information, such as issuing a subpoena directly to the account holder and limiting the scope of the subpoena for Meta records to basic subscriber information. (ER 18–20). In response to the objection, defendant filed a contempt complaint, alleging that Meta had "willfully disobey[ed]" the trial court's September 20, 2024, order that granted defendant's motion for pretrial production. (ER 22–23). The trial court dismissed the complaint because that order had not compelled Meta to produce any records; it had merely authorized the issuance of the subpoena. (ER 264, 314–15). *See also* ORS 136.583(4) (providing a mechanism for moving to quash subpoena). Meta then moved to quash the subpoena. (ER 176, 265).

of his request for a pretrial subpoena *duces tecum*.[4] (SER 16–22). At a hearing on the motion, defendant stated that location data "was one of the primary focuses of the Instagram request" and that he had a "good-faith basis" to believe that the cellphone "has information that's reasonably likely to lead to admissible evidence." (SER 31–32). He further asserted that he had "ample investigation to suggest" that the victim was associated with a rival gang, and that "the stronger of a link that we can make showing that the [victim] was not just associated with but intimately, involved, [as] an active member of the 18th Street Gang, would help corroborate the fact that the comments that we are – intend to attribute to the victim on the incident day that kind of provoked a lot of what was going on were real and could be perceived by [defendant] as real, true threats." (SER 33). Finally, he asserted that conducting a forensic examination of the cellphone was an "alternative means" of obtaining the information Meta had refused to disclose. (SER 34).

Over the state's objection, the trial court ordered the release of the victim's cellphone to defendant to conduct an independent search. Citing *State v. Bray*, 363 Or 226, 422 P3d 250 (2018), and ORS 136.580, the trial court

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[4] Although the state refers to the cellphone as belonging to the victim, the record indicates that it belongs to the victim's mother, who occasionally allowed him to use it. (SER 55, 59).

viewed the material sought as having "'potential use at trial.'" (SER 59). In its written Opinion and Order, the trial court appeared to authorize a broad search that included text or social media communications "concerning the defendant," as well as a search for information surrounding the death of defendant's friend because "the defense of self-defense [had] been raised." (SER 58, 59–60). In an amended order, the court imposed the following search parameters:

> Non-location data search parameters are restricted to the following: information, photographs or communications relevant to the [victim's] arrival at the location where he was killed; information, photographs or communications concerning the defendant; information, photographs or communications concerning the gang affiliation of both the [victim] and the defendant.

(SER 89). The court authorized a date range of March 1, 2024, to June 24, 2024, for non-location data, and a date range of June 23, 2024, to June 25, 2024, for location data. (SER 89). Defendant is now in possession of the victim's cellphone. (SER 113).

Defendant also sought and obtained over the state's objection a subpoena *duces tecum* that compelled to provide her cellphone and passcode to defendant for a forensic examination. (SER 25). Defense counsel submitted a declaration in support of the motion in which he essentially outlined the same information he previously provided in support of his motion for a subpoena *duces tecum* to Meta, with the addition that "it [was] believed that the perpetrator(s) of [the] Bush Park homicide were members of the 18th Street

Gang" and that the victim had been "wearing colors associated with" that gang. (SER 2–3, *see generally* SER 1–15). He also asserted that and the victim communicated regularly both in person and through social media" and that was "regularly posting to her Instagram account(s) about the incident night." (SER 2, 7). In support of that latter assertion, he included what appear to be screenshots of three Instagram posts in which expresses grief over the loss of the victim. (SER 13–15).

Although defendant identified limited search parameters, (SER 7–8), he also stated that the "narrowing construction [was] only offered in the event the court believes it is necessary" and if the court "should * * * require" it.[5] (SER 7–8). Citing continued use of Instagram, he sought permission to search the phone for all communications through the date that he received the phone. (SER 7).

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[5] Defendant also appeared to argue that no longer retained a protected privacy interest in her cellphone because she previously allowed police to obtain and search an extraction of that device. (SER 4–7). Despite that unqualified consent, however, police obtained only a limited extraction that, according to defendant, "contain[ed] a sliver of the information that [he] ordinarily receives from a cell phone extraction." (SER 4). Defendant wanted cellphone so that he could obtain a full extraction and "piece together the information [ had consented to release [to police] but [which] police were unable to capture. (SER 6–7).

Defendant asserted in a subsequent filing that he needed access to cellphone "to determine *if* exculpatory and impeachment evidence is available." (SER 91 (emphasis added)). He asserted that "evidence" in the cellphone was "likely to establish inconsistencies in the reports or evidence valuable to an expert evaluating disclosures" and that the information was "likely" to assist him in establishing that he "was in the midst of a setup and acted in self-defense." (SER 91–92). Defendant also stated at a later hearing that he needed the information for cross-examination of potential direct examination "of certain officers about their knowledge of certain gang rivalries," and "whether or not [the] 18th Street [gang] was going after the gang that [the victim allegedly] perceived" defendant "to be a member of." (SER 38–39).

The trial court granted the motion and imposed some restrictions on the search to be conducted. (SER 25). Specifically, the trial court imposed a date range of June 23, 2024, to June 25, 2024, for location data. (SER 8, 25). But, citing alleged "continued commentary" about "the incident," the trial court authorized defendant to search for "other items detailed in [counsel's] declaration from March 2024 through the present"—*i.e.*, May 21, 2025, the date the order was signed. (SER 25). Counsel, however, had not detailed specific items and had only made broad representations about a potential setup and gang activity while expressing an intent to conduct an unlimited search. (*See* SER 7–8). It may be that the trial court contemplated a more limited search, with

parameters similar to those imposed on the search of the victim's cellphone, (*see* SER 89), but the order does not reflect that. Defendant now has possession of phone. (SER 113).

