No. _____

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

PETITION FOR A WRITT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In this case, Petitioner was denied the right to subpoena evidence that a court has deemed material and necessary to the litigation examining the constitutionality of his conviction and death sentence. The lower courts held that the Stored Communications Act (SCA), 18 U.S.C. § 2702(a), unqualifiedly bars criminal defendants and other non-governmental litigants from subpoenaing technology companies for the contents of online communications, even where those communications could exonerate the wrongfully accused.

The questions presented are:

1. Whether federal statutes must contain express privilege language before courts may decide that Congress intended the statute to create an evidentiary privilege that abrogates the legislated subpoena and discovery rules, and impedes judicial truth-seeking, as the Ninth, Tenth, and Eleventh Circuits have ruled, or whether courts may read ambiguous silence in statutory text to impliedly create such a privilege, as the District of Columbia, Third, and Fifth Circuits, and the lower courts in this case, have ruled.

2. Whether the Stored Communications Act (SCA), 18 U.S.C. § 2702(a), yields to

QUESTIONS PRESENTED—Continued

judicial process, as the Ninth Circuit has presumed, or whether the Act impliedly creates a novel, unqualified evidentiary privilege for the Internet that bars judicial subpoenas requested by non-governmental litigants, as the Second Circuit, the Ohio State Supreme Court, the District of Columbia Court of Appeals, and the lower courts in this case, have ruled.

PARTIES TO THE PROCEEDING

Petitioner Joseph Colone, a person sentenced to death in the state of Texas, was the appellant in the California Supreme Court. Respondent, the Superior Court of the State of California for the County of San Francisco, was the appellee in that court. GitHub, Inc., was a Real Party in Interest in that court.

STATEMENT OF RELATED CASES

Joseph Colone v. Superior Court (GitHub), No. S265307 (Cal.) (judgment and order denying petition for review entered Jan. 13, 2021).

Joseph Colone v. Superior Court for the City and County of San Francisco (GitHub, Inc.), No. A160989 (Cal. Ct. App.) (judgment and opinion issued Oct. 21, 2020).

In re Application of Joseph Colone, No. 20-517083 (Cal. Superior Ct.) (judgment and opinion issued July 28, 2020).

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DECISIONS BELOW

The order of the Superior Court of California, San Francisco County, denying Mr. Joseph Colone's motion to compel and quashing the related subpoena duces tecum is unpublished and is reprinted in the Appendix at 4.

The order of the First Appellate District, Division One, in the Court of Appeal of the State of California is unpublished and is reprinted in the Appendix at 2.

The order of the California Supreme Court denying review is unpublished and is reprinted in the Appendix at 1.

JURISDICTION

The California Supreme Court declined review in this case on January 13, 2021. App. at 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

FEDERAL STATUTORY PROVISIONS INVOLVED

The Stored Communications Act (SCA), 18 U.S.C. § 2702(a), provides in relevant part:

> (1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and
>
> (2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service
>
> > (A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;
> >
> > (B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and
>
> (3) a provider of remote computing service or electronic communication service to the public

> shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

STATEMENT OF THE CASE

I. Introduction

Petitioner Joseph Colone is a death-sentenced person in the state of Texas. The State's case against Mr. Colone at trial was largely circumstantial, and the only physical evidence introduced at Mr. Colone's trial connecting him to the scene of the crime was some DNA evidence found on a few specific items. The prosecution relied on STRmix, a probabilistic genotyping computer program created by the New Zealand-based Institute of Environmental Science and Research (ESR), for the analysis of this DNA evidence at Mr. Colone's trial because critical mixtures of DNA evidence were too complex to be examined using more traditional methods. Mr. Colone's trial was the first death penalty trial in Texas in which prosecution experts testified to DNA analysis generated by STRmix. Despite the centrality of the DNA evidence to the case and the novelty of the STRmix analysis, Mr. Colone's trial attorneys did little to investigate STRmix or the underlying DNA evidence.

As part of his state postconviction investigation, Mr. Colone sought access to STRmix's source code in

relation to his Sixth and Fourteenth Amendment ineffective assistance of trial counsel claims. Mr. Colone applied for an out-of-state subpoena and obtained from his convicting court in Jefferson County, Texas, a certificate of materiality that called on California courts to issue a subpoena requiring the California-based technology firm GitHub, Inc., to produce the STRmix source code that it hosts on its cloud-based platform. In the certificate of materiality, the Texas court found that the source code was material and necessary in Mr. Colone's litigation.

Despite Mr. Colone's appropriate subpoena issued in San Francisco Superior Court, California courts have unanimously refused to enforce the subpoena. The lower courts held that a confidentiality provision in the Stored Communications Act (SCA), 18 U.S.C. § 2702(a), categorically bars criminal defendants from subpoenaing the contents of online communications, even where those communications otherwise implicate no privacy interest and are necessary to the litigation concerning the constitutionality of Mr. Colone's conviction and death sentence.

As a result of the lower courts' reliance on the SCA to bar compulsory process, this case presents the issue of whether ambiguous silence in the SCA impliedly creates an unqualified evidentiary privilege for the Internet that bars judicial subpoenas requested by criminal defendants and other non-governmental litigants. This Court should grant review to consider the California courts' interpretation of the SCA to bar process in Mr. Colone's underlying case, and to clarify more

broadly the proper interpretation of statutory silence as it relates to creating evidentiary privileges blocking judicial process. This Court's review is urgently needed on both the broader issue concerning the interpretation of ambiguous statutory silence that has caused a split among the United States Circuit Courts of Appeals as well as to resolve the confusion specifically in the application of the SCA in state and federal courts alike, as in Mr. Colone's case.

