No. 20-1474

IN THE

Supreme Court of the United States

JOSEPH COLONE,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
SAN FRANCISCO COUNTY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF OF THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, THE AMERICAN COUNCIL OF CHIEF DEFENDERS, THE NATIONAL DEFENDER INVESTIGATION ASSOCIATION, THE INNOCENCE PROJECT AND 25 OTHER INDIGENT DEFENSE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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(New) Orleans Public Defenders

New York County Defender Services

New York State Association of Criminal Defense Lawyers

Office of the Appellate Defender (New York)

Salt Lake Legal Defender Association

San Francisco Public Defender's Office

The Bronx Defenders

The California Public Defenders Association

The Center for Appellate Litigation

The Dallas County Public Defender's Office

The Federal Defender for the District of Arizona

The Federal Defender for the Eastern District of California

The Harris County Public Defender's Office

The Legal Aid Society (New York)

The Lubbock Private Defenders Office

The Maryland Office of the Public Defender

The National Defender Investigation Association

The New Jersey State Office of the Public Defender

The Public Defender Service for the District of Columbia

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STATEMENT OF INTEREST[1]

Amici are a nationwide group of public defender offices, public interest organizations, professional associations of criminal defense attorneys, and other indigent defense organizations. Through their work collectively representing tens of thousands of people in trial, appellate, and post-conviction proceedings every year, they grapple daily with the devastating implications of being denied access to critical evidence possessed by social media companies. *Amici* have a direct interest in preserving judges' authority to compel production of relevant and potentially exculpatory evidence, regardless of whether that evidence is stored on social media platforms or elsewhere.

SUMMARY OF ARGUMENT

The decision below invented an unqualified evidentiary privilege for "electronic communication service" providers, including social media companies, without basis in statutory text or legislative history. Contrary to the presumption against implied privileges, reiterated by this Court in *St. Regis Paper Co. v. United States*,[2]

1. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.

2. 368 U.S. 208, 218 (1961) (courts should avoid interpreting statutes to bar compulsory process "unless the statute, strictly construed, requires such a result" because when Congress has

the lower court interpreted textual silence in the Stored Communications Act (SCA), 18 U.S.C. § 2701 *et seq.*, to bar courts from enforcing defense subpoenas to social media companies for content in virtually every circumstance, without imposing any analogous constraint on law enforcement.[3] Thus, the lower court's interpretation denies defendants access to essential, potentially exculpatory evidence simply because that evidence happens to be stored on social media platforms. For the accused, if it is online, it is off-limits.

This reading of the SCA is wrong. It is atextual, reading into statutory silence an implicit rejection of foundational common law principles in direct contravention of settled canons of interpretation. It is also illogical, erecting an impenetrable barrier to essential evidence that just so happens to exist in the cloud, even though the same type of evidence is readily accessible via court-issued subpoenas when printed or captured in some other medium. And it is pernicious, undermining the courts' truth-seeking function and centuries-old precedent emphasizing the value of compulsory process. As this capital case demonstrates, the consequences of this textually unanchored construction can be a matter of life or death.

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intended for material "not to be subject to compulsory process it has said so.")

3. The statute expressly authorizes "voluntary" disclosure of content to non-governmental requestors where (a) the originator, addressee, intended recipient, or subscriber consents or (b) the requesting party was the addressee or intended recipient of the content. *See* 18 U.S.C. § 2702(b).

When read to create an implicit privilege, the SCA severely frustrates, and sometimes wholly defeats, defendants' basic right to present evidence on their own behalf. This result is real, not hypothetical, as *amici*'s experiences representing criminal defendants in a broad range of cases show. People seeking to present defenses, including credible claims of innocence, are blocked from accessing evidence that even a presiding trial judge has found to be material, such as an exculpatory statement by an eyewitness or evidence implicating a true perpetrator.

As *amici*'s experiences also establish, the lower court's interpretation unnecessarily disempowers judges. Long-existing procedures enable judges to safeguard sensitive yet crucial evidence like medical and mental health records—both pre-production, through review of requests for subpoenas and decisions on motions to quash, as well as post-production, through redaction and protective orders where appropriate. Those time-tested and judicially-managed processes offer more than adequate protection for the Instagram photos, Twitter messages, Facebook videos, and other content encompassed by the SCA.