## ARGUMENT

Defendant fails to satisfy the high bar required for mandamus relief. Mandamus is an extraordinary remedy that is limited to cases in which "there is a clear rule of law requiring the matter to be decided in a certain way," *State ex rel. Maizels v. Juba*, 254 Or 323, 327, 460 P2d 850 (1969), and there is no other "'adequate and specific remedy at law under the ordinary forms of legal procedure,'" *HotChalk, Inc. v. Lutheran Church-Missouri Synod*, 372 Or 249, 256, 548 P3d 812 (2024) (quoting *Durham v. Monumental Silver Min. Co.*, 9 Or 41, 44 (1880)); *see also Perkins v. Fhuere*, 374 Or 575, 577, 581 P3d 961 (2025) (explaining that "mandamus relief is available only to enforce a known, clear legal right"). "The fact that this court issued an alternative writ at the outset of [the] mandamus proceeding does not resolve whether those preliminary requirements are met." *HotChalk, Inc.*, 372 Or at 256. Extraordinary relief is not warranted in this case for any of the following three reasons.

First, defendant's constitutional arguments are premised on a categorical and undeveloped assumption about the meaning of the statute at issue. Specifically, defendant asserts that *if* the SCA, 18 USC § 2702, prohibits Meta

from disclosing records in response to his pretrial subpoena *duces tecum*, the statute violates his compulsory process rights under Article I, section 11, of the Oregon Constitution, and the Sixth Amendment to the United States Constitution. He provides no statutory analysis demonstrating that disclosure is prohibited and, indeed, acknowledges that some disclosure may not be prohibited. (Op Br 8 n 2). By failing to address the statutory requirements, defendant essentially invites this court to *assume* that the statute prohibits *all* disclosure and, based on that assumption, to declare the statute unconstitutional under both the state and federal constitutions. That assumption is not obviously correct, however, and this court should not assess the constitutionality of a statute without first ascertaining its meaning. Because defendant fails to provide that critical statutory analysis, this court should dismiss the alternative writ of mandamus.

But even if this court were to entertain defendant's assumption—and it should not—relator has not established that the SCA, as applied to him, violates either the state or the federal constitutions. His argument under Article I, section 11, fails for the simple reason that, under the Supremacy Clause of the United States Constitution, the state constitution cannot be a basis for invalidating federal law. And defendant tacitly admits that his arguments under the Sixth Amendment are foreclosed by existing law. The trial court thus did not violate "a clear rule of law" by quashing the subpoena *duces tecum* to Meta.

*See State ex rel. Maizels*, 254 Or at 327-28 (discussing standard); *HotChalk, Inc.*, 372 Or at 256 ("Accordingly, mandamus is appropriate to review only obligatory—not discretionary—action.").

Finally, defendant has a plain, speedy, and adequate remedy in the ordinary course of the law. Although couched in constitutional terms, the issue reduces to little more than a pretrial discovery dispute—an issue that will rarely be subject to mandamus absent "a special loss beyond the burden of litigation." *State ex rel. Auto. Emporium, Inc. v. Murchison*, 289 Or 265, 269, 611 P2d 1169 (1980); *see also HotChalk, Inc.*, 372 Or at 257–59 (discussing *State ex rel. Auto. Emporium, Inc.*, 289 Or at 268, and the "general rule" that "mandamus in the discovery context is generally inappropriate because 'direct appeal is a plain, speedy and adequate remedy'"). Defendant has not identified a special loss that cannot be remedied through the normal appellate process. Meta has voluntarily preserved the subpoenaed records, (Meta Opp to Pet at 10), and defendant has provided no reason to believe that Meta would destroy them should the court order them to be preserved during the pendency of the case. Finally, mandamus relief is particularly inappropriate in a case like this, where discovery is ongoing and the defendant either has obtained, or likely will obtain, the subpoenaed information through alternative sources. Accordingly, the alternative writ should be dismissed.

**A. This court should not address defendant's constitutional arguments because of his failure to provide any statutory analysis.**

Under established decisional methodology, this court must first determine whether the SCA prohibits Meta from disclosing the contents of users' Instagram accounts, including private communications, posts, and any associated geolocation information. *Burt v. Blumenauer*, 299 Or 55, 70, 699 P2d 168 (1985) ("The need to face a constitutional issue arises, if at all, only after the court determines what ordinary laws authorize, require or forbid."). Only if disclosure is prohibited should this court resolve whether a prohibition on disclosure violates defendant's compulsory process rights under the Sixth Amendment and Article I, section 11.

Defendant, however, fails to present any cogent or developed argument about whether the SCA prohibits Meta from disclosing the subpoenaed records. Instead, he asks this court to *assume* that disclosure is categorically prohibited and to declare the SCA unconstitutional based on that assumption. (*See, e.g.*, Op Br 34, 38 (arguing that "*[i]f* Meta's interpretation" is correct, the SCA violates his constitutional rights without offering alternative statutory construction (emphasis added)); *but see* Op Br 8 n 2 (stating that the SCA does not appear to prevent disclosure of "many" of the requested records)). *See also Snap, Inc. v. Superior Court*, 103 Cal App 5th 1031, 1061–64, *rev allowed*, 555 P3d 503 (2024) (holding that the SCA does not prohibit Meta from disclosing

social media records).[6] Such an approach turns this court's decisional methodology on its head and should be rejected. And without any argument on that foundational first inquiry, this court should not consider the remaining constitutional arguments and dismiss the alternative writ as improvidently granted. *Cf. State v. Montez*, 309 Or 564, 604, 789 P2d 1352 (1990) (refusing to consider constitutional question where the defendant failed to provide "a thorough and focused analysis"). In any event, the state provides the following overview of the SCA, followed by a discussion of the constitutional issues.

**1. The SCA prohibits the disclosure of the "contents" of electronically stored communications.**

Subject to exceptions, the SCA broadly prohibits providers of electronic computing services and remote computing services from disclosing "to any person or entity the contents" of electronically stored communications. 18 USC § 2702(1), (2); *Bray*, 363 Or at 229–31.[7] Thus, the first step in the analysis is

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[6] Defendant's assumption is based on the position Meta took before the trial court—*viz.*, that any production in response to the subpoena *duces tecum* would violate the SCA.

