IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Snap Inc., Meta Platforms, Inc., Petitioners, vs. *Superior Court of San Diego County*, Respondent, *Adrian Pina,* et al., Real Parties in Interest.	Case No.: S286267

After a Decision by the Court of Appeal,
Fourth Appellate District, Division 1, Case Nos. D083446, D083475
San Diego Superior Court, Dept. 21, Case No. SCN429787
The Honorable Daniel F. Link, Judge Presiding (760) 201-8021

APPLICATION TO FILE BRIEF AND BRIEF OF AMICUS CURIAE TWENTY-THREE LAW PROFESSORS IN SUPPORT OF REAL PARTIES IN INTEREST ADRIAN PINA AND THE PEOPLE.

Dean Erwin Chemerinsky
and Professor Rebecca Wexler,
on the brief.

Chesa Boudin (SBN: 284577)
Criminal Law & Justice Center
UC Berkeley School of Law
Berkeley, CA 94720-7200
Email: Chesa@berkeley.edu
Telephone: 510-664-4551

Counsel for *Amicus Curiae*

Twenty-Three Law Professors

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APPLICATION

I. IDENTIFICATION OF *AMICI CURIAE*

We are a group of concerned law professors who respectfully apply for permission of the Chief Justice to file an *amicus curiae* brief under Cal. Rules of Court, rule 8.520(f).[1]

1. Jonathan Abel is Professor of Law at the University of California College of the Law, San Francisco.
2. Chesa Boudin is the Executive Director of the Criminal Law and Justice Center at the University of California, Berkeley, School of Law.
3. Kiel Brennan-Marquez is Professor of Law and the William T. Golden Scholar at the University of Connecticut, School of Law.
4. Bennett Capers is the Stanley D. and Nikki Waxberg Professor of Law at the Fordham University School of Law.
5. Erwin Chemerinsky is the Dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley, School of Law.

[1] This application is timely made within 30 days of the filing of the reply brief on the merits. This brief was prepared by *amici curiae*. No counsel for any party authored this brief in whole or in part, and no monetary contribution was provided for preparation or submission of the brief. Institutional affiliations of *amici curiae* are included for identification purposes only.

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6. Colleen Chien is Professor of Law at the University of California, Berkeley, School of Law.
7. Jeffrey A. Fagan is the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School.
8. Eric Fish is Acting Professor of Law at the University of California, Davis, School of Law.
9. Daniel Fryer is Assistant Professor of Law and Philosophy at the University of Michigan Law School.
10. Brandon L. Garrett is the L. Neil Williams, Jr. Distinguished Professor of Law at Duke University School of Law.
11. Talia B. Gillis is Associate Professor of Law at Columbia Law School.
12. Ann M. Murphy is Professor of Law at the Gonzaga University School of Law.
13. Erin Murphy is the Norman Dorsen Professor of Civil Liberties at the New York University School of Law.
14. Alexander Nunn is Associate Professor of Law at the Texas A&M University School of Law.
15. Anna Roberts is Professor of Law at Brooklyn Law School.
16. Andrea Roth is Professor of Law and the Barry Tarlow Chancellor's Chair in Criminal Justice at the University of California, Berkeley, School of Law.

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17. Barry Scheck is Professor of Law at the Benjamin N. Cardozo School of Law.

18. Jeff Selbin is the Chancellor's Clinical Professor of Law at the University of California, Berkeley, School of Law.

19. Elisabeth Semel is the Chancellor's Clinical Professor of Law at the University of California, Berkeley, School of Law.

20. Jonathan Simon is the Lance Robbins Professor of Criminal Justice Law at the University of California, Berkeley, School of Law.

21. Olivier Sylvain is Professor of Law at the Fordham University School of Law.

22. Rebecca Wexler is the Hoessel-Armstrong Professor of Law at the University of California, Berkeley, School of Law.

23. Tim Wu is the Julius Silver Professor of Law, Science and Technology at Columbia Law School.

II. STATEMENT OF INTEREST OF *AMICI CURIAE*

We teach, write, and research in the areas of constitutional law, evidence law, privacy law, criminal law, criminal procedure, civil procedure, and other subjects related to this case. Accordingly, we have a strong interest in the correct interpretation of federal preemption and evidentiary privilege doctrines that govern when federal statutes may preempt the compulsory process powers of California courts. We recognize

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that the present matter will resolve important questions about whether the Stored Communications Act preempts the carefully crafted balance that California law has set between society's truth-seeking interests in enabling criminal defendants to access evidence that is relevant to their defense and countervailing interests in keeping certain categories of information secret from judicial compulsory process.

III. THE NEED FOR FURTHER BRIEFING

We seek permission to submit an *amicus curiae* brief to provide our perspective on the ways in which statutory language creating broad confidentiality rules, such as the text of 18 U.S.C. § 2702(a), can be ambiguous as to its effect on judicial compulsory process, and to share our view of the preemption issues, the privilege law, and the canons of statutory construction that apply.

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IV. CONCLUSION

For the reasons explained immediately above, *amici curiae* respectfully urge this Court to find that there is sufficient good cause for this Court to permit *amici curiae* to file a brief on the merits.

Dated: February 24, 2025

Respectfully submitted,

By /s/ Chesa Boudin

Chesa Boudin (SBN: 284577)

Criminal Law & Justice Center
UC Berkeley School of Law
Berkeley, CA 94720-7200
Email: Chesa@berkeley.edu
Telephone: 510-664-4551

Counsel for *Amicus Curiae*

Twenty-Three Law Professors

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Email: Chesa@berkeley.edu
Telephone: 510-664-4551

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ISSUE PRESENTED

Does the Stored Communications Act (18 U.S.C. § 2702, subd. (a)) absolutely bar California courts from enforcing a criminal defendant's good cause subpoena, issued pursuant to California Penal Code section 1326, for electronic communications contents stored by service providers such as Petitioners?

ARGUMENT

I. Introduction

California law expressly recognizes the importance of criminal defendants being able to subpoena witnesses and the evidence that is necessary for their defense. (See Cal. Pen. Code, § 1326, subd. (a)-(b).) It would be wrong for a person to face conviction simply because there was not access to necessary evidence. Indeed, for courts to fulfill their mission of providing fair trials, full disclosure of facts is essential. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 808.)

Of course, there can be limits on access to information by criminal defendants and courts, such as when there is a legal privilege that prevents disclosure. California law calls for courts to balance the competing interests, and especially to weigh the defendant's need for the information against competing interests, including privacy. (*Facebook, Inc. v. Superior Court ("Touchstone")* (2020) 10 Cal.5th 329, 344.)

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This case poses the question of whether a federal statute, the Stored Communications Act, bars criminal defendants from having access to needed information and precludes courts from engaging in the balancing test required under California law.

Quite importantly, the Stored Communications Act is totally silent about how it applies in such circumstances and whether it was meant to supersede California law. In light of this silence, it cannot be said that the Stored Communications Act preempts California law on criminal defense subpoenas. There is nothing in the law or its legislative history that indicates that the Act is meant to preempt state laws in such circumstances. There thus is nothing to overcome the presumption against finding preemption. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 938 [explaining the presumption against preemption].)

Moreover, in *St. Regis Paper Company v. United States* (1961) 368 U.S. 208, the Supreme Court held that federal laws should not be read to overcome a right to compulsory process unless, strictly construed, they require such a result. The Stored Communications Act nowhere does this. (See generally, Wexler, *Privacy as Privilege: The Stored Communications Act and Internet Evidence* (2021) 134 Harv. L.Rev. 2721.)

In light of the silence of the Stored Communications Act, and the presumption against preemption and against finding a limit on compulsory

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process, California should follow its usual rules of evidence and procedure and balance the competing interests in each case.

II. California Law Entitles Criminal Defendants to Subpoena Relevant Evidence and Appropriately Balances the Subpoena Power Against Competing Values.