ARGUMENT

I. GRANTING CERTIORARI IS NECESSARY TO PRESERVE COURTS' TRUTH-SEEKING FUNCTION.

This case involves 21st century technology but touches on 18th century rights so fundamental to the adversarial, truth-seeking process that they are written into the fabric of our legal system. *Washington v. Texas*, 388 U.S. 14, 19-20 (1967) ("[T]he Framers of the Constitution felt it necessary

specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury."); *see also United States v. Burr*, 25 F. Cas. 187, 192 (No. 14,694) (C.C.D. Va. 1807) ("Yet it is a very serious thing, if such letter [belonging to President Jefferson] should contain any information material to the defence, to withhold from the accused the power of making use of it."); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). Indeed, defendants' access to compulsory process is "imperative" to the function of the courts. *United States v. Nixon*, 418 U.S. 683, 709 (1974).

As explained below, access to evidence on social media platforms is becoming increasingly essential to a meaningful defense. Just as with other, far more sensitive, categories of discovery, judges are well-equipped to balance and protect all interests involved.

A. Social Media Evidence Is Increasingly Essential to a Meaningful Defense.

Courts' interpretation of the Stored Communications Act (SCA) carries momentous implications for the ability of people across the country to defend themselves against criminal accusations. As the type and amount of material shared online balloons, evidence obtained from social media plays an increasingly prominent role in criminal trials. For instance, in 2013, law enforcement agencies made 23,598 requests for material from Facebook alone. In 2019, they made 101,862 requests. *See* Transparency, United States, *available at* https://transparency.facebook.

com/government-data-requests/country/US/jan-jun-2020 (last visited May 10, 2021). Courts around the country are flush with cases in which evidence obtained from social media features as central, and occasionally the only, evidence against the accused.[4]

Social media content holds equal, if not even greater, import for the accused mounting a defense. Yet, unlike law enforcement, they are regularly denied access to messages, photos, and videos essential to their defenses based on the extrapolative interpretation of the SCA accepted by the court below. *Amici* commonly encounter cases where expired Instagram "stories," deleted messages, and photos shared only with "friends" contain valuable and potentially exculpatory evidence that remains inaccessible absent production by the social media company. *See* Jeffrey D. Stein, *Why Evidence*

4. *See, e.g.*, *United States v. González-Barbosa*, 920 F.3d 125, 130 (1st Cir. 2019) (relying on social media posts as evidence); *United States v. Pierce*, 785 F.3d 832, 840-41 (2d Cir. 2015) (Facebook photos and video); *United States v. Stoner*, 781 Fed. Appx. 81, 86 (3d Cir. 2019) (YouTube video); *United States v. Denton*, 944 F.3d 170, 175 (4th Cir. 2019) (Facebook messages); *United States v. Madrid*, 676 Fed. Appx. 309, 315 (5th Cir. 2017) (Facebook photo); *United States v. Farrad*, 895 F.3d 859, 864 (6th Cir. 2018) (relying on Facebook photos without any physical evidence, eyewitness testimony, or inculpatory statements by defendant in gun possession trial); *United States v. Johnson*, 916 F.3d 579, 588 (7th Cir. 2019) (Facebook photos); *United States v. Rembert*, 851 F.3d 836, 839 (8th Cir. 2017) (Facebook video); *United States v. Barnes*, 738 Fed. Appx. 413, 416 (9th Cir. 2018) (Facebook posts); *United States v. Wilson*, No. 18-cr-263, 2021 WL 1688760, at *4 (10th Cir. Apr. 29, 2021) (Facebook photos); *United States v. Brinson*, 791 Fed. Appx. 33, 34–35 (11th Cir. 2019) (social media photos were only evidence of gun possession); *United States v. Torres*, 894 F.3d 305, 313 (D.C. Cir. 2018) (Facebook photos).