[7] An "electronic communication service" is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 USC § 2510(15). "[T]he term 'remote computing service' means the provision to the public of computer storage or processing services by means of an electronic communications system." 18 USC § 2711(2); 18 USC § 2510(14) (defining "electronic communications system" as including systems "for the electronic storage of such communications").

determining whether the subpoenaed documents constituted "contents" of "electronic communications." If not, the SCA does not prohibit disclosure, and no further analysis is necessary. If the records do meet the definition of "contents" of "electronic communications," the next step in the analysis is determining whether disclosure is prohibited. *See Corp. of Presiding Bishop v. City of West Linn*, 338 Or 453, 463, 111 P3d 1123 (2005) (when construing a federal statute, this court "follow[s] the methodology prescribed by the federal courts," which includes examining the statute's text, structure, and legislative history).

**2. The term "contents" includes the "substance, purport, or meaning" of an electronic communication.**

The term "electronic communication" is expansive and likely includes most, if not all, of a user's Instagram activity. *See* 18 USC § 2510(12) (broadly defining "electronic communication" in relevant part as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce"). The term "'contents', when used with respect to any * * * electronic communication" has a slightly narrower definition and "includes any information concerning the substance, purport, or meaning of that communication." 18 USC § 2510(8). The terms "substance, purport, or meaning" are not defined, and this court has

not yet had the occasion to interpret them. However, the Ninth Circuit's decision in *In re Zynga Privacy Litig.*, 750 F3d 1098, 1106 (9th Cir 2014), provides persuasive authority.

Relying on dictionary definitions of the terms "substance, purport, or meaning," the Ninth Circuit interpreted "contents" to mean "the intended message conveyed by the communication" but not "record information regarding the characteristics of the message that is generated in the course of the communication." *In re Zynga Privacy Litig.*, 750 F3d at 1106. The court based the latter conclusion on 18 USC § 2702(c)(6), which states that a service provider may disclose "a record or other information pertaining to a subscriber or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2)) * * * to any person other than a governmental entity[.]" *Id.* (*citing United States v. Reed*, 575 F3d 900, 917 (9th Cir 2009) (holding that information about a telephone call's "origination, length, and time" was not "contents" for purposes of 18 USC § 2510(8), because it contained no "information concerning the substance, purport or meaning of [the] communication"); *Gilday v. Dubois*, 124 F3d 277, 296 n 27 (1st Cir 1997) (holding that a device that "captures electronic signals relating to the [personal identification number] of the caller, the number called, and the date, time and length of the call" does not capture the contents of communications and therefore "is not within the ambit of the Wiretap Act"); *In*

*re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F3d 304, 305-06 (3d Cir 2010) (holding that cell phone users' location data is not content information under the SCA)).[8]

**3. The prohibition on disclosure is generally limited to "contents" in "storage" for specified purposes.**

Subject to limited exceptions, electronic communication service and remote computing service providers cannot knowingly disclose "contents" of communications—*i.e.*, "any information concerning the substance, purport, or meaning of that communication." 18 USC § 2510(8); 18 USC § 2702(a). Specifically, under 18 USC § 2702(a)(1), an electronic communication service provider is prohibited from disclosing "the contents of a communication while in electronic storage by that service." The term "electronic storage" is defined as storage under two circumstances: "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 USC § 2510(17). Similarly, under 18 USC § 2702(a)(2), a remote computing service provider is prohibited from disclosing "the contents

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[8] The SCA uses the definition of "contents" provided in the Wiretap Act.

of any communication which is carried or maintained on that service * * * on behalf of * * * a subscriber or customer of such service * * * solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing[.]"

Thus, depending on the nature of the service provided, the SCA prohibits disclosure of the contents of communications that fall into two general categories: (1) communications that are stored temporarily for transmission or as backup protection, in the case of an electronic communication service; and (2) in the case of a remote computing service, communications stored solely for the purpose of providing the user with storage or computer processing services when the provider is not authorized to access the contents for any reason other than providing the service. 18 USC § 2702(a)(1), (2). A person or entity who violates the SCA is subject to criminal penalties. 18 USC § 2701.

**4. Defendant provides no statutory analysis to support his characterization of the SCA as a complete bar on disclosure of the subpoenaed records, and that characterization is not obviously correct.**

There is little dispute that Meta provides electronic communication services, remote computing services, or both. *See* 18 USC § 2510(15) (defining "electronic communication service"); 18 USC § 2711(2) (defining "remote

computing service"). But whether the subpoenaed records qualify as "contents" of "electronic communications" presents a closer question—one that defendant ignores. To be sure, some of the records easily meet the definition of "contents" of an electronic communication. For example, defendant expressly sought the "*[c]ontents of communications* (e.g. calls, mail, messages, bulletins, etc.), including text, and multimedia (e.g. audio, video, etc.) files[.]" (ER 14). And "multimedia" files likely meet the definition of "contents" insofar as defendant is requesting the contents of the files—*e.g.*, the photographs or videos themselves.

But whether the remaining records are "contents" is uncertain based on the record and arguments presented to this court. For example, defendant requests the "EXIF data" associated with multimedia files. The record does not define EXIF data, nor does it indicate whether it is embedded in the media file itself or produced as separately stored information. According to online sources, EXIF appears to be a form of metadata that provides a "broad spectrum" of information about "image and sound files recorded by digital cameras (including smartphones)," ranging from basic camera settings to descriptions of the image and geolocation data. *See* https://en.wikipedia.org/wiki/Exif (last accessed March 5, 2026). A description of the image almost certainly meets the definition of "contents" in that it reveals the substance of the communication. But camera settings used to capture the

image likely are more appropriately categorized as "record information regarding the characteristics of the message that is generated in the course of the communication," and not "the intended message." *In re Zynga Privacy Litig.*, 750 F3d at 1106. Thus, that subset of data would *not* be exempt from disclosure under the SCA, although its utility may be minimal absent the contents of the multimedia file.

