

1 Philip J. Wang (SBN 218349)  
PUTTERMAN YU WANG LLP  
2 345 California St., Suite 1160  
San Francisco, CA 94104  
3 Tel: (415) 685-0826  
4 Fax: (415) 737-1363  
pwang@plylaw.com

Electronically  
**FILED**  
by Superior Court of California, County of San Mateo  
ON 11/15/2021  
By /s/ Anthony Berini  
Deputy Clerk

5 Raúl Torrez, District Attorney\*  
6 James Grayson, Deputy District Attorney\*  
OFFICE OF THE SECOND JUDICIAL  
7 DISTRICT ATTORNEY  
520 Lomas Blvd. N.W.  
8 Albuquerque, NM 87102  
Tel: (505) 382-9116  
9 Fax: (505) 241-1100  
james.grayson@da2nd.state.nm.us

11 Mary B. McCord\*  
INSTITUTE FOR CONSTITUTIONAL  
12 ADVOCACY AND PROTECTION  
Georgetown University Law Center  
13 600 New Jersey Ave., NW  
Washington, DC 20001  
14 Tel: (202) 662-9042  
Fax: (202) 661-6730  
15 mbm7@georgetown.edu

16 \* *Pro hac vice forthcoming*  
17 *Attorneys for Petitioner State of New Mexico*

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF SAN MATEO**

19 STATE OF NEW MEXICO ex rel. RAÚL ) Case No.: 21-CIV-06145  
20 TORREZ, District Attorney, Second Judicial )  
21 District, ) **PETITION AND MEMORANDUM TO**  
 ) **ENFORCE SUBPOENA PURSUANT TO**  
22 ) **CODE OF CIVIL PROCEDURE § 2029.600**  
 )  
23 )  
 ) *State of New Mexico ex rel. Raúl Torrez,*  
24 ) *District Attorney, Second Judicial District*  
 )  
25 ) *v.*  
 ) *New Mexico Civil Guard, et al.*  
26 ) *State of New Mexico*  
 ) *County of Bernalillo*  
27 ) *Second Judicial District Court*  
28 ) *Case No. D-202-CV-2020-04051*

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Page

TABLE OF AUTHORITIES ..... ii

BACKGROUND ..... 1

ARGUMENT ..... 4

    I. Facebook Must Produce Responsive Records that Have Been Deleted If the Records Can Be Recovered Without Undue Burden or Expense. .... 4

    II. The State’s Subpoena Is Valid Under the Stored Communications Act. .... 7

        A. The SCA Does Not Bar the State from Obtaining Subscriber Information Through a Civil-Discovery Subpoena. .... 8

            1. Civil Subpoenas Are the Functional Equivalent of Administrative Subpoenas Under New Mexico Law. .... 8

            2. The Term “Trial Subpoena” Encompasses Pretrial Subpoenas. .... 10

        B. None of the Other Requested Information Implicates the SCA. .... 11

    III. None of Facebook’s Other Objections Have Merit. .... 13

CONCLUSION..... 15

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Page(s)

**Cases**

*Anti-Defamation League of B'nai B'rith v. Superior Court*,  
67 Cal. App. 4th 1072 (1998) ..... 13

*Doe v. City of San Diego*,  
No. 12-cv-0689-MMA (DHB), 2013 WL 2338713 (S.D. Cal. May 28, 2013)..... 9

*FTC v. Netscape Commc'ns Corp.*,  
196 F.R.D. 559 (N.D. Cal. 2000)..... 10

*O'Grady v. Superior Court*,  
139 Cal. App. 4th 1423 (2006) ..... 7, 10, 12

*People v. Stipo*,  
195 Cal. App. 4th 664 (2011) ..... 7

*United States v. Morton Salt Co.*,  
338 U.S. 632 (1950)..... 9

*United States v. Perrine*,  
518 F.3d 1196 (10th Cir. 2008) ..... 7

*Vasquez v. Cal. Sch. of Culinary Arts, Inc.*,  
230 Cal. App. 4th 35 (2014) ..... 6