Exonerating the Wrongly Accused Can Stay Locked Up on Instagram, Wash. Post, Sept. 10, 2019, *available at* https://www.washingtonpost.com/opinions/2019/09/10/why-evidence-exonerating-wrongly-accused-can-stay-locked-up-instagram/.

A few representative examples illustrate the damage social media companies inflict on individual defendants as well as the courts' search for truth when permitted to use the SCA to blockade defense subpoenas.

i. Evidence of a Third-Party Perpetrator

Omar Ameen was an Iraqi refugee living with his family in Sacramento, California. He supported his wife and four children by working as a delivery driver. He had no criminal history. In August 2018, federal agents arrived at his home and arrested him for murder. *See* Matt Stevens & Gabe Cohn, *ISIS Member Arrested in Sacramento, U.S. Says*, N.Y. Times, Aug. 15, 2018, *available at* https://www.nytimes.com/2018/08/15/world/middleeast/sacramento-al-qaeda-isis-arrest.html. Federal prosecutors asserted that, prior to his resettlement in the United States, he had belonged to ISIS and executed a police officer in Rawah, Iraq. He was held without bond pending an extradition hearing. *See* Minutes for Detention Hearing, *In re Extradition of Ameen*, No. 2:18-MJ-152-EFB (E.D. Cal. Aug. 20, 2018), ECF No. 14. The prosecution's request for certification of extradition relied exclusively on a single purported eyewitness's statement that Mr. Ameen had pulled the trigger. *See* Memorandum and Order Declining to Certify Extradition at 13, *In re Ameen* (E.D. Cal. Apr. 21, 2021).

Mr. Ameen steadfastly maintained that he had never murdered anyone, let alone an Iraqi police officer. He insisted that he could not have participated because, at the time, he was over 600 miles away in Mersin, Turkey. *See e.g.*, Request for Issuance of Letter Rogatory at 1, *In re Ameen*, (E.D. Cal. Dec. 19, 2018). Mr. Ameen and his federal defenders feared that extradition to Iraq would result in almost certain death. *See* Ben Taub, *The Fight to Save an Innocent Refugee from Almost Certain Death*, The New Yorker (Jan. 27, 2020), *available at* https://www.newyorker.com/magazine/2020/01/27/the-fight-to-save-an-innocent-refugee-from-almost-certain-death.

Prior to certifying the extradition, the magistrate judge agreed to consider only limited evidence that "obliterates" probable cause. *See* Memorandum and Order at 14, *In re Ameen* (E.D. Cal. May 22, 2019). Mr. Ameen's attorneys presented extensive evidence that he had remained in Mersin, without returning to Iraq, throughout the period of the murder. *See* Extradition Hearing Brief at 4-11, *In re Ameen* (E.D. Cal. May 14, 2019). They even presented phone records placing Mr. Ameen's cell phone in Mersin within an hour of the murder and showing call patterns consistent with Mr. Ameen's prior phone use. *See* Third Supplemental Extradition Hearing Brief at 3-7, *In re Ameen* (E.D. Cal. Jan. 26, 2021). Nonetheless, the prosecution pursued extradition, maintaining that none of the evidence presented proved that Mr. Ameen had not secretly travelled to Rawa to commit the murder. *See, e.g.*, Reply to Defense's Second Supplemental Extradition Hearing Brief at 2, *In re Ameen* (E.D. Cal. Feb. 12, 2020); *see also* Further Memorandum in Support of Extradition and Opposition to Admission of Cell Phone Records and Employer Declarations at 4-14, *In re Ameen* (E.D. Cal. Feb. 27, 2021).