California law appropriately balances society's interests in criminal defense subpoenas that serve accuracy and fairness in criminal cases with competing interests in third-party privacy. This Court should construe the Stored Communication Act's ("SCA's") ambiguous silence on criminal defense subpoenas as consistent with California's carefully crafted criminal procedures. The SCA should not be read as an unqualified, absolute bar on subpoenas for information that happens to be transmitted over the Internet.

A. California Law Properly Balances Defense Access and Countervailing Interests in Secrecy.

California law recognizes that criminal defendants must be able to access evidence that is relevant to their defense to safeguard the truth-seeking process of the courts and the fairness of criminal proceedings. This is why the California legislature enacted Penal Code section 1326 to enable access to evidence via the subpoena process. (Cal. Pen. Code, § 1326, subd. (a)-(b) [establishing subpoenas as the "process by which the attendance of a witness before a court or magistrate is required" and noting that subpoenas may command the production of "books, papers, documents, or records"].) As this Court has emphasized, "The need to

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develop *all relevant facts* in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of *all the facts,* within the framework of the rules of evidence." (*Delaney*, *supra*, 50 Cal.3d at p. 808 [quoting *United States v. Nixon* (1974) 418 U.S. 683, 709].) Indeed, criminal defense investigations using tools such as the subpoena are so essential that they are part of the constitutional right to effective assistance of counsel. (See *People v. Doolin* (2009) 45 Cal.4th 390, 412 ("Fundamental to counsel's role is 'a duty to make reasonable investigations[.]'" [quoting *Strickland v. Washington* (1984) 466 U.S. 668, 667].)

California law also recognizes that the right to subpoena evidence is not absolute, and it establishes safeguards to balance the interests in truth-seeking and fairness that the subpoena process serves against competing interests, including privacy. As this Court has stated, to defend against a motion to quash, a criminal defendant must "establish good cause to acquire the subpoenaed records." (*Touchstone*, *supra*, 10 Cal.5th at p. 344.) This Court has also endorsed a balancing procedure for the good cause assessment to weigh competing interests, including interests in "a third party's 'confidentiality or privacy rights.'" (*Id.* at p. 346 [citing *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1134].) Further,

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Penal Code section 1326(d) requires the nonparty recipient of a criminal defendant's subpoena to deliver the requested materials directly to the superior court, rather than to the defense, so that the court "may order an in camera hearing to determine whether or not the defense is entitled to receive the documents." (Cal. Pen. Code, § 1326, subd. (d); see also *Touchstone*, *supra*, 10 Cal.5th at p. 344.) This is to ensure that in each case the court carefully balances the important, competing interests.

In addition, California law grants special protection from subpoenas to limited categories of highly sensitive information. For instance, the California legislature has enacted statutory privileges that entitle people to refuse to disclose specific, narrow categories of information in response to a subpoena (Cal. Evid. Code, §§ 930-1063.) and has simultaneously protected the scope of the subpoena power by preventing courts from creating additional common law privileges (Cal. Evid. Code, § 911.). Most recently, the California legislature amended the Penal Code in 2022 to exempt certain information about gender-affirming health care from foreign subpoenas. (Cal. Pen. Code, § 1326, subd. (c).) And the California Constitution entitles the victim of a crime to prevent the disclosure of certain confidential information to the defense. (Cal. Const., art. I, § 28, subd. (b)(4).)

Through all these procedures, California law sets a nuanced balance between protecting privacy interests and the need "to promote 'the

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paramount judicial goal of truth seeking.'" (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 901 [quoting *Swidler & Berlin v. United States* (1998) 524 U.S. 399, 410].)

B. Construing the SCA as an Absolute Bar on Defense Subpoenas Would Make Meaningful Defense Investigation Impossible in Many Cases.

Construing ambiguous silence in the SCA's text as conflicting with California's well-balanced laws and gutting the subpoena power, as Petitioners urge, would make meaningful defense investigation impossible in a growing percentage of cases. Criminal defendants need to subpoena third-party communications in a variety of circumstances. Such communications can be crucial for investigations into self-defense, as in Mr. Pina's case. They can also be essential to prove third-party guilt by identifying a true perpetrator. They also provide other forms of exculpatory evidence. For instance, a complaining witness's social media posts might prove that the person still possesses property that a defendant has been charged with stealing. Alternately, a third-party eyewitness's communications might offer a narration of events that corroborates that of the defense. Third-party communications can also be crucial for investigating witness bias and other credibility problems. As society relies more and more on digital technologies, this essential evidence increasingly takes the form of electronic communications stored with service providers such as Meta and Snap. Denying defendants access to it threatens "the

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demise of due process and accurate fact-finding." (Murphy, *Digital Evidence Generated by Consumer Products: The Defense Perspective* in Human-Robot Interaction in Law and its Narratives: Legal Blame, Procedure, and Criminal Law (Gless & Whalen-Bridge, edits., 2024) p. 196.)

Crucially, it is often the case that the *only* way criminal defendants can obtain this essential evidence is by subpoenaing it from service providers such as Meta and Snap.

Criminal defendants cannot rely on discovery from the government to obtain this type of evidence because the government may not possess it. As in Mr. Pina's case, the defense theory of the case may differ from that of the government such that the evidence falls outside the scope of the government's own investigation. In such circumstances, the government is under no obligation to investigate on behalf of the defense and cannot be conscripted into doing so. (See *People v. Superior Court ("Johnson")* (2015) 61 Cal.4th 696, 715 ["The prosecutor had no constitutional duty to conduct defendant's investigation for him."] citation omitted.) On the contrary, in our adversarial system of justice, criminal defense lawyers are the sole actors tasked with finding evidence of innocence that is not already possessed by the prosecution team. If defense lawyers do not get this evidence, no one will.

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Although in some cases criminal defendants may be able to obtain this evidence by subpoenaing individual account holders directly, in many cases that is impossible. Account holders may be unreachable because they are deceased (as in Mr. Pina's case), because they are impossible to locate, because they reside abroad beyond the jurisdiction of courts within the United States, or because they assert a Fifth Amendment privilege against production. Account holders may also be unreliable sources of evidence because they refuse to comply with subpoenas or because there is a risk that they will destroy or tamper with the evidence. In some cases, subpoenaing an account holder would create a risk of flight. In other cases, account holders are dangerous and subpoenaing them would risk witness intimidation or a threat to someone's life or safety. When account holders are unreachable, unreliable, or dangerous, subpoenaing them directly is not an option.

Therefore, in an increasing number of cases, the *only* way for criminal defendants to obtain essential evidence of third-party communications is by subpoenaing service providers such as Meta and Snap. If, as Petitioners urge, ambiguous silence in the SCA's text were interpreted as an absolute bar on such subpoenas, then people would face conviction simply because they lack access to the evidence necessary to defend themselves. The result would be more wrongful convictions of factually innocent persons, more ineffective assistance of counsel, and less

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public trust in the justice system. In a world increasingly reliant on technological forms of proof, creating an absolute bar on defense access to critical evidence simply because it happens to be stored by a social media company "fatally undermines the presumption of innocence and the basic precepts of due process." (Murphy, *Digital Evidence*, *supra* at p. 194.)

There is no good reason to construe the SCA's ambiguous silence in this harmful way because California's usual rules of evidence and procedure already properly balance the competing interests at stake when criminal defendants subpoena sensitive information. California's criminal procedures appropriately govern the disclosure of private information to criminal defense teams in hundreds of thousands of cases each year. (See Judicial Council of Cal., Ct. Statistics Report (2024) at p. 52 [documenting approximately 450,000 felony and nontraffic misdemeanor filings in 2023].) California's criminal procedures successfully resolve conflicts between truth-seeking, fairness, and privacy for information that is far more sensitive than the vast majority of social media posts, including mental health and other medical records, personal diaries, financial data, location information, educational records, letters to loved ones, and more. And California's criminal procedures will continue to successfully balance the competing interests at stake in criminal defense subpoenas for social media evidence without Petitioners' extreme interpretation of the SCA.

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III. The SCA is Ambiguously Silent as to its Effect on Criminal Defense Subpoenas, so this Court Should Interpret the SCA to be Consistent with California Law.