II. Factual and Procedural Background

A. Issuance of the Out-of-State Subpoena

On June 10, 2019, Mr. Colone filed his first application seeking a writ of habeas corpus, which included constitutional challenges to his conviction and death sentence based on his trial counsel's ineffective assistance of counsel due to their failure to investigate or challenge critical DNA evidence and the related STRmix analysis at his trial.

During litigation of Mr. Colone's state postconviction proceedings, on January 3, 2020, The Hon. K. Michael Mayes in the 252nd Criminal District Court in Jefferson County, Texas, granted Mr. Colone's request for an out-of-state subpoena duces tecum seeking production of STRmix source code and related documents. In the Certificate the court issued, Judge Mayes found that the source code "is material and necessary for the administration of justice" in Mr. Colone's case. *Id.* The Texas court did not merely rubber-stamp the

certificate; the judge added the term "material" to the certificate in his own handwriting. *Id.*

Mr. Colone then obtained a subpoena in the Superior Court of California, San Francisco County, and served it upon GitHub. After GitHub declined to comply, Mr. Colone moved to compel production of the source code pursuant to California Penal Code Section 1334.2. Mot. to Compel, *In re Application of Colone*, No. 20-517083 (Cal. Super. Ct. Apr. 30, 2020). GitHub opposed Mr. Colone's motion and moved to quash the subpoena, arguing that the SCA unqualifiedly prohibits disclosure of the items requested in the subpoena because they were electronic communications by ESR within the meaning of the SCA, and that there was "no exception that would bring the Subpoena outside the SCA's broad prohibition on the disclosure of content data." Opp'n to Mot. to Compel, *In re Application of Colone*, No. 20-517083, at *14 (Cal. Super. Ct. July 15, 2020). In his reply, Mr. Colone raised the present statutory interpretation argument that the SCA does not excuse GitHub from complying with the so-ordered subpoena because the statute does not create an evidentiary privilege barring valid legal process. Reply to Mot. to Compel, *In re Application of Colone*, No. 20-517083, at *6-12 (Cal. Super. Ct. July 21, 2020). On July 28, 2020, the Superior Court denied Mr. Colone's motion to compel on the basis that the subpoena was "prohibited by the Stored Communications Act" and that "under controlling California authority . . . 'the Act must be applied, in accordance with its plain terms, to render unenforceable the subpoena' seeking

to compel GitHub to disclose the source code and other materials stored on its facilities." App. at 5.

B. Decision Below

Following the Superior Court's refusal to enforce his subpoena, Mr. Colone filed a petition to the Court of Appeal, First District, seeking a writ of mandate directing the Superior Court to vacate its July 28, 2020 order and grant Mr. Colone's motion to compel. The Court of Appeal issued a ruling on October 21, 2020, denying Mr. Colone's petition. App. at 2. In its denial, the Court of Appeal cited "18 U.S.C. § 2702(a)" and the California cases *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1447 (Cal. Ct. App. 2006), and *Facebook, Inc. v. Superior Court* (*Hunter*), 417 P.3d 725, 742 (Cal. 2018), for the proposition that Section 2702(a) rendered subpoenas for electronic communications unenforceable. *Id*. The Court of Appeal also cited collected cases within the District of Columbia Court of Appeals' opinion in *Facebook, Inc. v. Wint*, 199 A.3d 625 (D.C. 2019) for the same proposition. *Id*.

The California Supreme Court issued a disposition denying discretionary review of Mr. Colone's petition for review on January 13, 2021, without a written order or opinion. App. at 1.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUITS ARE SPLIT OVER WHETHER, OR IN WHAT CIRCUMSTANCES, COURTS MAY READ AMBIGUOUS SILENCE IN STATUTORY TEXT AS IMPLIEDLY CREATING AN EVIDENTIARY PRIVILEGE TO BAR JUDICIAL PROCESS.

The lower courts' decisions in this case exacerbate a conflict over whether, or in what circumstances, courts may construe ambiguous silence in federal statutory text as impliedly creating a privilege that bars judicial process in derogation of the truth-seeking function of the courts.

A. Background

Construing a statute to bar judicial process creates an evidentiary privilege. *United States v. Nixon*, 418 U.S. 683, 709 (1974) (The courts have "a right to every [person's] evidence, except for those persons protected by a constitutional, common-law, or statutory privilege." (internal quotation marks and citations omitted)). A statute's text creates a privilege when it "makes . . . information immune from process." 23A Kenneth W. Graham, Jr., & Ann Murphy, *Federal Practice and Procedure* § 5437 (1st ed. 2020); *see also Black's Law Dictionary* (11th ed. 2019) (defining "evidentiary privilege" as a protection that "allows a specified person to refuse to provide evidence. . . .").