Thus, Mr. Ameen's attorneys undertook to prove the identities of the actual murderers. The prosecution had disclosed a photograph posted to Twitter of what appeared to be the actual culprits carrying guns (Mr. Ameen was not among them) with a caption announcing the killing and applauding the killers. The post also contained a link to a Facebook page. By the time that Mr. Ameen's attorneys received the disclosure, Twitter and Facebook had deactivated the accounts and removed the posts. Because the Twitter account responsible for posting the photograph and caption likely posted other content that could help identify the true perpetrators and corroborate Mr. Ameen's innocence, Mr. Ameen's attorneys applied for a subpoena requiring Twitter to produce key content, including other photos, posted by the account. *See* Request for Court Approval of Defense Subpoena for Twitter Information Under 18 U.S.C. § 2703(c)(1)(B) & (d) & Subpoena Attach. A, *In re Ameen* (E.D. Cal., Feb. 21, 2019), ECF Nos. 65 & 65-2. Likewise, they applied for a subpoena requiring Facebook to produce the original page linked to in the Twitter post. *See* Request for Court Approval of Defense Subpoena for Facebook Information Under 18 U.S.C. § 2703(c)(1)(B) & (d) & Subpoena Attach. A, *In re Ameen* (E.D. Cal. Feb. 15, 2019), ECF Nos. 61 & 61-2.[5]

Finding that "there are reasonable grounds to believe that the information sought by [each] subpoena is relevant and material to an ongoing criminal investigation," the court issued the subpoenas. Order Granting Subpoena Under 18 U.S.C. § 3191 & § 2703, *In re Ameen* (E.D.

5. The subpoenas sought evidence including, *inter alia*, the then-deactivated "public content of those activities [listed in the account's activity logs]," ECF No. 65-2 at 3 (Twitter), and "the original social media post," ECF No. 61-2 at 3 (Facebook).

Cal. Feb. 21, 2019); Order Granting Subpoena Under 18 U.S.C. § 3191 & 2703, *In re Ameen* (E.D. Cal. Feb. 21, 2019). But when the defense served the subpoenas and accompanying court orders, Twitter and Facebook refused to comply, citing the SCA. *See* Audrey McNamara, *Facebook, Twitter withheld data that could prove refugee's innocence in murder case, attorneys say*, CBS News (Jan. 23, 2020), *available at* https://www.cbsnews.com/news/omar-ameen-facebook-twitter-withheld-data-that-could-prove-refugees-innocence-in-murder-case-attorneys-say-2020-01-22/.

Mr. Ameen's federal defenders knew that even if the District Court held the companies in contempt, they would refuse to disclose the content at least until they exhausted the full appellate process. *Cf.* Ethan Baron, *Facebook and Twitter in 'inexcusable' contempt of court over refusal to hand over private messages in murder case*, Mercury News, Aug. 2, 2019, *available at* https://www.mercurynews.com/2019/08/02/facebook-and-twitter-in-inexcusable-contempt-of-court-over-refusal-to-hand-over-private-messages-in-murder-case/ (describing unrelated case in which Facebook refused to disclose evidence despite contempt finding). Lacking the time to litigate the issue further, Mr. Ameen's attorneys withdrew the subpoenas. *Id.* According to one of them, Facebook and Twitter "have the ability to fight us tooth and nail and not give us anything . . . . We had a hearing staring us in the face, and we didn't have the time to fight them all the way." *Id.* As a result, they were never able to access potentially pivotal evidence establishing who actually committed the murder with which Mr. Ameen was charged.[6]

6. On April 21, 2021, the court denied the government's extradition request, finding, "Considering the obliterative alibi

ii. Evidence of Witness Bias

The value of social media content in criminal trials is not limited to corroboration of alibis or inculpation of third-party perpetrators. Posts can also reveal a key witness's bias against the person standing trial or other reasons to doubt their credibility. These forms of case-altering evidence are frequently shared on social media, yet remain out of the defense's reach.

For example, in *Facebook, Inc. v. Superior Court*, 46 Cal. App. 5th 109 (Cal. Ct. App. 2020), the defense sought Facebook messages that it proffered would help establish a critical eyewitness's motive to fabricate. Specifically, the messages would have established both the witness's jealousy at the defendant's involvement with other women as well as a motive to protect herself from criminal liability for the shooting in question. *Id.* at 116. The trial court agreed the evidence sought by the defense was relevant. *Id.* at 117. It ordered Facebook to comply with the subpoena. Facebook refused, citing the SCA and other grounds. *Id.* On appeal, the appellate court agreed that the defense had established a plausible justification for the content. *Id.* at 119. Nonetheless, it granted Facebook's