The SCA is ambiguously silent as to its effect on subpoenas requested by criminal defendants. Petitioners' claim to the contrary runs counter to the presumption against federal preemption, contradicts United States Supreme Court guidance to narrowly construe federal statutes as *not* blocking the truth-seeking process of courts, and distorts the SCA's textual silence into an implied, unqualified, absolute bar on criminal defense subpoenas for relevant evidence simply because that evidence was transmitted via the Internet. In effect, Petitioners are asking this Court to do what the California legislature has said it may not: create a novel block on lawful judicial process based on a federal law that is totally silent on access to information by criminal defendants. (Cal. Evid. Code, § 911.) This Court should decline the invitation and instead maintain California's well-crafted procedures for balancing society's interests in the enforcement of criminal defense subpoenas against overriding needs for secrecy.

A. The SCA's Text is Ambiguous.

The SCA states in relevant part:

> Voluntary disclosure of customer communications or records
>
> (a) Prohibitions.—Except as provided in subsection (b) or (c)—
>
> (1) a person or entity providing an electronic communication service to the public ***shall not knowingly***

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> ***divulge*** to any person or entity the contents of a communication . . .
>
> (18 U.S.C. § 2702, subd. (a), emphasis added.)

It is ambiguous whether Congress intended the word "*divulge*" in section 2702(a) to refer to compliance with court-ordered judicial compulsory process and, in particular, with the type of in camera review procedure indicated by California Penal Code section 1326. (Cal. Pen. Code, § 1326, subd. (d).) The Merriam-Webster dictionary defines "divulge" as: "to make known" or "to make public." (*Merriam-Webster.com* (2025) <https://www.merriam-webster.com/dictionary/divulge> [as of Feb. 10, 2025].) Complying with Mr. Pina's good cause subpoena by submitting documents to a court in a limited and controlled manner, pursuant to a court order, for the purpose of enabling the court to conduct in camera review, would not make anything "known" or "public."

Indeed, courts conduct in camera review precisely to *prevent* information from being divulged unnecessarily. Hence, trade secret owners do not 'divulge' their intellectual property when they submit it to a court for in camera review. On the contrary, the trade secrets remain valid because submitting them to a court for in camera review does not make the information "generally known to the public or to other persons" but rather counts as "reasonable under the circumstances to maintain its secrecy."

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(Cal. Civ. Code, § 3426.1, subd. (d).) Similarly, public officials do not 'divulge' anything when they submit records to a court for in camera review pursuant to the California Public Records Act to determine whether those records should be made public. (See Cal. Gov. Code, § 7923.105, subd. (a).) Legislative committees do not 'divulge' anything when they do the same pursuant to California's Legislative Open Records Act. (See Cal. Gov. Code, § 9077.) And corporations do not 'divulge' anything when they submit health records to a court for in camera review pursuant to California's Health and Safety Code to determine whether those records should be disclosed. (See Cal. Health & Saf. Code, § 101875, subd. (b).)

In each of these examples, complying with a court order to undertake the secure and trusted process of in camera review is the opposite of 'divulging' information. Records that do not contain relevant or essential evidence can be returned. (Cf. Cal. Health & Saf. Code, § 101875, subd. (c) [Following in camera review, the judge "shall return the item to the corporation *without disclosing its content* . . . ." emphasis added].) And, with criminal defense subpoenas, if the court decides that information must be shared with opposing counsel, then protective orders, sealing orders, and courtroom closures can prevent follow-on disclosures. (See, e.g., Cal. Evid. Code, § 1061, subd. (b).) Far from 'divulging' anything, in camera review procedures such as that contemplated by

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California Penal Code section 1326 are designed to keep information *secret*.

Considering language that Congress has used in other confidentiality statutes only emphasizes the SCA's textual ambiguity. Confidentiality provisions in federal statutes come in three categories: those that expressly block judicial compulsory process, those that expressly subject information to judicial compulsory process, and those that are textually silent on the matter and therefore ambiguous as to their effect on judicial compulsory process. The SCA falls into the third category, so its effect on criminal defense subpoenas is not mentioned in the law.

Congress knows how to block valid legal process when it wants to do so. Multiple federal statutes expressly privilege or exempt information from judicial compulsory process. (See, e.g., 5 U.S.C. § 574, subd. (a) [covered possessor of information "shall not voluntarily disclose or through discovery or compulsory process be required to disclose"]; 23 U.S.C. § 407 [covered information "shall not be subject to discovery"]; 13 U.S.C. § 9, subd. (a) [covered information "shall be immune from legal process"]; 15 U.S.C. § 2055, subd. (e)(2) [covered information "shall be immune from legal process and shall not be subject to subpoena or other discovery"]; 22 U.S.C. (2000) § 3144, subd. (d) [covered information "shall be immune from legal process"]; 49 U.S.C. §§ 6307, subd. (b)(2)(B)(i)-(ii) [covered information "shall be immune from legal process"]; 42 U.S.C. § 1395kk,

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subd. (e)(4)(D) [covered information "shall not be subject to discovery"]; 42 U.S.C. § 299b-22, subd. (a) [covered information "shall be privileged and shall not be—(1) subject to a Federal, State, or local civil, criminal, or administrative subpoena . . ."]; 15 U.S.C. § 7215, subd. (b)(5)(A) [covered information "shall not be subject to civil discovery or other legal process"]; 23 U.S.C. § 148, subd. (h)(4) [covered information "shall not be subject to discovery"]; 20 U.S.C. § 9573, subd. (d)(1)(B) [covered information "shall be immune from legal process"]; 34 U.S.C. § 20110, subd. (d) [covered information "shall be immune from legal process"]; 10 U.S.C. § 613a, subd. (b) [covered information is "immune from legal process"]; 26 U.S.C. § 7525, subd. (a) [covered information is protected "to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney"]; see also *Los Angeles Unified Sch. Dist. v. Trustees of S. California IBEW-NECA Pension Plan* (2010) 187 Cal.App.4th 621, 631 ["[The California] Legislature has demonstrated that when it intends to preclude information from discovery, it is capable of saying so."] [collecting California statutes that expressly block discovery and subpoenas].)

As these examples show, Congress has many ways of expressly blocking judicial compulsory process and does so regularly. Contrary to Meta's claim, no "magic words" are necessary. (Meta Reply at p. 22.) Congress can and does use any number of express phrases to

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unambiguously bar subpoenas. It chose not to use such language in the SCA.

Congress also knows how to subject information to valid legal process when it wants to do so. To start, Congress has enacted a detailed legislative scheme – promulgated by the Judicial Conference of the United States, approved by the United States Supreme Court, and reviewed by Congress pursuant to the Rules Enabling Act – that expressly regulates how criminal and civil litigants in federal court may subpoena information possessed by third parties. (See Fed. Rules Crim. Proc., rule 17(c)(1), 18 U.S.C. ["A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates."]; Fed. Rules Civ. Proc., rule 45(a)(1)(A)(iii), 28 U.S.C. [A subpoena may "command each person to whom it is directed to . . . produce designated documents, electronically stored information, or tangible things in that person's possession . . . ."].) Those statutes set the general rule that all information is subject to valid subpoenas by default. In addition, Congress sometimes alters those default subpoena rules through confidentiality statutes that expressly subject certain information to customized forms of legal process. (See, e.g., 8 U.S.C. § 1202, subd. (f) [covered information "may be made available to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case

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pending before the court"].) Once again, Congress chose not to use such language in the SCA.

In contrast to statutes that expressly block or expressly subject information to judicial compulsory process, confidentiality provisions in statutes that are silent on disclosures pursuant to legal process are ambiguous as to their effect on such process.

The SCA falls into this third, ambiguous category. Unlike the many other federal statutes that expressly privilege or exempt information from judicial compulsory process, the word "divulge" in section 2702(a) does not expressly address compelled disclosures pursuant to lawful judicial compulsory process. Hence, it is ambiguous whether Congress intended the SCA's command to "not knowingly divulge" to function like an attorney's ethical and professional duties of confidentiality to a client, which yield to court-ordered subpoenas, or like the attorney-client privilege, which does not.