This Court has repeatedly ruled that privileges must be construed narrowly due to their extraordinary

costs to judicial truth-seeking. *See, e.g.*, *Nixon*, 418 U.S. at 710 ("Whatever their origins, 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."). When considering proposed common law privileges, courts must balance whether "the proposed privilege 'promotes sufficiently important interests to outweigh the need for probative evidence. . . .'" *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

Similarly, when considering proposed statutory privileges, courts have a "duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961). A statute requires the creation of a privilege that "suppress[es] otherwise competent evidence," *id.*, if the statutory text states expressly that information "'shall not be subject to discovery or admitted into evidence,'" *Pierce County v. Guillen*, 537 U.S. 129, 136 (2003) (quoting 23 U.S.C. § 409), or otherwise "embod[ies] explicit congressional intent to preclude *all* disclosure of" covered information, *Baldrige v. Shapiro*, 455 U.S. 345, 361 (1982) (emphasis in original).

B. The Conflict

Lacking further guidance from this Court, lower courts are struggling to apply the holdings in *St. Regis*,

Baldrige, and *Pierce* to confidentiality provisions in statutory text. Confidentiality provisions in statutes fall into three categories: (1) those that expressly privilege or exempt information from judicial compulsory process; (2) those that expressly subject information to judicial process; and (3) those that are silent on disclosures pursuant to judicial process. The existence of the two express categories demonstrates that Congress knows how to create, and to preclude, evidentiary privileges when it wants to do so. In contrast, statutes in the remaining, silent category are ambiguous as to their effect on judicial process. That ambiguity has generated a sharp conflict among the federal circuits over whether, or in what circumstances, courts may conclude that, despite facial silence regarding privilege, statutory language impliedly creates a privilege.

When faced with the task of construing such ambiguous statutes, the Ninth, Tenth, and Eleventh Circuits have prioritized Congress's legislated subpoena and discovery rules that safeguard the truth-seeking process of the judiciary. These circuits hold that courts must not construe a federal statute as creating a privilege unless the statute's plain text expressly requires that result. In *Zambrano v. I.N.S.*, 972 F.2d 1122 (9th Cir. 1992), *vacated and remanded on other grounds*, 509 U.S. 918 (1993), a unanimous panel of the Ninth Circuit held that statutory confidentiality provisions are "not violated by . . . court ordered discovery" where the text "has no specific language prohibiting judicial disclosure." *Id*. at 1125-26. The court declared that "statutes prohibiting general disclosure of information

do not bar judicial discovery absent an express prohibition against such disclosure." *Id*. at 1125. The Tenth and Eleventh Circuits have adopted similar positions. *See United States v. Hernandez*, 913 F.2d 1506, 1511-12 (10th Cir. 1990); *In re Nelson*, 873 F.2d 1396, 1397 (11th Cir. 1989). All three circuits have held that broad statutory confidentiality provisions that require the possessor of protected information to not "permit anyone . . . to examine" it, and otherwise remain silent as to judicial process, do *not* create a privilege to bar court-ordered disclosures. *See Zambrano*, 972 F.2d at 1125-26; *Hernandez*, 913 F.2d at 1511-12; *In re Nelson*, 873 F.2d at 1397 (construing 8 U.S.C. § 1160(b)(5)-(6) and 8 U.S.C. § 1255a(c)(4)-(5)). In the Eleventh Circuit's words, this text contains "no indication that Congress intended to prohibit disclosure of [the protected information] in judicial proceedings." *In re Nelson*, 873 F.2d at 1397.[1] If this case had been litigated in these

[1] Various federal district courts have adopted similar reasoning and outcomes. *See, e.g.*, *In re Nassau Cnty. Strip Search Cases*, No. 99-cv-2844, 2017 WL 3189870, at *5-6 (E.D.N.Y. July 26, 2017) (Statutory prohibitions on "the use or disclosure of information" did not create a privilege because the text never "specifically provides that information is not subject to discovery."); *Rodriguez v. Robbins*, No. 07-cv-3239, 2012 WL 12953870, at *2-3 (C.D. Cal. May 3, 2012) (Statutory prohibitions on "permit[ting] use by or disclosure to anyone" did not create a privilege because "statutory provisions, generally forbidding disclosure of information, do not bar judicial discovery absent an explicit prohibition against such disclosure."); *Hassan v. United States*, No. C05-1066C, 2006 WL 681038, at *2-3 (W.D. Wash. Mar. 15, 2006) (Statutory requirement to "limit the use or disclosure of information" did not create a privilege because "statutes prohibiting general disclosure of information do not bar judicial discovery absent an express prohibition against such disclosure."); *Chaplaincy of Full*

courts, the asserted SCA evidentiary privilege almost surely would have been denied.

The District of Columbia, Third, and Fifth Circuits, and the lower courts in this case, take the contrary position that courts may, in narrow circumstances, construe ambiguous silence in federal statutes as impliedly creating privilege. In *In re England*, 375 F.3d 1169 (D.C. Cir. 2004), the D.C. Circuit panel unanimously held that a statutory confidentiality provision that "does not contain specific language barring

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Gospel Churches v. England, 234 F.R.D. 7, 12 (D.D.C. 2006) (Statute stating that protected information "may not be disclosed to any person" did not creating a privilege because of "the well established requirement that statutory bars to discovery be made expressly."); *Seales v. Macomb Cnty.*, 226 F.R.D. 572, 575-76 (E.D. Mich. 2005) (Statute designating information "confidential," safeguarding "disclosure of this information," and mandating that it "not be made public," did not create a privilege 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*, No. 99-cv-1579, 2004 U.S. Dist. LEXIS 29428, at *16-17 (S.D. Cal. Dec. 23, 2004) (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*, No. 101-mc-00005, 2001 WL 896479, at *3-4 (W.D. Va. June 12, 2001) (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[.]"). *See also* 23A Kenneth W. Graham, Jr., & Ann Murphy, *Federal Practice and Procedure* § 5437 (1st ed. 2020) (noting that the bulk of federal statutes create "confidentiality rather than privilege," and that even without an express exception for judicial process, "courts tend to construe the statutes as not creating a privilege").

