No. 20-1474

In The Supreme Court of the United States

JOSEPH COLONE,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SAN FRANCISCO,

Respondent.

GITHUB, INC.,

Real Party in Interest.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case is ultimately about whether a person can be put to death without access to crucial information about the methodology of the evidence used to convict him. It turns on important questions about implied statutory privileges and the Stored Communications Act (SCA), 18 U.S.C. § 2702(a), which have split the lower courts and which warrant resolution by this Court.

Respondent centers its opposition to this Court's review on its contention that there is no conflict of authority concerning the questions Petitioner presents. Additionally, Respondent views this case as a poor candidate for certiorari. Quite the contrary, there is a direct split of authority and this case is an ideal vehicle for resolving the issues presented. This Court's guidance and intervention is necessary to clarify its precedents and prevent injustices in life or death proceedings.

ARGUMENT

I. Respondent Misinterprets This Court's Precedents and Actually Highlights the Federal Circuit Split.

Petitioner showed that the federal circuits are starkly divided on a recurring issue of national importance: whether, or in what circumstances, courts may read ambiguous silence in statutory text as impliedly creating an evidentiary privilege that bars judicial process. Pet. 8–16. Respondent does not deny

the importance of this question, either generally or in the context of this capital case. Instead, Respondent tries to minimize the split's importance and distinguish other cases from the facts of this case. Neither attempt succeeds.

First, Respondent characterizes the split as "a methodological tension in judicial interpretation, not a 'real and embarrassing conflict[.]'" BIO 16 (internal citation omitted). But this Court did not consider privilege interpretation to be a mere "methodological tension" when it admonished that "these exceptions to the demand for every [person's] evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Here, the split has sweeping consequences for a host of federal statutes, Pet. 20–22, and determines whether courts, as here, may rely on ambiguous statutory silence to suppress crucial evidence in a death penalty case.

Next, Respondent tries to sidestep the split by asserting its own view of this Court's precedents. BIO 24–25. But in doing so, Respondent further showcases the disagreement that warrants this Court's review. Respondent argues that this Court *rejected* the rule that statutes must "specifically state that content data may not be disclosed in response to a civil subpoena" to block judicial process. BIO 23. Respondent also observes that the D.C. Court of Appeals, the D.C. Circuit, and the Fifth Circuit "rejected the theory that general language precluding disclosure will never suffice to preclude disclosure in response to subpoenas, and that

only a specific statutory reference to subpoenas will suffice[.]" BIO 24 (internal citations omitted).

But quite crucially, the Ninth, Tenth, and Eleventh Circuits reached the opposite conclusion and have held that this Court's precedents *require* statutory privileges to be express. *See Zambrano v. I.N.S.*, 972 F.2d 1122, 1125–26 (9th Cir. 1992); *In re Nelson*, 873 F.2d 1396, 1397 (11th Cir. 1989); *United States v. Hernandez*, 913 F.2d 1506, 1511–12 (10th Cir. 1990). This difference as to whether there can be implied statutory privileges has divided the lower courts and requires resolution by this Court.

Respondent also contends that, in *St. Regis*, "this Court concluded that a party subject to [statutory] prohibitions [on disclosure] . . . *cannot* respond to [discovery] requests." BIO 25 (emphasis in original) (citing *St. Regis Paper Co. v. United States*, 368 U.S. 208, 215–17 (1961)). But the Ninth Circuit takes exactly the opposite view of *St. Regis*: "The Supreme Court has held that statutes prohibiting general disclosure of information do not bar judicial discovery absent an express prohibition against such disclosure." *Zambrano*, 972 F.2d at 1125 (citing *St. Regis*, 368 U.S. 208).

Beyond spotlighting the conflict, Respondent's arguments misstate this Court's opinion in *St. Regis*. Respondent claims, incorrectly, that this Court "concluded" that the *St. Regis* statute "barred discovery of census reports 'while in the hands of . . . government officials.'" BIO 24 (citing *St. Regis*, 368 U.S. at 218). In

fact, no party sought discovery from the government, and this Court's opinion scrupulously avoids characterizing the statute as a privilege barring discovery, even in dicta. Instead, the Court's own description tracks the language of the statute itself, characterizing its confidentiality provisions as "merely restrict[ions]" on "us[e]," "publication," and "examin[ation]" of information, not on discovery. *See St. Regis*, 368 U.S. at 215–19. In any event, the Ninth and Eleventh Circuits disagree with Respondent. Both expressly relied on *St. Regis* to hold that statutes that, like the *St. Regis* statute, prohibit entities from "permit[ting] *anyone*" to examine information, *see* 368 U.S. at 216 (emphasis added), do *not* create a privilege barring discovery, *see Zambrano*, 972 F.2d at 1125–26; *In re Nelson*, 873 F.2d at 1397. The Tenth Circuit construed identical statutory language the same way. *See Hernandez*, 913 F.2d at 1511–12.