*Yelp Inc. v. Superior Court*,  
17 Cal. App. 5th 1 (2017) ..... 13

*Zubulake v. UBS Warburg LLC*,  
217 F.R.D. 309 (S.D.N.Y. 2003) ..... 6

**Statutes**

18 U.S.C. § 2701 ..... 7

18 U.S.C. § 2703 ..... 8, 10, 12

Cal. Civ. Proc. Code § 1985.8(e) ..... 6

Cal. Civ. Proc. Code § 2017.010 ..... 13, 14

Cal. Civ. Proc. Code § 2031.240(c)(1) ..... 14

Cal. Penal Code § 1546.1(i)(3) ..... 11

NMSA 1978 § 10-16F-3(M)(3) ..... 11

NMSA 1978, § 30-8-8(B) ..... 1

NMSA 1978, § 36-1-18(A)(1) ..... 1, 8

NMSA 1978, § 57-12-12 ..... 8

1	<b>Rules</b>	
2	Fed. R. Civ. P. 45(a)(1)(D)(2) (2006).....	10
3	Fed. R. Civ. P. 45(a)(2).....	11
4	Rule 1-012 NMRA.....	9
5	<b>Constitutional Provisions</b>	
6	U.S. Const. art. VI.....	11
7	<b>Other Authorities</b>	
8	Algernon Dammassa, <i>NM Civil Guard’s Facebook Account Deleted; Group Files Claim Against</i>	
9	<i>DA</i> , Albuquerque J. (Aug. 21, 2020), <a href="https://perma.cc/89DA-G89B">https://perma.cc/89DA-G89B</a> .....	3, 5
10	<i>Appealing Content Decisions on Facebook and Instagram</i> , Oversight Board,	
11	<a href="https://perma.cc/YD8F-GEXB">https://perma.cc/YD8F-GEXB</a> (last visited Nov. 3, 2021).....	5
12	Ben Gilbert, <i>How Facebook Makes Money from Your Data</i> , in <i>Mark Zuckerberg’s Own Words</i> ,	
13	Bus. Insider (Apr. 11, 2018), <a href="https://perma.cc/DG3P-3XJ9">https://perma.cc/DG3P-3XJ9</a> .....	4
14	Charles Davis, <i>Facebook Removes Page for New Mexico Civil Guard, Along with Other</i>	
15	<i>Paramilitary Organizations—And Anti-Fascist Groups</i> , Bus. Insider (Aug. 19, 2020),	
16	<a href="https://perma.cc/9L4M-RQDX">https://perma.cc/9L4M-RQDX</a> .....	3, 5
17	<i>Community Standards and Enforcement Report</i> , Facebook Transparency Center,	
18	<a href="https://perma.cc/SV33-8MYC">https://perma.cc/SV33-8MYC</a> (last visited Nov. 3, 2021) .....	5
19	<i>Dangerous Individuals and Organizations</i> , Facebook, <a href="https://perma.cc/W8YK-7UZR">https://perma.cc/W8YK-7UZR</a> (last	
20	visited Nov. 2, 2021).....	3, 5
21	Facebook Dangerous Individuals and Organizations List, The Intercept (n.d.),	
22	<a href="https://perma.cc/EQD6-NNNU">https://perma.cc/EQD6-NNNU</a> .....	3, 5
23	<i>Implicate</i> , Merriam-Webster’s Online Dictionary, <a href="https://perma.cc/ZM33-ZVQQ">https://perma.cc/ZM33-ZVQQ</a> (last visited	
24	Nov. 4, 2021) .....	12
25	<i>Introducing Meta: A Social Technology Company</i> , Meta (Oct. 28, 2021), <a href="https://perma.cc/7EHY-GAT9">https://perma.cc/7EHY-</a>	
26	<a href="https://perma.cc/7EHY-GAT9">GAT9</a> .....	12
27	Order Granting in Part and Den. in Part Mot. J. Pleadings, No. D-202-CV-2020-4051 (N.M. 2nd	
28	Judicial D. Ct. Sept. 13, 2021).....	2
	<i>Pertain</i> , Merriam-Webster’s Online Dictionary, <a href="https://perma.cc/93V9-W385">https://perma.cc/93V9-W385</a> (last visited Nov.	
	4, 2021).....	12
	<i>The Shift to Generalized AI to Better Identify Violating Content</i> , Facebook AI,	
	<a href="https://perma.cc/TB7F-7F88">https://perma.cc/TB7F-7F88</a> (Nov. 9, 2021) .....	5



1 state”). In September 2021, New Mexico’s Second Judicial District Court denied in all meaningful  
2 respects a motion for judgment on the pleadings filed by defendants and held that all of the State’s  
3 claims are legally viable. Order Granting in Part and Den. in Part Mot. J. Pleadings, No. D-202-  
4 CV-2020-4051 (N.M. 2nd Judicial D. Ct. Sept. 13, 2021).

5 Facebook possesses information that is critical to the State’s case. NMCG’s unlawful  
6 conduct reached its nadir during the summer of 2020. On several occasions, NMCG members self-  
7 deployed—in violation of New Mexico state law—to protests and demonstrations in New Mexico,  
8 wearing camouflage attire and sporting assault rifles and other military-style gear with the professed  
9 purpose of “protecting” individuals and property. At one such incident, an individual apparently  
10 unaffiliated with NMCG but emboldened by the group’s menacing presence at a protest battered  
11 several female protesters before he ultimately shot and injured another protester.