discovery," *id.* at 1179, may nonetheless bar court-ordered disclosures if "it categorically bars mere disclosure to anyone" with no or almost no exceptions, *id.* at 1180 (emphasis omitted). The Fifth Circuit subsequently adopted the D.C. Circuit's position in an overruling of prior Fifth Circuit law. *Compare Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, 552 (5th Cir. 2016), *with In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 487, 492 (5th Cir. 1998) (Absent "clear congressional intent to the contrary, however, we do not read [a broad confidentiality provision in statutory text] as creating an evidentiary privilege. . . . Because privileges are not lightly created, we will not infer one where Congress has not clearly manifested an intent to create one." (internal citation omitted)). The Third Circuit appears to have agreed with the D.C. and Fifth Circuits' view, though in passing dicta without clarifying the circumstances in which a court may construe ambiguous statutory silence as creating a privilege. *See Pearson v. Miller*, 211 F.3d 57, 68 (3d Cir. 2000) ("Statutory provisions providing for duties of confidentiality do not automatically imply the creation of evidentiary privileges binding on courts. . . . It does not follow, however, that a statute providing for a duty of confidentiality—but lacking an express provision for an evidentiary privilege, per se—could not also be interpreted as creating such a privilege.").[2]

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[2] Some federal district courts have adopted similar reasoning. *See Hitkansut L.L.C. v. United States*, 111 Fed. Cl. 228, 234-35 (Fed. Cl. 2013) (Statute stating that no covered information "shall be disclosed" had sufficient "breadth" to create a privilege.);

Meanwhile, the Fourth Circuit has recognized the general strict construction mandate that ambiguous language in purported statutory privileges should be construed narrowly to favor admissibility but has yet to squarely rule on the issue. *Krizak v. W.C. Brooks & Sons, Inc.*, 320 F.2d 37, 44-45 (4th Cir. 1963) (construing an express statutory privilege narrowly).

This Court's guidance is needed to avoid growing inconsistency, uncertainty, and confusion in the lower courts engendered by the circuit split over implied statutory privileges. While the D.C., Third, and Fifth Circuits apparently agree that courts may, in certain circumstances, construe ambiguous silence in statutory text as impliedly creating privilege, these circuits are themselves split as to what statutory language qualifies. The Fifth Circuit has taken the extreme position that statutory text mandating that information "shall not be made public" creates a privilege to bar judicial subpoenas. *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 879-80 (5th Cir. 1981). The D.C. Circuit, in contrast, has repeatedly asserted that courts should not construe statutory confidentiality provisions as creating privilege where "Congress was concerned

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Sajda v. Brewton, 265 F.R.D. 334, 340-41 (N.D. Ind. 2009) (Statute prohibiting "use" of covered information in a civil action for damages created a privilege against discovery.); *Bowman v. Consol. Rail Corp.*, 110 F.R.D. 525, 527 (N.D. Ind. 1986) (Statute stating that "[i]nformation obtained by the Board . . . shall not be revealed or open to inspection nor be published in any manner revealing an employee's identity" created a privilege for employee identities, but not for any other information obtained by the Board.).

with 'widespread dissemination of information not otherwise available to the public, and not with disclosure in judicial proceedings.'" *In re England*, 375 F.3d at 1180 (quoting *Freeman v. Seligson*, 405 F.2d 1326, 1349 (D.C. Cir. 1968)). Hence, the D.C. Circuit ruled that statutory language barring "publication" does not create a privilege because "disclosure in civil discovery [i]s not 'publishing' of the sort prohibited by this language." *Id*.

Inconsistent rulings within circuits further amplify the uncertainty. For instance, despite the D.C. Circuit's ruling that some statutes may impliedly create privilege, *see In re England*, 375 F.3d at 1181, multiple district courts within that circuit have continued to maintain that privileges must be express in statutory text. *See Cienfuegos v. Off. of the Architect of the Capitol*, 34 F. Supp. 3d 1, 3 (D.D.C. 2014) (finding that a statute making records "confidential" did not create a privilege); Minute Order, *Blackmon-Malloy v. U.S. Capitol Police Bd.*, No. 01-cv-02221 (D.D.C. June 23, 2010) (finding that a statute stating that records "shall be strictly confidential" did not create a privilege). Similarly, in the Federal Circuit, one district court relied on the Ninth Circuit rule to hold that even the word "privilege" in statutory text, without more, is insufficient to bar court-ordered disclosures. *Jicarilla Apache Nation v. United States*, 60 Fed. Cl. 611, 612 (Fed. Cl. 2004) (citing *Zambrano*, 972 F.2d at 1125). Yet another district court in the same circuit embraced the D.C. Circuit view. *Hitkansut L.L.C.*, 111 Fed. Cl. at 235 & n.5 (citing *In re England*, 375 F.3d at 1179) ("It is of no

consequence that [the statutory text] does not refer specifically to a prohibition on disclosure in civil discovery."). And district courts in the Seventh and First Circuits have adopted conflicting interpretations of statutory language that restricts the "use" of information. *Compare Sajda*, 265 F.R.D. at 340-41 (statute stating that covered information may not be "used in a civil action" created a discovery privilege), *with Macaulay v. Mass. Bay Commuter R.R. Co.*, No. 07-cv-10864, 2008 WL 11388601, at *2-3 (D. Mass. June 26, 2008) (statute stating that covered information may not be "used in a civil action" did not create a discovery privilege).