Importantly, the SCA's legislative history offers no guidance on this matter; it is also silent as to the statute's effect on subpoenas requested by criminal defendants. Nothing in the legislative history indicates that Congress intended the SCA to short-circuit normal judicial compulsory process procedures that serve the truth-seeking and fairness interests of the courts and of society. Nor is there any indication that Congress meant to

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override the balancing procedures that California's legislature and courts have devised to weigh those interests against overriding needs for secrecy.

B. The Presumption Against Preemption and the *St. Regis* Clear Statement Rule Both Favor Construing the SCA Narrowly to be Consistent with California Law and to Yield to Good Cause Criminal Defense Subpoenas.

Given the SCA's ambiguous silence as to its effect on judicial compulsory process requested by criminal defendants, two canons of statutory construction apply. The presumption against federal preemption requires that federal statutes be narrowly construed to avoid preempting state laws except in limited circumstances. Separately, the *St. Regis* clear statement rule requires that federal statutes be strictly construed to avoid suppressing evidence from the truth-seeking process of the courts. Both canons favor narrowly construing the SCA to permit criminal defendants to access evidence that is relevant to their defense using California's well-crafted subpoena rules and the privacy-protective balancing procedures that those rules contain.

1. The Presumption Against Preemption Favors Narrowly Construing the SCA to be Consistent with California Penal Code Section 1326.

The presumption against federal preemption applies especially strongly in areas like criminal subpoenas that are "traditionally regulated by the states: '[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the

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clear and manifest purpose of Congress.'" (*Viva! Internat. Voice for Animals*, *supra*, 41 Cal.4th at p. 938 [quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230].) Nonetheless, federal preemption can occur in three circumstances: if it is express, if it is implied by congressional intent to regulate an entire field of conduct exclusively, or if it is implied by an actual conflict between state and federal law. (See *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923.) Only the third avenue, conflict preemption, is potentially implicated by the SCA because there is no express preemption language in the SCA and no indication that Congress meant for this statute to wholly occupy the field. For conflict preemption to apply, it must be "impossible for a private party to comply with both state and federal requirements, or [the] state law [must stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.* at p. 923 citation omitted.)

It is not impossible for a private party to comply with both a good cause criminal defense subpoena issued pursuant to California Penal Code section 1326 and the SCA's prohibition on "divulg[ing]" the contents of a communication because submitting information to a court does not 'divulge' anything. California law merely permits the court to "order an in camera hearing to determine whether or not the defense is entitled to receive the documents." (Cal. Pen. Code, § 1326, subd. (d).) As when

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trade secret owners, public officials, legislative committees, and corporations holding health records submit information to courts for in camera review, in camera review enables the court to maintain the *secrecy* of the information. And if the court determines that information must be provided to criminal defense counsel, then protective orders, courtroom closures, and sealing orders can ensure continued confidentiality.

Nor does compliance with good cause criminal defense subpoenas pursuant to California Penal Code section 1326 stand as an obstacle to Congress's purposes in enacting the SCA. As this Court has stated, "the main goal . . . of the SCA in particular, was to update then existing law in light of dramatic technological changes so as to create a fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement." (*Facebook, Inc. v. Superior Court ("Hunter")* (2018) 4 Cal.5th 1245, 1262-63 citation omitted.) Accordingly, Congress's purposes in enacting the SCA encompassed "three themes— (1) protecting the privacy expectations of citizens, (2) recognizing the legitimate needs of law enforcement, and (3) encouraging the use and development of new technologies (with privacy protection being the primary focus)." (*Id*. at p. 1263.) Congress was particularly concerned that Fourth Amendment protections might not apply to electronic communications stored with third-party service providers and sought to create the SCA to fill that potential gap. (*Id*. at p. 1263 & fn. 15.) Nothing in the SCA's text or its legislative

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history indicates that Congress intended to restrict criminal defense subpoenas.

Enforcing good cause criminal defense subpoenas and in camera review procedures to balance defense access rights with countervailing interests in secrecy is not an obstacle to any of these congressional purposes. Compliance with criminal defense subpoenas does not stand in the way of Congress's goal of shoring up Fourth Amendment protections for the electronic age because criminal defense subpoenas co-exist with Fourth Amendment protections. Criminal defense subpoenas reach cell-site location information, papers stored in physical homes, and inspections of private premises without standing as an obstacle to Fourth Amendment protections for those same categories of information or physical spaces. Indeed, New York State has expressly codified criminal defendants' entitlement to court orders that compel access onto private property, including homes, to enable defendants to inspect "premises relevant to the subject matter of the case." (N.Y. Crim. Proc. Law § 245.30, subd. (2).) None of these defense-access procedures conflicts with Fourth Amendment protection, and neither do criminal defense subpoenas for stored electronic communications contents.

Nor would it undermine citizens' more general privacy expectations to compel Petitioners to comply with the same subpoena rules that apply to hospitals, banks, telephone service providers, credit card companies, and

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other businesses that store sensitive information about their users. Far from it, channeling criminal defense subpoenas to Petitioners would *protect* privacy because Petitioners have policies of notifying users when information about them has been subpoenaed. Meta states on its website: "Our policy is to notify people who use our service of requests for their information prior to disclosure[.]" (Information for Law Enforcement Authorities <https://about.meta.com/actions/safety/audiences/law/guidelines> [as of Feb. 10, 2025].) Snap states on its website: "Snap's policy is to notify our users when we receive legal process seeking disclosure of their records." (Information for Law Enforcement <https://values.snap.com/safety/safety-enforcement> [as of Feb. 10, 2025].) This notice enables individuals to move to quash a criminal defense subpoena and have the court weigh any privacy interests at stake against the defendant's need for the information. (*Touchstone*, *supra*, 10 Cal.5th at p. 346.).

As for Congress's goal of recognizing "the legitimate needs of law enforcement," (*Hunter*, *supra*, 4 Cal.5th at p. 1263.), enforcing good cause criminal defense subpoenas serves rather than conflicts with law enforcement needs for truth-seeking, fairness, and justice. Law enforcement has an interest in the integrity of their convictions. This includes avoiding convicting the innocent and avoiding needless reversals on appeal, both of which will surely result if this Court construes the SCA

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as an absolute bar on criminal defense subpoenas that prevents defense lawyers from being effective and forces them to fail to investigate their clients' cases. The People's own argument in this case urging the Court to hold that Petitioners "cannot use the SCA to avoid compliance with an otherwise lawful subpoena" (People Answer at p. 11.) shows that construing the SCA to be consistent with California's criminal subpoena laws would enhance rather than undermine the legitimate needs of law enforcement.

Finally, there is no evidence that enforcing good cause criminal defense subpoenas for information that a court will consider via in camera review would discourage people from using Meta or Snap, which are among the most used social networks in the world. Few people expect to be subject to an investigation *ex ante*. Those who do are more likely to be chilled from using social media by the prospect of law enforcement access than that of a criminal defense attorney. For the vast majority of Meta's 3.35 billion daily active users, and Snap's 453 million daily active users, such concerns are unlikely to be salient to their decision to use social media. (Cumulative Number of Daily Meta Product Users <https://www.statista.com/statistics/1092227/facebook-product-dau/> [as of Feb. 15, 2025]; Number of Daily Active Snapchat Users <https://www.statista.com/statistics/545967/snapchat-app-dau/> [as of Feb. 15, 2025].). Enforcing good cause criminal defense subpoenas to hospitals,

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banks, telephone service providers, credit card companies, and other businesses does not discourage people from using those services, and it will not discourage people from using social media either.

California's well-constructed procedures for balancing criminal defense subpoenas with competing privacy interests do not conflict with either the plain text of the SCA or Congress's goals in enacting it. This Court should apply the presumption against preemption and narrowly construe the SCA to be consistent with California law.

2. The St. Regis Clear Statement Rule Favors Narrowly Construing the SCA to Not Create an Absolute Privilege for the Internet.