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evidence presented by the defense, this series of events [alleged by the prosecution] is simply not plausible." Memorandum and Order Declining to Certify Extradition at 17, *In re Ameen* (Apr. 21, 2021). The government has since transferred Mr. Ameen to the custody of Immigration and Customs Enforcement and initiated removal proceedings against him based on the same allegations rejected by the District Court. *See* Sam Stanton, *After judge orders Iraqi man's release, agents whisked him to custody in Bakersfield*, Sac. Bee, Apr. 22, 2021, *available at* https://www.sacbee.com/news/local/article250875864.html.

motion to quash without ruling on the SCA question, finding that the trial judge was required but failed to consider factors beyond just the defense's justification for seeking the content. *Id.* at 119-20.

iii. Evidence of Self-Defense

In another example[7] of how defenses often hinge on evidence located exclusively on social media platforms, a young man in California was charged with shooting at a car in 2018. *See* Opposition to Non-Party Instagram Motion to Quash Subpoena Duces Tecum, People v. [REDACTED], No. [REDACTED], at 3 (Cal. Super. Ct. [REDACTED]) (on file with *amici*). Two months earlier, an individual associated with the car had previously shot at him and then used an Instagram account to harass, threaten, and stalk him. *Id.* at 4-5. The prior shooting and subsequent harassment placed him "in constant fear for his life," but the threatening Instagram messages were deleted before the charged shooting occurred. *See id* at 1 & 4-5. The defense served Facebook (the owner of Instagram) with a subpoena to obtain deleted posts and messages in support of his self-defense argument. *See id.* Facebook refused to comply, citing the SCA.[8] *See id.* at 1-2.

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7. This example is redacted to address confidentiality and other ethical obligations that bind *amici*, *see* Model Rules of Prof'l Conduct R. 1.6 & 1.9 (2021).

8. Although the Stored Communications Act permits disclosure "to an addressee or intended recipient of such communication," 18 U.S.C. § 2702(b)(1), Facebook argues that deleted messages are no longer addressed or intended to be viewed by the recipient and therefore beyond the reach of process. *See, e.g.*, *Facebook, Inc. v. Pepe*, 241 A.3d 248, 254 (D.C. 2020).

Although the case was ultimately dismissed, it serves as yet another example of both the central role that social media content can play in criminal cases as well as the devastating impact that reading a silent privilege into the SCA has on individuals' ability to defend themselves in court. *Amici* often learn of potentially exculpatory evidence on social media that is not accessible because it is deleted, restricted to certain viewers, or otherwise not visible to the public. Inserting a silent privilege into the SCA—as done by the court below—strips judges of the power to compel essential evidence and creates an uneven playing field by denying the accused access to now-ubiquitous and increasingly pivotal social media evidence.

B. Judges Are Well-Equipped to Balance and Protect Privacy Interests. They Do It Every Day.

For centuries, judges have ensured adequate protection for even the most sensitive evidence while simultaneously upholding defendants' compulsory process rights, recognizing and respecting the fundamental role that compulsory process plays in the truth-seeking function of our legal system. *See, e.g.*, *United States v. Burr*, 25 F. Cas. 187, 192 (No. 14,694) (C.C.D. Va. 1807) (compelling production of letter belonging to President Jefferson under protective order prohibiting use outside of trial). A blanket privilege eliminating courts' power to compel evidence held by social media companies would dispense with judges' seasoned expertise and sharply curtail their role in bringing the truth to light. *See Pierce Cnty. v. Guillen*, 537 U.S. 129, 144 (2003) ("[P]rivileges impede the search for the truth.").

When sensitive materials are relevant to a trial, courts have time-tested tools and rules to safeguard privacy interests, both before subpoenas are enforced and after responsive materials are returned. Every day, judges consider and rule on applications for subpoenas to ensure they are not used as mechanisms for harassment or unreasonable intrusion. For example, under Fed. R. Crim. P. 17 and its local analogues, a party seeking a pre-trial subpoena must show that (1) the materials sought are "evidentiary and relevant," (2) they are "not otherwise procurable . . . by exercise of due diligence," (3) "the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial," and (4) "the application is made in good faith and is not intended as a general 'fishing expedition.'" *United States v. Nixon*, 418 U.S. 683, 699-700 (1974) (footnotes omitted). The rule provides additional protections where subpoenas target "personal or confidential information" of victims. *See* Fed. R. Crim. P. 17(c)(3) (requiring a court order and prior notice). Judges routinely review applications for subpoenas and, where justified, deny those that fall short of the applicable standard or are unreasonable in some other respect.