Similarly, although the disclosure of customer record (or subscriber) data is not prohibited, 18 USC § 2702(c)(6), defendant's request goes beyond that, seeking "profile information." *See In re Zynga Privacy Litig.*, 750 F3d at 1106, 1109 (concluding that "record" data like "basic identification and address information" is not included within the definition of "contents"). Again, the record does not indicate what kinds of information would be included in a user's "profile information," making it difficult, if not impossible, to determine whether such information qualifies as the "content of an electronic communication." It may be that a user's "profile information" is limited to basic subscriber data, or it may convey substantive information to those who view the user's profile and therefore meet the definition of "contents." (*See also* ER 18–19 (Meta expressing willingness to disclose "basic subscriber information to determine the account holder")).

But even assuming the requested information meets the definition of "contents," it is not obvious that disclosure is prohibited under 18 USC §

2702(a). Restrictions on disclosure differ based on the type of service provided and the nature of the stored communication. As discussed above, and broadly described, disclosure is prohibited when the contents are in electronic storage for any of three reasons: temporarily, incident to the transmission itself; for "backup protection"; or when stored "solely" for storage and computer processing services and the service provider generally lacks authorization to access the contents. 18 USC § 2702(a); 18 USC § 2510(17).

Many courts have held that those criteria prohibit Meta from disclosing records such as those at issue in this case. *See, e.g.*, *United States v. Glenn*, 341 FRD 217, 222 (ND Ohio 2022) (collecting cases and holding that the SCA does not permit a criminal defendant to subpoena records from Meta). But a recent decision from the California Court of Appeal has cast some doubt on those decisions. In *Snap, Inc.*, 103 Cal App 5th at 1062–64, the California Court of Appeal held that Meta was not prohibited from disclosing the contents of electronic communications because it stores the contents of its user's communications for a dual purpose: namely, "for purposes of backup for its users" *and* for its own business purposes. *See also Facebook, Inc. v. Superior Court (Touchstone)*, 10 Cal 5th 329, 363 (Cal 2020) (Cantil-Sakauye, C.J., concurring) ("Facebook does not contest that it mines, analyzes, and shares with third party advertisers information about content found in, among other things, its users' communications—including restricted posts and private messages.").

Although California appears to be an outlier in its conclusion, the decision highlights the difficulty with defendant's assumption that disclosure is categorically prohibited. That is, to agree with defendant, this court would have to accept a proposition that at least one court has rejected on a more developed record and then declare a statute unconstitutional based on that questionable assumption. This court should decline to do so and dismiss the alternative writ as improvidently allowed. *See HotChalk, Inc*., 372 Or at 256, 259 (explaining that the issuance of "an alternative writ at the outset of a mandamus proceeding does not resolve whether * * * preliminary requirements" for mandamus relief are met and dismissing writ as improvidently allowed).[9] Nevertheless, the state adopts defendant's assumption for the purpose of responding to his constitutional arguments, which, as discussed below, are meritless.

**B. Assuming the SCA prohibits disclosure under these circumstances, defendant's constitutional arguments are without merit.**

Both Article I, section 11, of the Oregon Constitution, and the Sixth Amendment to the United States Constitution guarantee an accused in a criminal prosecution the right "to have compulsory process for obtaining

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[9] Defendant does not argue that, if the SCA permits disclosure, enforcement of the subpoena is required under the state discovery statutes. Nor does he challenge the trial court's ruling that he failed to comply with procedural requirements regarding the issuance of the subpoena. (*See* ER 322 (trial court assuming without deciding that procedural defects can be cured)).

witnesses in his favor." Defendant contends that those provisions, as applied, entitle him to use a subpoena for general discovery or investigative purposes, notwithstanding federal law prohibiting disclosure. But defendant's Article I, section 11, arguments are foreclosed by the Supremacy Clause of the United States Constitution, and he tacitly admits that his Sixth Amendment arguments are foreclosed by existing law.

**1. This court need not decide whether the SCA violates Article I, section 11.**

Although defendant relies on both constitutional provisions, this court need not address his Article I, section 11, arguments for one simple reason: Under the Supremacy Clause of the United States Constitution, "state law"—whether statutory or constitutional—"that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 US 504, 516, 112 S Ct 2608, 120 L Ed 2d 407 (1992) (citing *McCulloch v. Maryland*, 4 Wheat 316, 427, 4 L Ed 579 (1819)); US Const, Art VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*." (Emphasis added.)).

There are three circumstances "that result in the preemption of state law by federal law: (1) when the federal law expressly provides for preemption; (2) when a congressional statutory scheme so completely occupies the field with respect to some subject matter that an intent to exclude the states from legislating in that subject area is implied; and (3) when an intent to preempt is implied from an actual conflict between state and federal law." *Willis v. Winters*, 350 Or 299, 308, 253 P3d 1058 (2011). "The third type of preemption exists not only when it is physically impossible to comply with both the state and federal law, but when under the circumstances of the particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. (cleaned up).

As discussed, defendant invites this court to assume that the SCA operates as a categorical prohibition on disclosure and to then conclude that the categorical prohibition violates his rights under Article I, section 11. Defendant's own arguments thus provide a complete answer contrary to his position: If state law *requires disclosure*, compliance with both state law and federal law (which, according to defendant, *prohibits disclosure*) is physically impossible. Thus, even if this court were to conclude that Article I, section 11, required enforcement of the subpoena, it would have no effect and cannot override the SCA's prohibitions on disclosure. At a minimum, defendant provides no argument to the contrary, and "it is not this court's function to

speculate as to what a party's argument might be" or "to make or develop a party's argument when that party has not endeavored to do so itself." *See Beall Transport Equipment Co. v. Southern Pacific*, 186 Or App 696, 700–01 n 2, 64 P3d 1193, *adh'd to as clarified on recons*, 187 Or App 472, 68 P3d 259 (2003); *Montez*, 309 Or at 604 (refusing to consider constitutional question where the defendant failed to provide "a thorough and focused analysis"). Thus, the only remaining question is whether the Compulsory Process Clause of the Sixth Amendment compels disclosure. As explained, it does not.

**2. Defendant tacitly concedes that, under existing caselaw, the Sixth Amendment does not entitle a criminal defendant to use a pretrial subpoena for general discovery or investigative purposes.**

The issue before this court is *not* whether, or to what extent, the Sixth Amendment may require enforcement of a *trial* subpoena commanding production of the "contents" of electronic communications. Rather, the issue before the court is narrow: Whether the Compulsory Process Clause of the Sixth Amendment requires enforcement of the subpoena *duces tecum* sent to Meta for *pretrial* production of records. The answer to that question is equally narrow: The Compulsory Process Clause does not entitle a criminal defendant to use a pretrial subpoena for general discovery or investigative purposes.