The other canon of statutory construction that applies in this case is the *St. Regis* clear statement rule. The United States Supreme Court has instructed courts not to construe a federal statute to block otherwise valid subpoenas unless the plain text of the statue clearly indicates congressional intent to immunize information from legal process. The Court announced this clear statement rule in *St. Regis Paper Company v. United States* (1961) 368 U.S. 208, stating that courts considering a federal statute have a "duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result. . . . Indeed, when Congress has intended [information] not to be subject to compulsory process it has said so." (*Id*. at p. 218.)

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Subsequent cases clarified that a federal statute can satisfy the clear statement rule in two circumstances: if it contains express privilege language blocking legal process (see *Pierce County v. Guillen* (2003) 537 U.S. 129, 145.), or by implication if it "embod[ies] explicit congressional intent to preclude *all* disclosure" of covered information, and thus establishes such a "strong policy of nondisclosure [that it] indicates that Congress intended the confidentiality provisions to constitute a 'privilege' within the meaning of the Federal Rules" (*Baldrige v. Shapiro* (1982) 455 U.S. 345, 361 emphasis in original.)

The SCA does not contain express privilege language blocking legal process. The Supreme Court has provided at least three examples of federal statutes that do. One stated that covered information "shall [not] be admitted as evidence or used for any purpose in any suit or action for damages." (*St. Regis*, *supra*, 368 U.S. at p. 218 n.8.) Another stated that "no [covered information] shall be admitted as evidence, or used for any purpose, in any suit or action for damages." (*Id.* at p. 218 n.9.) The third stated that covered information "shall not be subject to discovery" and "shall not be . . . admitted into evidence." (*Pierce*, *supra*, 537 U.S. at p. 145.) The SCA has no such language. It is totally silent regarding courts' normal powers of judicial compulsory process. Therefore, the SCA cannot satisfy the *St. Regis* clear statement rule via the express language route.

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The SCA also does not imply a privilege by embodying "explicit congressional intent to preclude *all* disclosure" of covered information. (*Baldrige*, *supra*, 455 U.S. at p. 361.) On the contrary, the SCA's confidentiality provision has a plethora of exceptions permitting service providers to divulge stored electronic communications in an array of circumstances, including to addressees, intended recipients, and their agents; with consent from a variety of different possible people; to employees, "authorized" persons, and people whose facilities are used to provide a service; when divulgences are "incident" to protect a service provider's rights or property; and to law enforcement, other governmental entities, and foreign governments under various conditions. (See 18 U.S.C. § 2702, subd. (b).) Far from establishing such a "strong policy of nondisclosure [that it] indicates that Congress intended the confidentiality provisions to constitute a 'privilege' within the meaning of the Federal Rules" (*Baldrige*, 455 U.S. at p. 361.), the SCA's plethora of exceptions establishes a *weak* policy of nondisclosure offering no indication that Congress intended to create an absolute privilege against criminal defense subpoenas.

The United States Supreme Court has provided one example of statutory text that implied a privilege by embodying "explicit congressional intent to preclude *all* disclosure" of covered information. (*Baldrige*, 455 U.S. at p. 361 emphasis in original.). *Baldrige* concerned "lists of addresses

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collected and utilized by the Bureau of the Census" that contained "raw census data pertaining to particular individuals." (*Id*. at pp. 347, 349.). The United States Supreme Court held that two sections of the Census Act, codified at 13 U.S.C. § 8, subd. (b) and 13 U.S.C. § 9, subd. (a), prohibited disclosure of the address lists in response to either a Freedom of Information Act or a civil discovery request. (*Id*. at pp. 354-56, 360.)

The pertinent portion of section 8(b) stated that the Secretary of Commerce must "***not disclose the information*** reported by, or on behalf of, any particular [census] respondent . . . ." (13 U.S.C. § 8, subd. (b), emphasis added [quoted in *Baldrige*, 455 U.S. at p. 354].). The pertinent portions of section 9(a) stated:

> Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, or local government census liaison, may, ***except as provided in section 8*** of this title –
>
> 1) ***use the information*** furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> 2) ***make any publication*** whereby the data furnished by any particular establishment or individual under this title can be identified . . . .
>
> (13 U.S.C. § 9, subd. (a)(1), emphasis added [quoted in *Baldrige*, 455 U.S. at p. 354-55].).

That statutory language was nothing like the SCA for at least two reasons. *First,* section 8(b) expressly mandated that the Census Bureau

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must "not *disclose*" information (13 U.S.C. § 8, subd. (b), emphasis added.), whereas the SCA merely contains an ambiguous prohibition on "divulg[ing]" information. (18 U.S.C. § 2702, subd. (a).) *Second*, unlike the SCA's plethora of exceptions, section 8(b)'s nondisclosure mandate contained no exceptions whatsoever. Meanwhile, the *Baldrige* opinion noted that the pertinent portions of section 9(a) contained only one narrow exception for statistical uses that did not reveal the raw census data. (*Baldrige*, 455 U.S. at p. 356 ["The Secretary is prohibited from using the 'information' except for statistical purposes . . . ."].)[2] Hence, in sharp contrast to the SCA, sections 8(b) and 9(a) of the Census Act really did "preclude *all* disclosure."

The SCA's prohibition on divulgence is thus distinguishable from the Census Act prohibition on disclosure, and the SCA cannot satisfy the *St. Regis* clear statement rule via the implied privilege route from *Baldrige*.

[2] Although the *Baldrige* opinion does not mention this, one other exception arguably applied to the section 9(a) prohibitions on use and publication. Section 8(a) permitted the Secretary to furnish a census respondent with "authenticated transcripts or copies of reports (or portions thereof) containing information furnished by, or on behalf of, such respondent . . . ." (13 U.S.C. § 8, subd. (a).) Hence, the Secretary could have returned the address list data to the people who provided it in the first place. That additional possible exception was so narrow that it does not undermine the *Baldrige* holding that the Census Act has a "strong policy of nondisclosure," which is readily distinguishable from the plethora of exceptions in the SCA.

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This Court should instead construe the SCA narrowly to be consistent with California's normal subpoena procedures.

St. Regis's clear statement rule prevails over the *expressio unius* canon advanced by Meta. (Meta Reply at p. 22.). (See, e.g., *Roeder v. Islamic Republic of Iran* (D.C. Cir. 2011) 646 F.3d 56, 62 [*expressio unius* is insufficient to overcome a clear statement rule]; *Arabian Motors Grp., W.L.L. v. Ford Motor Co*. (6th Cir. 2019) 775 F. App'x 216, 219 [same].) Even if it did not, *expressio unius* cannot resolve the issue in this case. The logic of *expressio unius* is that when Congress knows how to write something and did not, courts should presume the omission was intentional. Here, that logic cuts both ways. Although it is true that Congress knows how to create express exceptions to confidentiality rules and did not create one in the SCA for subpoenas requested by criminal defendants, Congress also knows how to create express privileges barring compulsory process and did not create one in the SCA for subpoenas requested by criminal defendants. (Cf., *Hardt v. Reliance Standard Life Ins. Co.* (2010) 560 U.S. 242, 252 ["Congress knows how to impose express limits on the availability of attorney's fees in ERISA cases. Because Congress failed to include in § 1132(g)(1) an express 'prevailing party' requirement, the Fourth Circuit's decision adding that term of art to the statute more closely resembles 'invent[ing] a statute rather than interpret[ing] one.'"].)

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Notably, this Court has established a canon of narrow construction for state statutes that bar compulsory process that is similar to the *St. Regis* clear statement rule. (See *People v. Sinohui*, (2002) 28 Cal.4th 205, 212 ["Because privileges prevent admission of relevant and otherwise admissible evidence they should be narrowly construed."] citations omitted.).

Therefore, this Court should apply the *St. Regis* clear statement rule and its own narrow construction mandate from *Sinohui* to construe the SCA as consistent with the carefully crafted balance in California subpoena law between criminal defendants' interests in accessing relevant evidence and overriding interests in keeping some information secret.