This Court's intervention is needed now to achieve uniformity in the lower courts and maintain proper deference to Congress's legislated subpoena and discovery rules that safeguard the judicial truth-seeking process, and through that process, the legitimacy of the courts.

II. THE FEDERAL CIRCUITS AND STATE HIGH COURTS ARE SPLIT OVER WHETHER AMBIGUOUS SILENCE IN THE STORED COMMUNICATIONS ACT IMPLIEDLY CREATES AN UNQUALIFIED EVIDENTIARY PRIVILEGE FOR THE INTERNET THAT BARS JUDICIAL SUBPOENAS REQUESTED BY CRIMINAL DEFENDANTS AND OTHER NON-GOVERNMENTAL LITIGANTS.

The lower courts' decisions in this case deepened an existing split among the federal circuits and state

high courts over whether ambiguous silence in the SCA's text and legislative record impliedly creates an unqualified evidentiary privilege that bars judicial subpoenas seeking communications contents from electronic communication service providers, if those subpoenas are requested by criminal defendants or other non-governmental litigants.

A. Background

The SCA protects privacy by prohibiting anyone from "intentionally access[ing]" stored electronic communications "without authorization." 18 U.S.C. § 2701. Its "Voluntary Disclosure" provision imposes a duty of confidentiality on electronic communication service providers to "not knowingly divulge to any person or entity" the contents of stored communications, except in nine enumerated circumstances. 18 U.S.C. § 2702. And the statute also requires heightened forms of legal process before "[a] governmental entity may require the disclosure" of communications contents from a service provider. 18 U.S.C. § 2703.

Quite importantly, the SCA's text and legislative record are silent on disclosures pursuant to judicial process requested by criminal defendants and other non-governmental litigants.

B. The Conflict

Lower courts are struggling to determine whether, despite facial silence regarding privilege in the SCA's

confidentiality provision, the statute impliedly creates a privilege to bar judicial process requested by criminal defendants and other non-governmental litigants.

The Ninth Circuit has read the SCA as not creating such a privilege. In *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004), the defendants had accessed the plaintiffs' emails by subpoenaing an electronic communication service provider. *Id.* at 1071. A unanimous panel of the Ninth Circuit concluded that the subpoena "transparently and egregiously" violated the Federal Rules of Civil Procedure because it was overbroad. *Id.* at 1071-72, 1074. The court explained that "[t]he subpoena's falsity transformed the access from a bona fide state-sanctioned inspection into private snooping," and that a "false subpoena" "does not constitute valid authorization" to access communications under the SCA because "it would not defeat a trespass claim in analogous circumstances." *Id.* at 1073-74. But a *lawful* subpoena would effect a bona fide state-sanctioned inspection and defeat a trespass claim in analogous circumstances. *See, e.g.*, Fed. R. Civ. P. 45 ("A subpoena may command . . . inspection of premises at the premises to be inspected."). The Ninth Circuit thus recognized that the SCA does not bar non-governmental litigants from accessing stored electronic communications via a lawful subpoena.

Hence, similar to the Fourth Amendment warrant requirement, the Ninth Circuit has construed the SCA's heightened legal process requirements for governmental entities as *constraints* on government power, without creating a privilege that bars non-governmental

litigants' use of judicial process. So too, the Fourth Amendment requires governmental entities to get a warrant before they may compel entry onto private property, *see, e.g.*, *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018), while non-governmental litigants may use a subpoena to do the same, *see, e.g.*, Fed. R. Civ. P. 45 (subpoena for "inspection of premises").

The Second Circuit, the District of Columbia Court of Appeals, and the Oregon Supreme Court, take the contrary position that the SCA *aggrandizes* government power. These Circuits hold that the SCA's heightened legal process requirements for governmental entities uniquely enable those entities to compel disclosures of communications contents from service providers. These courts see the SCA's confidentiality provision as impliedly creating an unqualified privilege to bar the criminally accused from using judicial process and Congress's legislated subpoena rules to do the same. In *United States v. Pierce*, 785 F.3d 832 (2d Cir. 2015), a unanimous panel of the Second Circuit asserted—without analysis—that "[t]he SCA does not, on its face, permit a [criminal] defendant to obtain [electronic communications contents from service providers]." *Id.* at 842. The District of Columbia Court of Appeals and the Oregon State Supreme Court subsequently agreed with this position. *See Wint*, 199 A.3d at 628-29; *State v. Bray*, 422 P.3d 250, 256 (Or. 2018). Multiple federal district courts and state courts of appeals have ruled similarly, for both criminal defense and non-governmental civil subpoenas. *See, e.g.*, *Wint*, 199 A.3d at 629 (collecting criminal subpoena cases); *P.P.G.*

Indus., Inc. v. Jiangsu Tie Mao Glass Co., Ltd., 273 F. Supp. 3d 558, 560-61 (W.D. Pa. 2017) (collecting civil subpoena cases).[3]

This Court's guidance is needed now to clarify whether the presumption in favor of judicial truth-seeking, and the accused's right to subpoena material evidence, applies to the Stored Communications Act.