The Compulsory Process Clause of the Sixth Amendment provides criminal defendants the right to present evidence in their defense. *Taylor v.*

*Illinois*, 484 US 400, 408-09, 108 S Ct 646, 98 L Ed 2d 798 (1988). The provision was adopted in reaction to the common-law rule that prevented felony defendants from offering evidence, particularly "the refusal to allow the defendant in a serious criminal case to present witnesses in his defense." *Washington v. Texas*, 388 US 14, 20–21, 87 S Ct 1920, 18 L Ed 2d 1019 (1967). Courts have held that the "right to subpoena a witness into the courtroom" encompasses a "right to obtain the testimony of the witness." *See State v. Mai*, 294 Or 269, 272, 656 P2d 315 (1982) (discussing state and federal compulsory process clauses); *Taylor*, 484 US at 409; *Washington*, 388 US at 23.

But defendant cites no binding precedent for the proposition that the federal compulsory process clause entitles him to use a pretrial subpoena for general discovery or investigative purposes. And the Supreme Court has held in related contexts that "[t]here is no general constitutional right to discovery in a criminal case." *See Weatherford v. Bursey*, 429 US 545, 559, 97 S Ct 837, 846, 51 L Ed 2d 30 (1977) (discussing the Due Process Clause of the Fourteenth Amendment to the United States Constitution and citing *Wardius v. Oregon*, 412 US 470, 474, 93 S Ct 2208, 37 L Ed 2d 82 (1973)); *see also State ex rel. Maizels*, 254 Or at 327 (explaining that mandamus is available to enforce "a clear rule of law requiring the matter to be decided in a certain way").

**a. Defendant's argument that it is "unclear" whether the United States Supreme Court would overrule binding precedent in a future case does not provide a basis for mandamus relief.**

Tacitly conceding that his Sixth Amendment argument is foreclosed by existing law, defendant instead takes an historical approach and suggests that, if the Supreme Court were to address the issue today, it likely would rule in his favor. (*See* Op Br 38-39 (arguing for a historical analysis under *Bruen* and *Dobbs v. Jackson Women's Health Org.*, 597 US 215, 142 S Ct 2228, 213 L Ed 2d 545 (2022)); *see also Michigan v. Lucas*, 500 US 145, 149, 111 S Ct 1743, 114 L Ed 2d 205 (1991) (holding that a defendant's evidence may be excluded based on a discovery violation and that "the right to present relevant testimony is not without limitation" and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process" (cleaned up)). But defendant does not engage in a comprehensive historical analysis, and the extent of his argument is only that, based on three cases, it is "unclear" whether any restrictions on the right to compulsory process "would survive today." (Op Br 38). That bare assertion without any developed legal analysis is insufficient for this court's review. *See Montez*, 309 Or at 604 (refusing to

consider constitutional question where the defendant failed to provide "a thorough and focused analysis").[10]

Further, the cases defendant cites—*United States v. Burr*, 25 F Cas 30 (CCD Va June 13, 1807), *United States v. Burr*, 25 F Cas 187 (CCD Va Sept. 3, 1807), and *Washington*—do not support his position. In *Burr*, the federal government prosecuted "the former Vice President [Aaron Burr] for treason" and, after the treason charges were dismissed, for "misdemeanor incitement." *United States v. Zubaydah*, 595 US 195, 227, 142 S Ct 959, 212 L Ed 2d 65 (2022) (Thomas, J., concurring in part and concurring in the judgment); *Trump v. Vance*, 591 US 786, 793-98, 140 S Ct 2412, 2421, 207 L Ed 2d 907 (2020) (chronicling *Burr* proceedings). The trial of Burr has been described as "the greatest spectacle in the short history of the republic," *Vance*, 591 US at 793–99, and it generated at least ten written decisions by the presiding circuit court judge, Chief Justice Marshall. In one of those decisions, the circuit court ruled that Burr could *serve* "a subpoena *duces tecum* ordering President Jefferson to

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[10] After defendant filed his opening brief, the Supreme Court issued its decision in *Villarreal v. Texas*, __ US __, __ S Ct __ (Feb 25, 2026), in which the Court held that prohibiting a criminal defendant from consulting with counsel about his testimony during an overnight recess does not violate the Sixth Amendment right to counsel. Although not directly on point, it highlights the Court's ongoing adherence to the general principle that a defendant's Sixth Amendment rights are "not without limitation." *Lucas*, 500 US at 149.

produce a letter from General Wilkinson, Burr's principal accuser," before the grand jury had issued a true bill. *Zubaydah*, 595 US at 227 (Thomas, J., concurring in part and concurring in the judgment); *Vance*, 591 US at 793-96; *Burr*, 25 F Cas at 32–34. In reaching that conclusion, the circuit court held that "any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses." *Burr*, 25 F Cas at 33.

Seizing on the preindictment language, defendant suggests that Chief Justice Marshall interpreted the Compulsory Process Clause as granting a right to pretrial *production* of documents for investigative and trial preparation purposes. (*See* Op Br at 19–21). Defendant, however, conflates the *issuance* of a subpoena *duces tecum* with the specific purpose for which the subpoena is issued, and he ignores the historical and procedural context in which that ruling was made. Nothing in the *Burr* decisions suggests that Chief Justice Marshall intended President Jefferson to produce the letter outside of a judicial proceeding, let alone for general discovery or investigative purposes.