Even after receiving a court-authorized subpoena, a third party may still move the court to narrow or quash it "if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2); *see also* John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law at 2998 § 2211 (1904) (recognizing a judge's discretion to quash subpoenas where "the document's utility in evidence would not be commensurate with the detriment to the witness"). Such oft-invoked rules providing for

ex ante adversarial review enable judges to ensure that subpoenas, including those to social media companies, do not serve as weapons of harassment, intrusiveness, or anything but instruments of truth-seeking.

Moreover, judges have an array of tools at their disposal to regulate what information is ultimately produced *ex post* in response to a subpoena. For instance, judges can review the material *in camera*, redact it, and/or even impose a protective order limiting its use, when so required by dueling interests. *See, e.g.*, *Burr*, 25 F. Cas. at 192 (enforcing subpoena under protective order). In extremely sensitive cases, *amici* have been bound by protective orders that not only limited which attorneys within a defense office were permitted to view the protected materials, but specified the security measures to be taken in whichever office the material was stored. In some of *amici's* cases, courts even required that the materials be returned or destroyed at the conclusion of the case.

There is no reason to treat online digital evidence as categorically distinct from any of the far more sensitive types of records that judges routinely review, compel and regulate. Judges retain the power to order third-party custodians to provide far more sensitive categories of evidence, including medical records from hospitals,[9] mental health records from providers,[10] educational

9. *See* HIPAA, 45 CFR 164.512(e)(1)(ii)-(vi) (permitting disclosure in response to subpoenas).

10. *See id.*

records from schools,[11] substance abuse treatment records from rehabilitation centers,[12] bank records from banks,[13] financial records from service providers,[14] cell site location information from phone companies,[15] and tax records from preparers.[16]

Judges routinely review and regulate the disclosure of much more private materials. Social media companies do not require a special privilege.

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11. *See* 34 CFR § 99.31(a)(9) (authorizing disclosure in response to judicial order or lawfully issued subpoena).

12. *See* 42 CFR § 2.61 (authorizing disclosure in response to court order and subpoena).

13. *See Young v. United States Dep't of Justice*, 882 F.2d 633, 641-43 (2d Cir. 1989) (observing that banker-client duties of confidentiality do not create a testimonial privilege); *see also* 18 U.S.C. § 986 (permitting subpoenas for bank records).

14. *See Trump v. Vance*, 140 S. Ct. 2412, 2429-30 (2020) (holding a state criminal subpoena may compel an accounting firm to disclose a client's personal financial records); *see also Stokwitz v. United States*, 831 F.2d 893, 894-97 (9th Cir. 1987) (establishing tax records are subject to subpoena through normal discovery process); 12 U.S.C. §§ 3401–3423 (no limitations on criminal defense subpoenas to financial services intermediaries seeking records for clients, includeing those other than the defendant).

15. *United States v. Martin*, No. 3:07-CR-51, slip op. at 4, 10 (E.D. Tenn. Dec. 23, 2008) (upholding criminal defense subpoena seeking nonparty's cell site location information).

16. 26 CFR § 301.7216-2(f).