III. THIS CASE PRESENTS IMPORTANT AND RECURRING ISSUES OF NATIONAL IMPORTANCE AND IS AN IDEAL VEHICLE FOR ADDRESSING THEM.

A. The Propriety of Courts Construing Ambiguous Silence in Statutory Text as Impliedly Creating Privilege Has Sweeping Consequences for a Host of Federal Statutes and Should Be Resolved Now.

The issue of whether courts may read ambiguous silence in statutory text as impliedly creating privilege has outcome-determinative consequences for a slew of federal statutes, including the Violence Against Women Act, 8 U.S.C. § 1367(a)(2) (construed

[3] Meanwhile, the California Supreme Court has twice granted review without resolving the issue. *See Facebook, Inc. v. Super. Ct. of San Diego Cnty.* (*Touchstone*), 471 P.3d 383, 401-03 (Cal. 2020) (remanding for consideration of good cause basis of subpoena without ruling on the scope of Section 2702(a)'s confidentiality provision); *Hunter*, 417 P.3d at 728 (construing Section 2702(b)(3)'s lawful consent exception without ruling on the scope of Section 2702(a)'s confidentiality provision).

as creating a privilege for visa applications in *Cazorla*, 838 F.3d at 552, but construed as not creating a privilege for the same information in *Rodriguez*, 2012 WL 12953870, at *2-3); the Immigration Reform and Control Act, 8 U.S.C. § 1160(b)(5)-(6) (construed as not creating a privilege for immigration asylum applications in *Zambrano*, 972 F.2d at 1125-26, in *Hernandez*, 913 F.2d at 1511-12, in *In re Nelson*, 873 F.2d at 1397, and in *Rodriguez*, 2012 WL 12953870, at *2-3); the Immigration and Nationality Act, 8 U.S.C. § 1255a(c)(4)-(5) (construed as not creating a privilege for immigration asylum applications in *Zambrano*, 972 F.2d at 1125-26, in *Hernandez*, 913 F.2d at 1511-12, and in *Rodriguez*, 2012 WL 12953870, at *2-3); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(b) (construed as creating a privilege for certain Equal Employment Opportunity Commission records in *Branch*, 638 F.2d at 880); the Food Stamp Act Supplemental Nutrition Assistance Program ("SNAP"), 7 U.S.C. § 2020(e)(8) (construed as not creating a privilege for the personal identifiable information of food stamp recipients in *In re Nassau County Strip Search Cases*, 2017 WL 3189870, at *5-6, in *Hassan*, 2006 WL 681038, at *3, and in *In re Grand Jury Subpoena*, 2001 WL 896479, at *3-4); the Federal Technology Transfer Act, 15 U.S.C. § 3710(a)(c)(7)(A)-(B) (construed as creating a privilege for information derived from the government's cooperative research and development agreements in *Hitkansut L.L.C.*, 111 Fed. Cl. at 234-35); Title XIX of the Social Security Act, 42 U.S.C. § 1396a(a)(A)(7) (construed as not creating a privilege for the personal identifiable information of Medicaid recipients in *In*

re Grand Jury Subpoena, 2001 WL 896479, at *3-4, and in *In re Nassau County Strip Search Cases*, 2017 WL 3189870 at *5); the Motor Carrier Safety Act, 49 U.S.C. § 504(f) (construed as creating a privilege for a motor vehicle accident report from a trucking company in *Sajda*, 265 F.R.D. at 341); the Congressional Accountability Act, 2 U.S.C. § 1416(a)-(f) (construed as not creating a privilege for dispute-resolution hearing records in *Cienfuegos*, 34 F. Supp. at 3, and in Minute Order, *Blackmon-Malloy*, No. 01-cv-02221); the Railroad Unemployment Insurance Act, 45 U.S.C. § 362(d) (construed as creating a privilege for employee identity information, but no other information, from the railroad retirement board in *Bowman*, 110 F.R.D. at 527); the Agricultural Credit Act, 7 U.S.C. § 5101(c)(3)(D) (construed as not creating a privilege for mediation session records in *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d at 492); the Indian Mineral Development Act, 25 U.S.C. § 2103(c) (construed as not creating a privilege for mineral development information in *Jicarilla Apache Nation*, 60 Fed. Cl. at 612); the Accident Reports Act, 49 U.S.C. § 20903 (construed as not creating a privilege for railroad accident reports in *Macaulay*, 2008 WL 11388601, at *2); and the Stored Communications Act, 18 U.S.C. § 2702(a) (presumed to not create a privilege in *Theofel*, 359 F.3d at 1073-74, but construed as creating a privilege in *Bray*, 422 P.3d at 256, *Pierce*, 785 F.3d at 842, and *Wint*, 199 A.3d at 628-29).

B. The Propriety of Judicial Process Requested by Criminal Defendants and Other Non-Governmental Litigants Seeking To Subpoena Electronic Communication Service Providers for Stored Communications Contents Should Be Resolved Now.