Rather, Chief Justice Marshall expressed the view that the Constitution afforded the right "to compel the *attendance of his witnesses*" and "the right to examine those witnesses," and that the President was not exempt from

"testimonial obligations." *Burr*, 25 F Cas at 32, 33 (emphasis added); *Vance*, 591 US at 795.[11] When President Jefferson learned of Burr's motion for a subpoena *duces tecum*, he offered to provide the letter but objected to his "personal attendance" because it "'would leave the nation without' the 'sole branch which the constitution requires to be always in function.'" *Vance*, 591 US at 796. Chief Justice Marshall rejected that contention, reasoning that, "should the President's duties preclude his attendance at a particular time and place, a court could work that out upon return of the subpoena." *Vance*, 591 US at 795; *see also Burr*, 25 F Cas at 191 ("That the president of the United States may be subpoenaed, *and examined as a witness*, and required to produce any paper in his possession, is not controverted." (Emphasis added.)).

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[11] At the time of the request for the subpoena, it appears that Burr already had been arrested and granted "recognizance" release and that grand jury proceedings were ongoing. *See United States v. Burr*, 4 Cranch 455, n 1, 8 US 455, 25 F Cas 2 (CCD Va 1807) (No. 14692A) (summarizing procedural history of case). Arguments concerning the production of the letter continued until about a week before the jury was sworn in. *See Burr*, 25 F Cas at 190–93; *see also Burr*, 4 Cranch 455, n 1. Notably, Chief Justice Marshall appeared to cabin the right to a subpoena *duces tecum* to only those "papers as may be material in the defence [*sic*], and it was generally known that General Wilkinson's letter to President Jefferson concerned Burr's alleged act of treason. *See Burr*, 25 F Cas at 32, 35–36 (stating that the letter was "a statement of the conduct of the accused made by the person who is declared to be the essential witnesses against him").

A primary concern about delaying the issuance of the subpoena until after formal charges issued was that it could result in delay and "loss of testimony." *See Burr*, 25 F Cas at 32–33. Chief Justice Marshall "perceived" that "no mischief" would "be produced" by the early issuance of subpoenas because "[t]he process would only issue when, according to the ordinary course of proceeding, the indictment would be tried at the term to which the subpoena is made returnable." *Id*. at 33–34; *see also id*. at 34 (describing issue as "whether a subpoena could issue, in any case, to the chief magistrate of the nation; and if it could, whether that subpoena could do *more* than direct his personal attendance; whether it could direct him *to bring with him* a paper which was to constitute the gist of his testimony" (emphasis added)). That is, given the difficulties of travel and other aspects of life in the early 1800s, it made practical sense to issue subpoenas well in advance of trial to secure witnesses' attendance. And in the more than 200 years since the circuit court's decision in *Burr*, the United States Supreme Court has never adopted its reasoning or construed it as affording criminal defendants a right to use a pretrial subpoena for general discovery or investigation purposes, despite having opportunity to do so. *See, e.g.*, *United States v. Nixon*, 418 US 683, 698–99, 94 S Ct 3090, 41 L Ed 2d 1039 (1974) (discussing Federal Rule of Criminal Procedure 17 and stating that it was "not intended to provide a means

of discovery"); *Pennsylvania v. Ritchie*, 480 US 39, 107 S Ct 989, 94 L Ed 2d 40 (1987).[12]

Defendant's reliance on *Washington* is equally misplaced. There, the issue concerned a state procedural statute providing that persons charged as principals, accomplices, or accessories in the same crime could not testify on behalf of each other, although there was no bar to their testifying on behalf of the state. 388 US at 15. That rule was based on the premise that accomplices were likely to perjure themselves, and that the court's interest in preventing

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[12] In *Ritchie*, the defendant sought enforcement under the Confrontation and Compulsory Process Clauses of a pretrial subpoena for production of records held by a state "protective service agency charged with investigating cases of suspected mistreatment and neglect." 480 US at 43–46. The Court observed that it "traditionally has evaluated [such] claims * * * under the broader protections of the Due Process Clause of the Fourteenth Amendment" and concluded that the defendant's "claims more properly [were] considered by reference to due process." *Id*. at 56. The Court referenced *Burr* but expressly declined to consider "whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment." *Id*.

Defendant does not advance a due process argument, and it is well established that "[t]here is no general constitutional right to discovery in a criminal case" under the Due Process Clause. *Weatherford*, 429 US at 559 (citing *Wardius*, 412 US at 474–75). Rather, only the withholding of evidence that is both favorable to the defendant and material to the determination of his guilt or innocence can give rise to a due process violation. *See Brady v. Maryland*, 373 US 83, 87, 83 S Ct 1194, 10 L Ed 2d 215 (1963). And neither defendant nor the *amici* criminal defense attorneys argue that standard has been met in this case.

perjury outweighed the defendants' right to call witnesses. *Id*. at 21. However, the Court concluded, the rule did not rationally set apart a group of persons who were likely to commit perjury. For example, the rule did not prohibit accomplices from testifying on the state's behalf. Yet, as "[c]ommon sense would suggest," an accomplice may have a greater interest in lying in favor of the prosecution than on behalf of the charged defendant, particularly if the accomplice is awaiting his own trial or sentencing. *Id*. at 22.

Because the interests underlying the disqualification rule did not serve the purpose of preventing perjury *at trial*, the Court held that it arbitrarily denied the defendant's right under the Compulsory Process Clause to call a witness whose testimony would have been "relevant and material" to the case. In so ruling, the Court made it clear that the right to present evidence at trial is not absolute. *Id.* at 23 n 21 ("Nothing in this opinion should be construed as disapproving testimonial privileges[.]"); *see also Lucas*, 500 US at 149 (stating that the "right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process" (cleaned up)); *Taylor*, 484 US at 410 (holding that compulsory process clause does not grant "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence").

Thus, contrary to defendant's suggestion, (Op Br 39), *Washington* does not stand for the proposition that unequal access necessarily violates a criminal defendant's compulsory process rights to present testimony, and it has no bearing on whether a defendant is entitled to equal access to investigatory tools. The animating concern for the Court was that the rule excluding testimony was arbitrary and did not serve its stated purpose. Defendant does not argue that either of those concerns are present here, perhaps with good reason. Social media has become a ubiquitous feature of modern-day life—so much so that the President of the United States utilizes it to convey matters of national and global significance to the American populace. For some, apps like Instagram have become the preferred means of communication, functioning much like email and text messaging services. Disclosure of the contents of such accounts raises significant privacy concerns for the individual users—concerns that Congress was attempting to address when it enacted the SCA, restricting *all* access.