C. Three Federal Circuits Have Narrowly Construed Similar Statutory Text as Consistent with Judicial Compulsory Process.

The United States Courts of Appeal for the Ninth, Tenth, and Eleventh Circuits have all narrowly construed federal confidentiality statutes that are very similar to the SCA as *permitting* disclosures pursuant to court-ordered discovery and to serve truth-seeking interests in criminal proceedings. All three federal circuits considered the following statutory text from the Immigration Reform and Control Act (IRCA), codified at 8 U.S.C. § 1255a, or text from the IRCA that is codified at 8 U.S.C. § 1160 and is identical in all relevant respects:

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Confidentiality of Information

> Neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may--
>
> (A) ***use the information*** furnished pursuant to an application filed under this section for any purpose other than to make a determination on the application or for enforcement of paragraph (6) or for the preparation of reports to Congress under section 404 of the Immigration Reform and Control Act of 1986,
>
> (B) make any ***publication whereby the information*** furnished by any particular individual can be identified, or
>
> (C) ***permit anyone*** other than the sworn officers and employees of the Department or bureau or agency or, with respect to applications filed with a designated entity, that designated entity, ***to examine individual applications***; except that the Attorney General may provide, in the Attorney General's discretion, for the furnishing of information furnished under this section in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of Title 13.
>
> (8 U.S.C. (1992) § 1255a, subd. (c)(5), emphasis added.)

This text is remarkably similar to that of the SCA because both statutes impose broad confidentiality mandates followed by a plethora of enumerated exceptions but silence regarding disclosure pursuant to judicial compulsory process. Regarding confidentiality, the SCA prohibits service providers from 'divulging' communications contents (18 U.S.C. § 2702, subd. (a).), while the IRCA prohibits the Department of Justice from 'using' or 'publishing' information and from "permit[ting] anyone . . . to examine individual applications" (8 U.S.C. § 1255a, subd. (c)(5)(A)-(C).).

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Regarding enumerated exceptions, the SCA expressly authorizes 'divulgences' in a wide array of circumstances, including "to an addressee," to employees, and as "necessarily incident to the rendition of the service[.]" (18 U.S.C. § 2702, subd. (b).) Similarly, the IRCA expressly authorizes 'use' of information in three circumstances: making "a determination on the application," enforcing "penalties for false statements in applications," and preparing "reports to Congress." (8 U.S.C. § 1255a, subd. (c)(5)(A).) It also expressly authorizes 'examination' of applications in three circumstances: by "sworn officers and employees," by a "designated entity," and in the same manner as "census information" disclosures (8 U.S.C. § 1255a, subd. (c)(5)(B).). Neither statute contains an express exception for standard judicial compulsory process.

As described in detail below, the Ninth Circuit narrowly construed the IRCA's prohibition on "use" or "publication" of information as not barring court-ordered discovery. The Tenth Circuit narrowly construed the IRCA's prohibition on "use" or "publication" of information as not barring the introduction of information into evidence in a criminal trial. And the Eleventh Circuit narrowly construed the IRCA's prohibition on "permit[ting] anyone . . . to examine individual applications" as not barring court-ordered discovery.

More specifically, the Ninth Circuit construed the IRCA in a class action suit against the Immigration and Naturalization Service (INS), which

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was an agency of the Department of Justice. In *Zambrano v. I.N.S* (9th Cir. 1992) 972 F.2d 1122, a federal district court "ordered the INS to provide a list of the names and addresses of [noncitizens who applied for amnesty pursuant to the IRCA] to the court and the class counsel." (*Id.* at p. 1124.) In other words, this was a court order to disclose "information furnished pursuant to an application" that would identify "particular individual[s]," so it potentially conflicted with the IRCA's prohibitions on "use" and "publication." Accordingly, the INS argued that the IRCA acted "as a complete bar to the disclosure of the names to the district court and class counsel." (*Id.* at p. 1125.) Instead, the Ninth Circuit held that the IRCA's "confidentiality provision is not violated by [] court ordered discovery" because it "does not specifically prohibit judicial disclosure." (*Id.* at p. 1125-26.) The Ninth Circuit reasoned that "statutes prohibiting general disclosure of information do not bar judicial discovery absent an express prohibition against such disclosure." (*Id.* at p. 1125 citations omitted.) Applying the same reasoning to the SCA would mean that the SCA's prohibition on 'divulging' communications contents does not bar judicial discovery because it does not expressly prohibit such disclosure.

The Tenth Circuit construed the IRCA in a criminal case in *United States v. Hernandez* (10th Cir. 1990) 913 F.2d 1506. Zenon Hernandez was convicted by a jury of making false statements in connection with the acquisition of a firearm and receiving a firearm while illegally in the United

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States. (*Id.* at p. 1509.) To prove that Hernandez was in the country illegally, the government introduced into evidence a "computer printout from the INS indicat[ing] that Hernandez applied for amnesty to legalize his immigration status[.]" (*Id*.) The printout revealed individually-identifying information that Hernandez had "provided in the context of [his] application" (*id.* at p. 1511.), so it potentially conflicted with the IRCA's prohibitions on "use" and "publication." On appeal, Hernandez argued that the IRCA prohibited the government from introducing this evidence. (*Id.* at p. 1510.) The Tenth Circuit acknowledged that "[o]ne reading of the statute would suggest that *any* disclosure of information is prohibited" (*id.* at p. 1511.), but reasoned that the statutory language was "somewhat ambiguous as to the scope of the confidentiality requirement" (*id.* at p. 1511.). Given this ambiguity, the Tenth Circuit consulted the legislative history of the statute and found that the "legislative history does not indicate that Congress sought to restrict disclosure of such applications" in run-of-the-mill criminal proceedings. (*Id.* at p. 1512.) As a result, the Tenth Circuit held that the IRCA did not bar introducing the printout as evidence in court. (*Id*.)

Applying the same reasoning to the SCA would mean that, since the SCA's prohibition on 'divulging' is also ambiguous as to scope, and since the SCA's legislative history never indicates that Congress intended to

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restrict standard judicial compulsory process, the SCA does not bar subpoenas requested by criminal defendants.

The Eleventh Circuit construed the IRCA in another class action suit against the INS. In *In re Nelson* (11th Cir. 1989) 873 F.2d 1396, a federal district court ordered the INS to grant plaintiffs "access to files of applicants for Special Agricultural Worker ("SAW") status." (*Id.* at p. 1397.) In other words, this was a court order to disclose application files, so it potentially conflicted with the IRCA's prohibition on "permit[ting] anyone . . . to examine individual applications." The INS argued that "the district court's order violates the confidentiality requirement embodied in [the IRCA], which prohibits Justice Department officials from disclosing information from files of SAW applicants." (*Id.*) The Eleventh Circuit responded to the statute's textual ambiguity by consulting its legislative history and concluded that: "There is no indication that Congress intended to prohibit disclosure of SAW application files in judicial proceedings . . . . The district court's protective order restricting use of the information for purposes of discovery and trial preparation adequately ensures that disclosure will be limited to counsel and their assistants." (*Id*.) Hence, the Eleventh Circuit held that the IRCA's prohibition on "permit[ting] anyone . . . to examine individual applications" does not bar court-ordered discovery of individual applications. (*Id*.) Applying the same reasoning to the SCA would mean that the SCA's prohibition on 'divulging'

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communications contents does not bar court-ordered discovery of communications contents.

Meta's attempt to distinguish these persuasive precedents from three different United States Courts of Appeal falls flat. To start, Meta inexplicably ignores that the IRCA prohibited the Department of Justice from "permit[ting] anyone . . . *to examine* individual applications," and erroneously contends that the text "precluded only the '*use*' or '*publication*' of immigration information." (Meta Reply at p. 23.) This is not true. In addition to prohibiting the "use" and "publication" of information, the IRCA's text also prohibits the "examination" of applications.