To the extent that the statutory confidentiality provision in the SCA impliedly creates an unqualified evidentiary privilege for the Internet, it harms prosecutors, criminal defendants, civil litigants, and the public alike by undermining the truth-seeking process of the courts with no significant countervailing societal benefits. Judicial truth-seeking in the digital age urgently depends on litigants' access to digital evidence stored by electronic communication service providers. As one indication of scale, law enforcement and other governmental entities within the United States served Facebook with 35,586 unique search warrants implicating 55,002 accounts,[4] and Google with 19,783 unique search warrants implicating 28,865 accounts,[5] in just the period from January to June, 2020. Even if the number of criminal defense subpoenas barred by an SCA privilege were a mere fraction of their law

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[4] *Overview: United States*, Facebook Transparency Report, https://transparency.facebook.com/government-data-requests/country/US (last visited Apr. 6, 2021).

[5] *Global Requests for User Information: United States*, Google Transparency Report, https://transparencyreport.google.com/user-data/overview?hl=en&user_requests_report_period=series:requests,accounts;authority:US;time:&lu=legal_process_breakdown&legal_process_breakdown=expanded (last visited Apr. 6, 2021).

enforcement counterparts, the result would suppress an increasingly critical source for relevant and material evidence with profound and growing consequences for the accurate and fair resolution of criminal proceedings.

Certainly, criminal defendants and non-governmental civil litigants can sometimes subpoena a person's electronic communications directly from that person. But that route is not available in a slew of circumstances, such as when the person cannot be located, resides abroad, presents a danger to someone's life or physical safety, might tamper with and destroy evidence, has died, has a Fifth Amendment or other privilege against production, or simply refuses to comply with the subpoena and is held in contempt. In those cases, subpoenaing the service provider can be the sole practical source for relevant and material digital evidence, and construing the SCA's confidentiality provision to unqualifiedly bar such subpoenas is "in derogation of the search for truth." *Nixon*, 418 U.S. at 710.

If the SCA does impliedly create an unqualified privilege for the Internet, it is a radical outlier privilege that attaches merely because of the *medium* used to communicate, without regard to the communicants' purpose, topic, or expectations of confidentiality. *Cf. Guillen*, 537 U.S. at 144 (describing statutory privilege); *UpJohn Co. v. United States*, 449 U.S. 383, 389 (1981) (describing attorney-client privilege). The result undermines judicial truth-seeking with no clear societal benefit.

An unqualified SCA privilege for the Internet would harm privacy by reducing the likelihood that a person whose communications are subpoenaed from a third party will receive notice of the subpoena and an opportunity to object to it in court. When it is not feasible to subpoena a person's communications directly from that person herself, litigants must choose between subpoenaing a service provider and subpoenaing another individual with whom the first person communicated online. If the SCA were not in the way, the service provider route would be more privacy-protective because most providers have contractual or fiduciary duties to notify their users about subpoenas.[6] In contrast, other individuals have no such duty and can comply with the subpoena entirely behind the back of the person who is being investigated. Construing the SCA as impliedly creating a privilege channels subpoenas away from service providers and to this latter, less privacy-protective route. *See, e.g.*, *Facebook, Inc. v. Super. Ct. of the City and Cnty. of S.F.*, 46 Cal. App. 5th 109, 121 (Cal. Ct. App. 2020) (responding to purported SCA subpoena bar by directing counsel to subpoena a prosecution witness's electronic communications from another person with whom the witness communicated online, rather than from the service provider).

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[6] *See, e.g.*, *Guidelines for Legal Requests of User Data*, GitHub, https://docs.github.com/en/github/site-policy/guidelines-for-legal-requests-of-user-data (last visited Apr. 6, 2021) ("We will notify affected users about any requests for their account information. . . .").

Construing the SCA's confidentiality provision as impliedly creating a privilege supplies a court-created subsidy to electronic communication service providers and their data-mining businesses by specially exempting them from the administrative burdens of complying with judicial process—a subsidy that the legislative record indicates they did not even request at the time of enactment. It is unclear why these businesses should receive this subsidy at the expense of the judiciary when banks, hospitals, telephone providers, and private persons all must shoulder the public duty to provide relevant evidence to the courts.

If service providers want a special exemption from the burdens of complying with judicial process that others must bear, they can ask Congress to grant them such a privilege via unambiguous statutory text. In the meantime, courts must not use their common law authority to gift such special treatment to technology markets without first conducting the careful balancing of competing interests required for the creation of a novel common law privilege. *See Trammel*, 455 U.S. at 51 (new common law privileges must "promote[] sufficiently important interests to outweigh the need for probative evidence"); *Jaffee*, 518 U.S. 1 (dictating factors for *Trammel*'s balancing test). Courts should not duck the hard work of *Trammel*'s balancing test, and disguise their own acts as those of Congress, by misattributing such a privilege to ambiguous silence in statutory text.

In light of the increasing importance of digital evidence in criminal proceedings and the lower courts'

confusion over whether the SCA suppresses relevant evidence from the truth-seeking process of the judiciary merely because it happened to be sent over the Internet, this Court's intervention is critical. Courts, litigants, and the public alike need to know the extent to which the SCA permits criminal defendants' and other non-governmental litigants' subpoenas, subject to the legislated procedural rules and the safeguards of ex ante adversarial judicial review. Resolving this question is essential to maintain the integrity of criminal proceedings and the truth-seeking capacity of the judiciaries nationwide.