To that end, Congress carved out a narrow exception for the government, generally requiring either a warrant supported by probable cause or a court order based on "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or

the records or other information sought, are relevant and material to an ongoing criminal investigation."[13] 18 USC § 2703(a)–(d); *Bray*, 363 Or at 230. The government also must obtain a warrant to seize geolocation data. *See Carpenter v. United States*, 585 US 296, 316, 138 S Ct 2206, 201 L Ed 2d 507 (2018).

Defendant, however, does not seek equal access based on those standards. He seeks *greater* access based on speculation that the records *may* contain information useful to his defense, and he seeks to dispense entirely with the probable cause standard for geolocation data—something that "provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." *Carpenter*, 585 US at 311 (cleaned up).[14]

Furthermore, criminal investigations necessarily are asymmetrical. *See United States v. Turkish*, 623 F2d 769, 774 (2d Cir 1980) (noting that police

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[13] If the government attempts to obtain the records through a subpoena, absent advance court approval, notice generally must be given to the subscriber, thereby affording that person the opportunity to object to any disclosure. 18 USC § 2703(b)(1)(B); 18 USC § 2705 (setting forth exceptions to notification requirement).

[14] As this court noted in *Bray*, the use of a subpoena for discovery poses "risks to individual privacy" that are similar to those at play when the state seeks a search warrant. *Bray*, 363 Or at 253 (discussing enforcement of subpoena to search computer based on its known contents).

may arrest suspects, search private homes, and seek wiretap orders); *People v. Sutter*, 134 Cal App 3d 806, 834–35 (1982) (refusing to confer judicial use immunity on witness whose testimony was compelled by the defendant). Complete equalization of the powers of the prosecution and defense is not appropriate because a criminal prosecution, "unlike a civil trial, is in no sense a symmetrical proceeding." *Turkish*, 623 F2d at 774. That is, the parties have distinct roles:

> The prosecution assumes substantial affirmative obligations and accepts numerous restrictions, neither of which are imposed on the defendant. The prosecution must prove the defendant's guilt beyond a reasonable doubt to the satisfaction of [the jury]; it may not obtain the defendant's testimony, suppress exculpatory evidence, nor retry the defendant after acquittal, even though errors prejudicial to the Government occurred. The defendant, by contrast, may prevail without offering any proof at all; he need not disclose whatever inculpatory evidence he discovered, and may avoid conviction by persuading a single juror that reasonable doubt exists, and may challenge a conviction by direct appeal and subsequent collateral attack.

*Id*. And because the prosecution and the defense have "inherently different roles, with entirely different powers and rights," the general principle of equalization is "not a sound principle on which to extend any particular procedural device." *Id*. at 774–75.

**b. Defendant's remaining arguments provide no basis for mandamus relief.**

Finally, defendant suggests that the SCA's prohibition on disclosure "make[s] an entire category of information completely unavailable to criminal

defendants," because Meta likely would refuse to comply with a subpoena *duces tecum* to appear at trial. (Op Br 40). But again, the issue in this case is not whether defendant has a Sixth Amendment right to compel a Meta representative to testify at trial. The issue is whether the Compulsory Process Clause requires enforcement of a *pretrial* subpoena for *general discovery or investigative purposes*. Simply stated, it does not. And, as discussed, defendant *assumes* that the SCA categorically prohibits disclosure of the subpoenaed records—a proposition that is not obvious on this record. It may be that, on a more thoroughly developed record, a court could conclude that some records are subject to disclosure warranting enforcement of a trial subpoena. But in the absence of a thoroughly developed argument and supporting record, this court should not declare a federal statute unconstitutional based on that assumption.

However, even if this court were to consider whether, on this record, the SCA interferes with defendant's compulsory process right to present evidence at trial, the argument lacks merit. Like the Due Process Clause, the Compulsory Process Clause provides no authority for a defendant to "obtain evidence of unknown import to test and determine whether it helps or hurts his case." *State v. Koennecke*, 274 Or 169, 180, 545 P2d 127 (1976) (discussing due process principles); *United States v. Valenzuela-Bernal*, 458 US 858, 867, 102 S Ct 3440, 73 L Ed 2d 1193 (1982); *Washington*, 388 US at 16. Rather, he must demonstrate that the evidence is both favorable and material, and that

comparable evidence cannot be obtained through other means. *Valenzuela-Bernal*, 458 US at 867–70 (mere fact that the defendant was prevented from calling a witness is insufficient to establish violation of right to compulsory process; he must make a "plausible" showing that the testimony would have been favorable and material to his defense); *Washington*, 388 US at 16 (finding violation of the Compulsory Process Clause when the defendant was deprived of "testimony [that] would have been relevant and material, and * * * vital to the defense")); *see also State ex rel. Gladden v. Lonergan*, 201 Or 163, 188-89, 269 P2d 491 (1954) (discussing Article I, section 11, and stating that an accused has a right to compulsory process for "necessary and material witnesses on his behalf"). *Cf. California v. Trombetta*, 467 US 479, 489, 104 S Ct 2528, 81 L Ed 2d 413 (1984) (to establish violation of Due Process Clause based on destruction of evidence, the defendant must establish that the evidence possessed "an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means). Defendant does not argue that his pretrial request satisfied the favorability and materiality test. And the ongoing discovery proceedings belie his suggestion that there are no alternative means of obtaining comparable information.

Evidence is favorable if it is directly exculpatory or if it is impeaching. *United States v. Bagley*, 473 US 667, 676, 105 S Ct 3375, 87 L Ed 2d 481

(1985); *Valenzuela-Bernal*, 458 US at 872 (adopting due process standards for assessing favorability and materiality under the Compulsory Process Clause). Evidence is material if there is a reasonable probability that disclosure of the evidence would change the outcome of the proceeding. *Bagley*, 473 US at 682. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case. *Id.* at 678, 682.