Unable to dispel the conflict over implied statutory privileges, Respondent tries to distinguish it by claiming that "the SCA does not operate as a privilege. The statute does not close all doors to *what* litigants can obtain, but only limits *from whom* they can obtain it[.]" BIO 22. But Respondent misunderstands that many privileges operate this way. The attorney-client privilege, for instance, protects statements that clients make to their attorneys but not the same statements obtained from other sources. *See*, *e.g.*, *United States v. Wilson*, 798 F.2d 509, 513 (1st Cir. 1986) (statements obtained from messenger not privileged); *Pasteris v. Robillard*, 121 F.R.D. 18, 21–22 (D. Mass. 1988)

(statements obtained from insurance company not privileged).

Finally, Respondent tries to distinguish the opposing Ninth, Tenth, and Eleventh Circuit holdings based on statutory text and congressional intent. BIO 15–16, 21–22. But the plain texts of the SCA and the statutes at issue in *Zambrano*, *Hernandez*, and *In re Nelson* all contain similarly broad confidentiality rules with ambiguous silence as to privilege. *Compare* 18 U.S.C. § 2702(a) *with* 8 U.S.C. § 1160(b)(5)–(6) and 8 U.S.C. § 1255a(c)(4)–(5).

Respondent's mistaken views of this Court's precedents reflect the inconsistency, uncertainty, and confusion in the law.[1] That this confusion led to suppressing crucial information in a death case shows why this Court's guidance is essential.

II. Respondent's Argument That Federal Circuit Courts and State High Courts Are Not Fractured Over the SCA is Wrong.

Respondent argues that there is no split in authority between the federal circuits and state high courts over the SCA because no court has "concluded that enforcing the plain language of the SCA implicitly creates an 'evidentiary privilege.'" BIO 14 (quoting

[1] Contrary to Respondent's claim, Petitioner correctly characterized *In re England*, 375 F.3d 1169 (D.C. Cir. 2004). *See* BIO 23 & n.4; Pet. 14–15. Respondent confuses *In re England*'s discussion of statutes barring "publication" with its holding about entirely different language in 10 U.S.C. § 618(f).

Pet. 11–12). Yet the lower courts in this very case reached that conclusion when they construed the SCA to make "information immune from process," 23A Kenneth W. Graham, Jr., & Ann Murphy, *Federal Practice and Procedure* § 5437 (1st ed. 2020), and to "allow[ ] a specified person to refuse to provide evidence," *Black's Law Dictionary* (11th ed. 2019). Courts need not use the magic words "evidentiary privilege" to effectively create one.

Next, Respondent relies heavily on trial court opinions to claim that "courts are in universal agreement [that] the SCA prohibits a service provider from disclosing its customer's content data outside the statute's carefully delineated exceptions[.]" BIO 10–11. But quite the contrary, the trial courts have disagreed about exactly this. *See*, *e.g.*, Order and Judgment of Contempt at 1,4, *California v. Sullivan*, No. 13035657 (Cal. Super. Ct. July 26, 2019) (holding Facebook and Twitter in contempt for refusing to comply with court-ordered disclosure due to "disagreement over the requirements of federal law [the SCA]" and thereby "depriv[ing] two indigent young men facing life sentences of their constitutional right to defend themselves[.]").

Moreover, Respondent's arguments again actually highlight the conflict in appellate authorities. Respondent contends that "courts have widely recognized" that the SCA bars disclosure "except in specific circumstances not applicable here," BIO 14–15, and offers an *expressio unius* analysis in support, BIO 22 ("[T]hat Congress crafted certain exceptions to the

statutory bar on disclosure does not authorize the courts to imply an additional exception[.]"). Concededly, three federal appellate and state high courts have adopted this position. *United States v. Pierce*, 785 F.3d 832, 842 (2d Cir. 2015); *Facebook, Inc. v. Wint*, 199 A.3d 625, 628–29 (D.C. App. 2019); *State v. Bray*, 422 P.3d 250, 256 (Or. 2018).