C. Additional Percolation Would Not Aid this Court's Consideration of the Issues.

There is no good reason to delay resolution of the questions presented. At least six federal appellate courts have already deliberated, decided, and divided on the issue of whether, or in what circumstances, courts may construe ambiguous silence in statutory text as impliedly creating privilege. Additional percolation is particularly unlikely to surface new legal theories, or to lead to a uniform legal regime, given the nature of the courts' disagreement over the questions presented. On one side of the split, courts believe that this Court's decisions in *St. Regis*, *Baldrige*, *Pierce*, and other cases constitute binding precedent that requires them to not construe statutes as creating a privilege that bars judicial process unless the statutes' plain text contains express privilege language. *See*

Zambrano, 972 F.2d at 1125-26; *Hernandez*, 913 F.2d at 1511-12; *In re Nelson*, 873 F.2d at 1397. On the other side of the split, courts do not think this Court's prior cases require that statutory privileges must be express. *See Pearson*, 211 F.3d at 68; *Cazorla*, 838 F.3d at 552; *In re England*, 375 F.3d at 1177. Only this Court can decide which of these two conflicting views of its precedents is correct.

Meanwhile, the issue of whether the confidentiality provision in the Stored Communications Act bars judicial process served by non-governmental litigants has been percolating in the lower courts for at least fifteen years. *See, e.g.*, *O'Grady*, 139 Cal. App. 4th 1423. It has spawned at least five federal appellate and state high court opinions. *See Theofel*, 359 F.3d 1066; *Wint*, 199 A.3d 625; *Hunter*, 417 P.3d 725; *Bray*, 422 P.3d 250; *Pierce*, 785 F.3d 832. And it has inspired a rich body of scholarly commentary that can help to inform the Court's deliberations. *See generally*, Rebecca Wexler, *Privacy as Privilege: The Stored Communications Act and Internet Evidence*, 134 Harv. L. Rev. __ (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3673403; Brendan Sasso, *Digital Due Process: The Government's Unfair Advantage Under the Stored Communications Act*, 8 Va. J. Crim. L. 35 (2020); Joshua A.T. Fairfield & Erik Luna, *Digital Innocence*, 99 Cornell L. Rev. 981 (2014); Jeffrey Paul DeSousa, Note, *Self-Storage Units and Cloud Computing: Conceptual and Practical Problems with the Stored Communications Act and Its Bar on ISP Disclosures to Private Litigants*, 102 Geo. L.J. 247, 257 (2013);

Ryan A. Ward, Note, *Discovering Facebook: Social Network Subpoenas and the Stored Communications Act*, 24 Harv. J.L. & Tech. 563 (2011); Marc J. Zwillinger & Christian S. Genetski, *Criminal Discovery of Internet Communications Under the Stored Communications Act: It's not a Level Playing Field*, 97 J. Crim. L. & Criminology 569 (2007).

D. This Case Is an Ideal Vehicle for the Court To Resolve the Circuit Splits Over Implied Statutory Privileges and Whether the SCA Impliedly Creates an Unqualified Privilege for the Internet.

This case presents an ideal vehicle for the Court to resolve the persistent split over implied statutory privileges in a setting in which it has sweeping implications. In a perfect intersection of the two questions presented, the lower courts in this case quashed Petitioner's so-ordered judicial subpoena to GitHub on one basis only. Despite the SCA's facial silence as to privilege, the courts construed the statute as unqualifiedly barring criminal defendants from subpoenaing an electronic communication service provider for relevant and material evidence, even if that evidence could exonerate a person wrongfully accused and sentenced to death. The lower courts cited no other authority for quashing Petitioner's subpoena.

This case exemplifies the devastating consequences of unqualified evidentiary privileges. This Court has required a strict construction rule for

statutory privileges, *see St. Regis*, 368 U.S. 208, and mandatory balancing of competing interests for common law privileges, *see Trammel*, 445 U.S. 40, to check those devastating consequences and protect judicial truth-seeking and the legitimacy of the courts. The lower courts need guidance on how to apply these precedents in the digital age.

Given the explosion of digital evidence critical to litigation of all kinds, and the ever-increasing dependence of the nation's courts, and the litigants before them, on digital evidence possessed by electronic communication service providers, this Court should resolve the issues now.

E. The Stored Communications Act Must Be Construed Narrowly To Not Imply a Novel Evidentiary Privilege for the Internet from Ambiguous Statutory Text.

Certiorari is also warranted because the lower courts' decisions in this case are wrong. Courts construing 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." *St. Regis Paper Co.*, 368 U.S. at 218 (emphasis added). The SCA does nothing of the kind. The statute's plain text contains "no specific language prohibiting judicial disclosure" to criminal defendants and other non-governmental litigants. *Zambrano*, 972 F.2d at 1126. Nor does the text "embody explicit congressional intent to preclude *all* disclosure

of" covered information, *Baldrige*, 455 U.S. at 361 (emphasis in original), or "categorically bar[] mere disclosure to anyone" with no or almost no exceptions, *In re England*, 375 F.3d at 1180. To the contrary, the SCA's provision limiting "Voluntary Disclosure" contains a plethora of exceptions that permit disclosures in a wide array of circumstances. *See* 18 U.S.C. § 2702(b). Thus, the plain text of 18 U.S.C. § 2702(a), strictly construed, bestows confidentiality without impliedly creating an unqualified evidentiary privilege that would bar criminal defendants' and other non-governmental litigants' so-ordered subpoenas.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

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