Meta's omission is particularly strange for three reasons. *First*, the Tenth Circuit made it hard to miss the "to examine" statutory language by quoting that language in the main text of its opinion. (See *Hernandez*, 913 F.2d at p. 1511.) *Second*, the Eleventh Circuit's holding applied directly to the "to examine" language because the court ruled that the IRCA does not bar court-ordered discovery of "SAW *application files*." (*In re Nelson*, *supra*, 873 F.2d at p. 1397, emphasis added.) *Third*, the Tenth Circuit's opinion also implicated the "to examine" language because, while the computer printout at issue in that case was not a full application file, the court's reasoning addressed applications, not merely information. (See *Hernandez*, 913 F.2d at p. 1512 ["[Congress's] concern is not implicated

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when the *application* is disclosed to a United States Attorney in a collateral criminal prosecution . . .” emphasis added].)

Meta relies on its curious omission of the “to examine” language to argue that the Ninth, Tenth, and Eleventh Circuit cases “say nothing about statutory language, like the SCA’s, that prohibits the *disclosure* of information—because one could disclose information in response to a subpoena without ‘using’ or ‘publishing’ it.” (Meta Reply at p. 23.) But the SCA’s statutory language does not prohibit the *disclosure* of information; on the contrary, it mandates that service providers “shall not knowingly *divulge*” information. (18 U.S.C. § 2702, subd. (a), emphasis added.) It is ambiguous whether the word “divulge” in the SCA includes limited and controlled disclosures pursuant to judicial compulsory process.

The Ninth, Tenth, and Eleventh Circuit cases should inform this Court’s analysis of the SCA because they show that broad statutory confidentiality provisions can be ambiguous as to their effect on disclosures pursuant to judicial compulsory process. The Ninth Circuit narrowly construed a statutory prohibition on “use” and “publication” as “not violated by [] court ordered discovery.” (*Zambrano*, *supra*, 972 F.2d at p. 1125.) The Tenth Circuit narrowly construed a statutory prohibition on “use” and “publication” as not violated by introducing information into evidence at trial. (*Hernandez*, *supra*, 913 F.2d at p. 1512.) And the Eleventh Circuit narrowly construed a statutory prohibition on

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"permit[ting] anyone . . . to examine individual applications" as not violated by court-ordered discovery. (*In re Nelson*, *supra*, 873 F.2d at p. 1397.). The principles and reasoning unifying these three courts' holdings suggest that—to paraphrase Meta—one could also disclose information in response to a subpoena without "divulg[ing]" it.

Rather than admit the logic of the Ninth, Tenth, and Eleventh Circuits, Meta points to a case from the D.C. Circuit, *In re England* (D.C. Cir. 2004) 375 F.3d 1169. But the statutory language at issue in *In re England* was distinguishable from the SCA. At the time, the statute in that case stated that board deliberations concerning military personnel promotions "may not be disclosed to any person not a member of the board." (10 U.S.C. (2000) § 618, subd. (f).) It never used the ambiguous term "divulge" that appears in the SCA. Further, the disclosure bar at issue in *In re England* had merely a narrow set of exceptions allowing the board to send reports up the chain of command to the President, exceptions which are necessary to effectuate the purpose of the statute as a whole. (See 10 U.S.C. (2000) § 618, subd. (a)-(c), (e).) The narrowness of those exceptions makes the statute similar to the one at issue in *Baldrige*, "embody[ing] explicit congressional intent to preclude *all* disclosure" (*Baldrige*, 455 U.S. at p. 361.), and nothing like the plethora of exceptions to the SCA's confidentiality provision.

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In sum, the statutory language at issue in *Zambrano*, *Hernandez*, and *Nelson* was remarkably similar to the text of the SCA, and United States Courts of Appeal for the Ninth, Tenth, and Eleventh Circuits all agreed that it did not preclude limited and controlled disclosures pursuant to lawful judicial compulsory process. (See also, Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 502A.05(I) (2d ed.) ["[S]tatutes asserted to create privileges should be construed strictly, so as to avoid suppressing otherwise competent evidence unless *no other conclusion* can be drawn from the statutory language." emphasis added].) This Court should apply similar reasoning to the SCA and conclude that the SCA is consistent with California law's careful balancing of criminal defendants' need to have access to relevant evidence to prepare their defense and the simultaneous need to protect overriding interests in secrecy.

D. Numerous Federal District Courts Have Narrowly Construed Similar Statutory Text as Consistent with Judicial Compulsory Process.

Federal district courts across the country have applied similar reasoning to the Ninth, Tenth, and Eleventh Circuits and narrowly construed confidentiality mandates in an array of other federal statutes as not barring compliance with normal judicial compulsory process. These cases show that even statutory language prohibiting "disclosure" can be ambiguous as to its effect on judicial compulsory process, and that numerous courts have construed such ambiguous language narrowly to be

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consistent with the truth-seeking procedures of the courts. (See, e.g., *In re Nassau Cnty. Strip Search Cases* (E.D.N.Y. July 26, 2017) No. 99-cv-2844, WL 3189870 at pp. *2 & *6 [Statutory prohibitions on "the use or disclosure of information" did not block court-ordered discovery because the text never "specifically provides that information is not subject to discovery."]; *Rodriguez v. Robbins* (C.D. Cal. May 3, 2012) No. 07-cv-3239, WL 12953870, at pp. *2-*3 [Statutory prohibitions on "permit[ting] use by or disclosure to anyone" did not block legal process because "statutory provisions, generally forbidding disclosure of information, do not bar judicial discovery absent an explicit prohibition against such disclosure."]; *Hassan v. United States* (W.D. Wash. Mar. 15, 2006) No. C05-1066C, WL 681038, at pp. *2-*3 [Statutory requirement to "limit the use or disclosure of information" did not block legal process because "statutes prohibiting general disclosure of information do not bar judicial discovery absent an express prohibition against such disclosure."]; *Chaplaincy of Full Gospel Churches v. England* (D.D.C. 2006) 234 F.R.D. 7, 12 [Statute stating that protected information "may not be disclosed to any person" did not block legal process because of "the well established requirement that statutory bars to discovery be made expressly."]; *Seales v. Macomb Cnty.* (E.D. Mich. 2005) 226 F.R.D. 572, 575-76 [Statute designating information "confidential," safeguarding "disclosure of this information," and mandating that it "not be made public," did not block

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legal process because "[s]tatutory provisions providing for duties of confidentiality do not automatically imply the creation of evidentiary privileges binding on courts."]; *Wilkins v. United States* (S.D. Cal. Dec. 23, 2004) No. 99-cv-1579, U.S. Dist. LEXIS 29428, at pp. *16-*17 [observing that courts must "avoid construing a confidentiality provision in a statute as barring disclosure for discovery purposes unless the statute clearly requires such suppression"]; *In re Grand Jury Subpoena Duces Tecum* (W.D. Va. June 12, 2001) No. 101-mc-00005, WL 896479, at pp. *3-*4 [construing a statutory requirement to "limit the use or disclosure of information," the court reasoned that, "based on my duty to strictly construe statutes purporting to create new privileges, I find that the statutes and regulations at issue here do not create a statutory privilege[.]"].)

In sum, even statutory prohibitions on "disclosure" do not always unambiguously bar compliance with judicial compulsory process. The SCA's vague prohibition on "divulg[ence]" is more ambiguous still.

E. California Courts Have Narrowly Construed Similar California Statutes as Consistent with Judicial Compulsory Process.

California courts have also narrowly construed confidentiality provisions in state statutes as not blocking normal judicial compulsory process, thereby maintaining the proper balance between criminal defendants' ability to investigate evidence that they need for their defense and countervailing interests in secrecy.

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In *White v. Superior Court*, (2002) 102 Cal.App.4th Supp. 1, a criminal defendant subpoenaed the Inspector General for information protected by the following statutory text:

> [T]he information provided shall be held as confidential by the Inspector General and ***may be disclosed***, in confidence, ***only to*** the secretary, the Governor, the appropriate director or chair, or a law enforcement agency in the furtherance of their duties.
>
> (Cal. Pen. Code (2002) § 6128, subd. (a), emphasis added.)