Defendant's justification for seeking access to the victim's and Instagram accounts is based on little more than speculation that he *might* discover helpful information. The only factual basis he provided in support of the subpoena *duces tecum* consisted of generic assertions that he, his girlfriend, and were driving around, drinking, and that who wanted defendant to pick up the victim "so they could all hang out"—communicated with the victim via Instagram shortly before they picked him up. Defendant asserts that *believed* that he and the victim were in rival gangs (although he did not) and that *believed* he was mourning the death of a friend who had been murdered almost four months earlier. Defendant claimed that he fell asleep before they reached the victim's location and that, when he woke up, he believed he was "being set up" because he was in a strange location and the victim was standing outside of the pickup truck. Finally, he asserts that, after arriving at the police station, continued to communicate "with others" through her Instagram account. (ER 7–8).

Based on that information, defendant sought the entire contents of the victim's and Instagram accounts without *any* meaningful limitation. That is, he sought the contents of *all* communications (regardless of the identity of the participants), *all* multimedia files, and *all* search history information for a period of nearly four months based solely on the assertion that had communicated with the victim via Instagram shortly before the shooting and that subjectively believed that defendant and the victim were members of rival gangs. Defendant provided no reason to believe there is a connection between the events in this case and the death of his friend over three months earlier, or even that the prior homicide was gang related. Nor did he present any evidence to suggest that and the victim had regularly communicated over the preceding three to four months (let alone regularly communicated via Instagram), or that communications "with others" concerned the shooting. And with respect to the request for 72 hours of geolocation data, defendant provided no justification apart from the general assertion that he had "not located any discovery indicating that police attempted to piece together [the victim's] whereabouts in the hours leading up to the incident." (ER 9). It is thus pure speculation to believe that the two Instagram accounts contain favorable and material information. Without that threshold showing, defendant would not be entitled to enforcement of the subpoena regardless of whether the SCA applies.

Further, "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts[.]" *Washington*, 388 US at 19. If there are alternative means of obtaining (and ultimately presenting to the jury) the same information, it cannot be said that the trial court violated defendant's compulsory process rights by quashing the subpoena *duces tecum* to Meta. Defendant has alternative means, and he does *not* argue that those alternatives are insufficient. (*See* SER 32). As outlined in the statement of facts, the trial court granted defendant's motions to conduct a forensic search of and the victim's cellphones, using search parameters largely identical to (if not more expansive than) those included in the subpoena *duces tecum* to Meta. (SER 25, 89).

Unlike the subpoena *duces tecum*, however, defendant's search of the cellphones is not limited to records contained on Instagram or geolocation information associated with use of the Instagram account. Instead, defendant may search the entire contents of the two cellphones (all social media apps, voicemail, text messages, multimedia files, etc.) for information that falls within the court-imposed search parameters, and he will receive *all* geolocation data for a 72-hour period that includes time *after* the shooting occurred. Undoubtedly, those searches will reveal comparable—and ultimately

significantly more—information than he would have received from Meta.[15] Again, defendant does not argue otherwise.

In summary, the Sixth Amendment's Compulsory Process Clause does not entitle a criminal defendant to enforcement of a pretrial subpoena *duces tecum* for general discovery or investigative purposes. Consequently, the trial court did not commit legal error in granting Meta's motion to quash.

### C. Defendant is not entitled to mandamus relief because he has a plain, speedy, and adequate remedy on appeal.

At its core, this case reduces to a discovery dispute. Defendant contends that the trial court erred in quashing the subpoena *duces tecum* to Meta because he has a constitutional right to pretrial discovery for investigatory purposes. It is well established, however, "that mandamus in the discovery context is generally inappropriate because" an appeal is "a 'plain, speedy and adequate' remedy so long as the relators [do] not 'suffer[ ] an irretrievable loss of

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[15] The trial court authorized a search of the cellphones over the state's objection. Whether the trial court's orders comply with statutory and constitutional requirements, however, is not at issue. *See, e.g.*, *Bray*, 363 Or at 252–54, 254 n 19 (incorporating limitations articulated in *State v. Mansor*, 363 Or 185, 215, 421 P3d 323, 341 (2018), to subpoenas "that require the production of a computer at trial," including "prescribing the contours of the examination and the terms of requested protective orders" and conducting an *in camera* inspection of the materials before disclosure); *Carpenter*, 585 US at 305, 319–20 (reiterating requirement that state obtain a warrant to search a cellphone and imposing same requirement to obtain cell-cite location data from third-party wireless service providers).

information and tactical advantage [that] could not be restored to them on direct appeal.'" *HotChalk, Inc.*, 372 Or at 257 (quoting *State ex rel. Auto. Emporium, Inc.*, 289 Or at 268–69).

Defendant has not demonstrated any irretrievable loss of information or any "special loss beyond the burden of litigation by being forced to trial." *State ex rel. Auto. Emporium, Inc.*, 289 Or at 269. Meta has represented to the court that it already has preserved the subpoenaed records. (Meta Opp to Pet at 10). The state is unaware of any authority that would prohibit this court from ordering Meta to *preserve* the records during the pendency of the case, and there is no reason to believe that Meta would refuse to comply with such an order. Thus, any concern about an irretrievable loss of information is easily remedied.

Defendant nevertheless contends that appellate review is insufficient because, under Meta's interpretation of the law, it cannot provide a sealed copy of the records to the trial court for purposes of appellate review. But that is precisely the situation *this* court is in now. That is, defendant asks this court to address the constitutional issue without the benefit of having seen the subpoenaed records. And he does not explain why this court is in a better position to rule on an absent record than the Court of Appeals would be on direct appeal. If anything, the Court of Appeals (and potentially this court) will be in a *better* position on direct appeal to assess whether defendant's

compulsory process rights were violated because it will have the benefit of a fully developed record, including any information defendant obtains during the ongoing discovery proceedings and the searches of the victim's and cellphones. *See, e.g.*, *Bray*, 363 Or at 242–52 (deciding on direct appeal whether ORS 136.580 provided a statutory basis for the defendant to subpoena and search the victim's computer).

## CONCLUSION

For the foregoing reasons, this court should decline to issue a peremptory writ of mandamus, and it should dismiss the alternative writ.

Respectfully submitted,

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