II. GRANTING CERTIORARI IS NECESSARY BECAUSE PEOPLE ACCUSED OF CRIMES ARE RARELY ABLE TO LITIGATE SUBPOENAS AGAINST SOCIAL MEDIA COMPANIES TO A CONCLUSION

This Court's review is needed now because social media giants have weaponized the SCA to avoid compliance with subpoenas, knowing full well that the appellate process only rarely provides a timely avenue for defendants to access the critical evidence stored on their platforms. Indeed, the Petition in this case arose out of a post-conviction proceeding. Pet'r's Br. 3-4. The dilemma that faced Mr. Ameen's federal defenders[17] repeats in countless public defender offices every year: either spend already-limited time and office resources litigating against mammoth technology companies capable of outspending and outwaiting them, in many cases postponing clients' opportunity to confront the allegations against them and prolonging their pre-trial detention, or proceed to trial without potentially exculpatory evidence. As *amici* know all too well, rather than risk a trial without key evidence withheld by social media companies, clients are often willing to plead guilty. *Cf.* Jeffrey D. Stein, *Why Evidence Exonerating the Wrongly Accused Can Stay Locked Up on Instagram*, Wash. Post, Sept. 10, 2019, *available at* https://www.washingtonpost.com/opinions/2019/09/10/why-evidence-exonerating-wrongly-accused-can-stay-locked-up-instagram/.

Moreover, social media companies have the resources to suffer contempt and delay production even in the face of contrary legal rulings. As one judge observed, "Facebook

17. *See* Part I(A), *supra*.

and Twitter appear to be using their immense resources to manipulate the judicial system in a manner that deprives two indigent young men facing life sentences of their constitutional right to defend themselves." Order and Judgment of Contempt, *People v. Sullivan and Hunter*, Nos. 13235657 & 13035658 at ¶ 1 (Cal. Super. Ct. Jul. 26, 2019).[18]

Exhausting the appellate process can take months, if not years. For example, in the case just referenced and described in Part I(B), *supra*, Mr. Sullivan and Mr. Hunter sought non-public evidence from Facebook and Twitter. They spent nearly half a decade litigating the companies' SCA challenges to their subpoenas in the trial and appellate courts. *See Facebook, Inc. v. Superior Ct.*, 4 Cal. 5th 1245, 1253 (2018). They remained in pretrial detention for six years. *See* Maura Dolan, *After that $5-billion fine, Facebook gets dinged again: $1,000 by judge overseeing murder trial*, L.A. Times (Jul. 26, 2019). Eventually, forced to choose between continuing to remain in jail indefinitely while litigating their subpoenas and proceeding to trial without the exculpatory evidence, they opted for the latter. Facebook and Twitter never produced the contested evidence. *See id*; *see also* Petition for Writ of Certiorari at 9, Facebook, Inc. and Twitter, Inc. v. Superior Court, Supreme Court of the United States (2020) (No. 19-1006).[19]

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18. The California Supreme Court reversed the underlying order enforcing the subpoenas, finding that it failed to consider all factors in the jurisdiction's general balancing test for reviewing subpoenas, "particularly options for obtaining materials from other sources." *Facebook, Inc. v. Superior Court*, 46 Cal. App. 5th 109, 119 (Cal. Ct. App. 2020).

19. Mr. Hunter was acquitted. Mr. Sullivan was convicted. *See* Petition for Writ of Certiorari at 5, Facebook, Inc. and Twitter,

Likewise, in yet another case, a defendant served Facebook with a subpoena for content related to a key prosecution witness. *See Facebook, Inc. v. Superior Court*, 10 Cal. 5th 329, 338 (2020). Facebook refused to comply, citing the SCA. The trial judge denied Facebook's motion to quash. *See id*. Over four years later, the appellate process and ensuing litigation on remand remains ongoing. The accused has yet to receive a trial or the evidence from Facebook. *See* Order, *People v. Touchstone*, No. CD268262 (San Diego Sup. Ct. May 12, 2021).

Thus, even where a trial court agrees that the defense is entitled to evidence stored on a social media platform, the time generally required to litigate the companies' inevitable appeals can dramatically lengthen the pretrial detention period and, depending on the offenses charged, even exceed the maximum possible sentence upon conviction. Such math explains why the social media companies' interpretation of the SCA is so often shielded from appellate review. And why this Court should grant certiorari when presented cleanly with the issue here.

Inc. v. Superior Court, Derrick D. Hunter, and Lee Sullivan, Supreme Court of the United States (2020) (No. 19-1006).

CONCLUSION

This Court should grant the writ and reverse.

Respectfully submitted,

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