In other words, the statute prohibited 'disclosure' except to an enumerated list of recipients that did not include criminal defendants pursuant to a subpoena. Nonetheless, the California Court of Appeal for the Fourth District held that the statute did not bar enforcement of the defendant's subpoena. The court reasoned that, "[a]lthough the statute places limitations on public disclosure, it does not create an evidentiary privilege against all disclosure." (*White*, *supra*, 102 Cal.App.4th Supp. at pp.*5-*6.) The Fourth District thus affirmed the view that, whenever possible, courts should narrowly construe confidentiality statutes to be consistent with truth-seeking interests in criminal investigations. (See also *Los Angeles Unified Sch. Dist. v. Trustees of S. California IBEW-NECA Pension Plan* (2010) 187 Cal.App.4th 621, 629-30 [statute requiring a covered entity "to prevent disclosure of" protected information yielded to discovery in civil litigation because to block legal process, a statute must "not only restrict[] disclosure, but include[] some additional indicia that the Legislature

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intended to restrict disclosure even in the context of litigation."]; *DMV v. Superior Court* (2002) 100 Cal.App.4th 363, 366 [statute providing that certain DMV records "are confidential" did not bar subpoenas].)

As all these cases show, the effect of SCA section 2702(a)'s 'divulgence' language on criminal defense subpoenas is ambiguous. A multitude of other courts have construed similar statutory language as yielding to valid judicial compulsory process. This Court should do the same and rule that the SCA is consistent with California law.

IV. Misconstruing the SCA as Blocking all Subpoenas Would Create an Outlier Privilege for a *Medium* of Communication, Without Regard to the Relationship Between the Communicants or the Sensitivity of their Communications.

Misconstruing the SCA to block so-ordered criminal defense subpoenas, rather than merely to protect confidentiality in circumstances other than court-ordered in camera review, would create a vast and unprecedented privilege immunizing an entire *medium* of communication from the court's truth-seeking process, without regard to the communicants' purpose, topic, or expectations of confidentiality. The result would undermine judicial truth-seeking with no clear societal benefit.

Barring exceptional topical privileges like military and trade secrets, privileges protect narrow categories of communications arising out of specific relationships. The attorney-client privilege and spousal privilege apply solely to communications between a lawyer and a client or between

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spouses respectively, and solely to communications made in confidence in reliance on that relationship. (See, e.g., Cal. Evid. Code, §§ 954, 980.) The statutory privilege in *Baldrige* also protected a specific relationship between citizens and the Census Bureau for the purpose of facilitating census reporting. (*Baldrig*e, 455 U.S. at p. 354.)

But the SCA is neither topic nor relationship specific. There is no indication in the SCA's text or legislative history that Congress intended it to create a novel "medium privilege" for any and all communications that happen to be sent over the Internet. If service providers want a special exemption from the burdens of complying with judicial process that other business, private persons, and even Presidents must bear (cf. *Trump* v. *Vance* (2020) 591 U.S. 786, 810 ["[N]o citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding."].), then the service providers can ask Congress to grant them such a privilege via unambiguous statutory text. In the meantime, courts should not construe ambiguous silence in the SCA to gift such special treatment to technology markets.

V. Mr. Pina's Privilege Law Argument is not Forfeited Because Petitioners put Privilege Law at Issue in the Superior Court, the Court of Appeal, and this Court by Claiming that the SCA Blocks Mr. Pina's Subpoena.

Petitioners made privilege law the central issue in this case in the Superior Court, the Court of Appeal, and this Court when they claimed that

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the SCA's confidentiality provision blocks compulsory process. (Meta Br. at pp. 13, 15; Snap Br. at p. 21.) Petitioners' claim that the SCA blocks Mr. Pina's subpoena is a claim of privilege because construing a statute to block compulsory process creates a privilege. (See, e.g., *Touchstone*, *supra*, 10 Cal.5th at p. 348 [Criminal defendants are "ordinarily entitle[d] . . . to pretrial knowledge of any *unprivileged* evidence . . . ." emphasis added]; *DMV v. Superior Court*, *supra*, 100 Cal.App.4th at p. 509 ["Absent a statutory privilege, no person has a privilege to refuse to produce a writing in a legal proceeding."]; *White*, *supra*, 102 Cal.App.4th Supp. at p. *4 ["Under California law, if good cause has been shown for the production of a writing in a legal proceeding, no person has a right to refuse production of the writing in the absence of a statutory privilege permitting such refusal."]; Cal. Civ. Pro § 2017.010 ["Any party may obtain discovery regarding any matter, *not privileged*, that is relevant to the subject matter involved in the pending action." emphasis added]; Graham & Murphy, Fed. Practice & Proc. § 5437 [A statute's text creates a privilege when it "makes . . . information immune from process."]; Black's Law Dictionary (11th ed. 2019) [defining "evidentiary privilege" as a protection that "allows a specified person to refuse to provide evidence . . . "].) Thus, upholding Petitioners' claim would require this Court to read the SCA's ambiguous silence as impliedly creating a privilege.

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Petitioners' privilege claim has been central to every brief that they have filed in this case from the start because, if the SCA does not create a privilege and instead yields to lawful judicial process, then Petitioners would have to comply with Mr. Pina's subpoena regardless of whether they fall within the definition of an "electronic communication service" or "remote computing service" under the SCA. (18 U.S.C. § 2702, subd. (a)(1)-(2).)

Given that Petitioners are the ones who put privilege law at issue at every stage of this case, it is incorrect and unreasonable for them to argue that Mr. Pina forfeited the right to respond by not using the magic word "privilege" in his prior filings. On the contrary, under both the presumption against preemption and the *St. Regis* clear statement rule, it is Petitioners' burden to prove that the SCA's confidentiality provision does not yield to lawful judicial process despite the plethora of similarly worded statutes that do, and it was Petitioners' burden to prove this claim in the Superior Court and the Court of Appeal. (See *Viva! Internat. Voice for Animals*, *supra*, 41 Cal.4th at p. 936 ["[C]ourts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it."] citation omitted; *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 730 ["The party claiming an evidentiary privilege carries the burden of showing that the evidence it seeks to suppress is within the terms of the statute."] citations omitted; *United States v. Zolin* (9th Cir. 1987) 809 F.2d

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1411, 1415 overruled on other grounds by *United States v. Jose* (9th Cir. 1997) 131 F.3d 1325 [“The burden of demonstrating the existence of an evidentiary privilege rests on the party asserting the privilege.”].) Petitioners failed to satisfy that burden below and they have failed to satisfy it in this Court as well.

This Court need not reach any other issue to resolve this dispute.

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CONCLUSION

For the foregoing reasons, we urge the Court to affirm the Court of Appeal and enforce Mr. Pina's good cause subpoena by holding that 18 U.S.C. § 2702(a) is consistent with California law governing judicial compulsory process requested by criminal defendants and does not preempt the type of in camera review procedure indicated by California Penal Code section 1326. (Cal. Pen. Code, § 1326, subd. (d).)

Dated: February 24, 2025

Respectfully submitted,

By /s/ Chesa Boudin

Chesa Boudin (SBN: 284577)

Criminal Law & Justice Center
UC Berkeley School of Law
Berkeley, CA 94720-7200
Email: Chesa@berkeley.edu
Telephone: 510-664-4551

Counsel for *Amicus Curiae*

Twenty-Three Law Professors

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CERTIFICATE OF COMPLIANCE

(California Rules of Court, rule 8.520(c)(1))

I certify that the attached Amicus Curiae Brief of Twenty-Three Law Professors uses a 13-point Times New Roman font and contains 10,471 words as counted by the Microsoft Word program used to generate this brief.

Dated: February 24, 2025

Respectfully submitted,

By /s/ Chesa Boudin

Chesa Boudin (SBN: 284577)

Criminal Law & Justice Center
UC Berkeley School of Law
Berkeley, CA 94720-7200
Email: Chesa@berkeley.edu
Telephone: 510-664-4551

Counsel for *Amicus Curiae*

Twenty-Three Law Professors

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