But a unanimous panel of the Ninth Circuit concluded otherwise. Instead of *expressio unius*, the Ninth Circuit interpreted the SCA in light of "the common law of trespass." *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072–73 (9th Cir. 2004) ("Just as trespass protects those who rent space from a commercial storage facility to hold sensitive documents, the Act protects users whose electronic communications are in electronic storage[.]" (internal citations omitted)). This trespass reasoning compelled *Theofel*'s holding that accessing stored emails via a *false* subpoena violated the SCA because "falsity transformed the access from a bona fide state-sanctioned inspection into private snooping" and thus "would not defeat a trespass claim in analogous circumstances." *Id*. at 1073. The same trespass reasoning compels the conclusion that the SCA does not block *lawful* subpoenas requested by nongovernmental litigants because lawful subpoenas do defeat trespass claims in analogous circumstances. *See*, *e.g.*, Fed. R. Civ. P. 45(c)(2) ("A subpoena may command . . . inspection of premises at the premises to be inspected."). Otherwise, the *Theofel* court would not have needed to interrogate the subpoena's falsity. The

Ninth Circuit in *Theofel* took a totally different approach than several other courts.[2]

Respondent is conspicuously silent on the Ninth Circuit's trespass reasoning. *See* BIO 11–16. But trespass reasoning makes sense here. The Fourth Amendment constrains government power by requiring a warrant before governmental entities may compel entry onto private property, *see*, *e.g.*, *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018), but does not block nongovernmental litigants from using a subpoena to do the same, *see*, *e.g.*, Fed. R. Civ. P. 45(c)(2). So too the SCA constrains government power by requiring heightened process before governmental entities may compel disclosures of communications contents, *see* 18 U.S.C. § 2703, but does not block non-governmental litigants from using a subpoena to do the same. The Second Circuit, D.C. Court of Appeals, and Oregon Supreme Court's contrary holdings read the SCA's heightened process requirements as aggrandizing government power by uniquely empowering the government to compel such disclosures.

This Court's guidance is needed to clarify whether the SCA's confidentiality provisions function like common

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[2] Respondent attempts to deflect *Theofel* using dicta from *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir. 2011), stating: "Declaring an implicit exception to the [SCA] for civil litigation would erode the safety of the stored electronic information and trigger Congress' privacy concerns." BIO 11. This dicta derives from *Suzlon*'s elision of the fact that *Theofel*'s holding concerned solely *false* subpoenas and erroneous suggestion that it concerned *all* civil subpoenas. *See Suzlon*, 671 F.3d at 728–30.

law trespass and yield to subpoenas, or impliedly create a novel, one-sided privilege for the entire medium of the Internet that unqualifiedly bars access to crucial evidence in a capital case.

III. Respondent's Arguments That This Case is An Inappropriate Vehicle Are Misleading and Incorrect.

Respondent argues that the California courts' interpretation of the SCA is not dispositive because there are "alternative grounds" on which those lower courts could have relied to dispose of this case. BIO 26. Due to these alternative grounds, Respondent argues, this case is a "poor candidate" for certiorari. *Id*. This Court should reject these arguments because they are legally and factually inaccurate.

First, Respondent argues that Petitioner did not "establish[] that the disputed data is 'necessary'" to his capital proceedings to justify enforcement of his subpoena under California Penal Code § 1334.2, and "[a]s a result, the interpretation of the SCA will ultimately be irrelevant to the outcome of this case, if the case were to be remanded." BIO 26. In fact, the opposite is true. The lower courts never reached the issue of the subpoena's validity under § 1334.2 precisely because they held that the SCA unqualifiedly blocked Petitioner's subpoena regardless of its validity or necessity to exonerate a person wrongfully convicted and sentenced to death. The California trial court denied Petitioner's motion to compel based on its

interpretation of the SCA alone. Pet. App. 4–6.[3] The First Appellate District Court of Appeal's order cited only the SCA and related authority without referencing any alleged defects in Petitioner's subpoena or section 1334.2. *Id*. at 2–3. And the Supreme Court of California denied review without a written order. *Id*. at 1.

Contrary to Respondent's contention, the lower courts' singular reliance on the SCA to deny Petitioner's subpoena makes this case an *exceptionally good* vehicle for certiorari. This Court can and should decline Respondent's invitation to deny review based on alleged alterative grounds no lower court accepted.

Remarkably, Respondent asks this Court to determine the factual issue of necessity in the first instance. Respondent argues that Petitioner cannot establish that the source code he seeks is "material and necessary" under § 1334.2—despite a Texas court's determination that it is "material and necessary for the administration of justice"—due to ongoing litigation in Ohio courts concerning a subpoena Petitioner issued

[3] While Respondent's proposed order denying Petitioner's motion to compel, which the trial court signed, did state that, "[i]f [Mr.] Colone wishes to review the source code, he may do so by entering into the non-disclosure agreement required by ESR[,]" that statement cannot reasonably be considered an alternative ground for disposition and is not the statutory argument Respondent now puts forth. Because "[t]his Court reviews judgments, not statements in opinions," even if the trial court's order was at issue—and to be clear, it is not—Respondent could still find no support for its alternative grounds argument. *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam).

there. *See* BIO 6, 27. That argument is wrong on the merits. Although there is ongoing litigation in Ohio, respondents in those proceedings, ESR's counsel, asserted there that they do not possess the subpoenaed materials. *See*, *e.g.*, Memorandum Contra to Applicant's Objections Magistrate's Decision at 4-5, *In re Joseph Colone*, No. MS-2020-00-0011 (Ohio Ct. Com. Pl. Mar. 16, 2021) ("Movants [ESR's counsel] do not have the [STRmix™] code, cannot access it and could not produce the source code in any form."). If counsel for ESR in Ohio are to be believed, Petitioner cannot otherwise obtain these materials through that litigation.

Likewise, although Respondent has repeatedly asserted that Petitioner could obtain the materials through a non-disclosure agreement (NDA), BIO 27–28, this argument is without support, as Petitioner's expert refuses to sign the unreasonable NDA ESR has offered.[4] There are no other apparent methods available to Petitioner, who has been sentenced to death, to obtain these materials than this one and the enforcement of his California subpoena is therefore necessary in fact.

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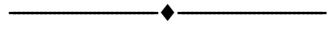
[4] Respondent has failed, again, to engage with Petitioner's well-founded arguments in California and Texas state courts that this is not a tenable solution, in part because of the onerous terms of ESR's NDA. *Cf., New Jersey v. Pickett*, 246 A.3d 279, 289–90 (N.J. Super. Ct. App. Div. 2021) (calling the NDA offered to a litigant by ESR's competitor, Cybergenetics, "severely restrictive" and noting it imposed an automatic $1 million fine on a reviewing expert in the event of a breach).

IV. Deference to Congress Favors Granting Review

Respondent contends that Petitioner's concerns about the derogation of the judiciary's truth-seeking process "are properly addressed to Congress." BIO 17. But Respondent's arguments for deference to Congress cut exactly the opposite way and favor granting review in this case and ultimately ruling in favor of Petitioner. *See* BIO 18–20.

Specifically, Respondent argues that Congress "already struck" a balance between access to crucial evidence in a capital case and competing interests in blocking counsel's scrutiny of forensic software source code "through the SCA's unambiguous text." BIO 18. But the SCA is not unambiguous. The SCA's text and legislative history both contain ambiguous silence as to whether the statute creates an evidentiary privilege that, as the lower courts held in this case, unqualifiedly bars judicial subpoenas requested by persons on death row and other nongovernmental litigants. Pet. 10. If anything, the legislative history indicates that Congress did *not* intend that result because it shows that Congress was centrally concerned with "creat[ing] a set of Fourth Amendment-like privacy protections by statute[.]" Orin Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1212 (2004). The Fourth Amendment does not unqualifiedly bar judicial subpoenas requested by nongovernmental litigants, *see* Fed. R. Civ. P. 45(c)(2), which suggests that Congress did not intend the SCA to do so either.

More broadly, deference to Congress counsels against courts relying on ambiguous silence in statutory text to negate Congress's carefully legislated subpoena and discovery rules that safeguard the truth-seeking process of the judiciary—rules promulgated by the Judicial Conference of the United States and approved by this Court, prior to review by Congress pursuant to the Rules Enabling Act. *See* 28 U.S.C. § 2072. While federal courts may create common law privileges if they follow the balancing procedures that this Court's precedents require, *see Jaffee v. Redmond*, 518 U.S. 1, 8–12 (1996), the *St. Regis* strict construction rule mandates deference to Congress by prohibiting courts from construing ambiguous statutory silence to supersede the legislated subpoena and discovery rules.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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