12 NMCG catalogued much of its unlawful conduct on Facebook pages that the group created  
13 and on several of its members’ Facebook pages. Among other things, NMCG and its members used  
14 the Facebook app to recruit new members; to issue orders to members and recruits about how to  
15 equip and outfit themselves; to provide instructional information on paramilitary tactics; and to  
16 encourage members to deploy to protests and demonstrations for the purpose of engaging in  
17 paramilitary activity and falsely assuming law-enforcement duties. In anticipation of litigation, the  
18 State archived a significant amount of the Facebook content posted by NMCG and its members.  
19 That archived content forms the foundation of the State’s pleadings. The State’s subpoena seeks the  
20 non-content subscriber information associated with the NMCG’s Facebook pages and those of its  
21 members. As opposed to “content” information, which would include the messages and photos on  
22 the pages themselves, “non-content” subscriber information is metadata that contains information  
23 about the ownership of the accounts in question, including each owner’s name, IP address, contact  
24 information, and login history. Obtaining such information is critical to the State’s efforts to tie  
25 evidence that it has gathered to the defendants.

26 Facebook took down NMCG’s pages and those belonging to several of its members on or  
27 around August 19, 2020, in connection with the company’s “Dangerous Individuals and  
28

1 Organizations” policy.<sup>2</sup> Under that policy, entities like NMCG that “engage in violations of  
2 [Facebook’s] Hate Speech or Dangerous Organizations policies on-or-off the platform or  
3 demonstrate strong intent to engage in offline violence in the near future . . . . may not have a  
4 presence or coordinate on [the company’s] platforms.”<sup>3</sup> Recently disclosed internal documents  
5 from Facebook reveal that the company—correctly—identifies NMCG as a “Militarized Social  
6 Movement” and an “Armed Militia Group.”<sup>4</sup> Because the NMCG account and other affiliated  
7 accounts are no longer active, the State cannot obtain the requested information from the presumed  
8 former owners of the accounts. Only Facebook can provide the requested information.  
9 Enforcement of the State’s subpoena is therefore critical to the State’s efforts to hold NMCG  
10 accountable.

11 Before domesticating and serving this subpoena on Facebook, the State engaged in a lengthy  
12 series of informal discussions with counsel for Facebook concerning the discovery sought by the  
13 State. Nearly three months after those discussions began, Facebook represented for the first time  
14 that the primary focus of the State’s discovery efforts—non-content subscriber information  
15 associated with Facebook accounts connected to NMCG—had been deleted after Facebook took  
16 down the accounts in question on or around August 19, 2020.<sup>5</sup> Grayson Decl. ¶ 12; *see* Grayson  
17 Decl. Ex. 13, Req. No. 8. For several months following that representation, the State repeatedly  
18

---

19 <sup>2</sup> Algernon Dammassa, *NM Civil Guard’s Facebook Account Deleted; Group Files Claim Against*  
20 *DA*, Albuquerque J. (Aug. 21, 2020), <https://perma.cc/89DA-G89B>; Charles Davis, *Facebook*  
21 *Removes Page for New Mexico Civil Guard, Along with Other Paramilitary Organizations—And*  
*Anti-Fascist Groups*, Bus. Insider (Aug. 19, 2020), <https://perma.cc/9L4M-RQDX>.

22 <sup>3</sup> *Dangerous Individuals and Organizations*, Facebook, <https://perma.cc/W8YK-7UZR> (last visited  
23 Nov. 2, 2021).

24 <sup>4</sup> Facebook Dangerous Individuals and Organizations List, The Intercept 53 (n.d.),  
<https://perma.cc/EQD6-NNNU>.

25 <sup>5</sup> Among the Facebook accounts enumerated in the State’s subpoena is one believed to have  
26 belonged to NMCG’s founder prior to August 19, 2020, as well as one that NMCG’s founder  
27 created after the takedown. As of May 2021, Facebook possessed (and presumably still does  
28 possess) non-content subscriber information associated with the NMCG founder’s new account.  
But the non-content subscriber information associated with that account is of little value to the State  
absent similar data from the NMCG founder’s now-defunct account with which to compare it.

1 inquired whether the non-content subscriber information in question could be recovered, but  
2 Facebook refused to directly answer the question or to provide a sworn statement certifying that the  
3 information at issue could not be recovered. Accordingly, the State’s subpoena also contains  
4 several requests for records intended to ascertain whether Facebook is able to recover that  
5 information. Grayson Decl. Ex. 13, Req. Nos. 3–7. The subpoena also contains a request for  
6 Facebook’s communications concerning the takedown of Facebook accounts associated with  
7 NMCG and any communications that Facebook had with law-enforcement agencies concerning  
8 those accounts. *Id.*, Req. Nos. 1–2. The records sought in Request Nos. 1 and 2 are particularly  
9 important to the State if Facebook truly is unable to recover the requested non-content subscriber  
10 information because the requested communications will help the State establish that the accounts in  
11 question were associated with NMCG.

## 12 ARGUMENT

### 13 I. Facebook Must Produce Responsive Records that Have Been Deleted If the Records 14 Can Be Recovered Without Undue Burden or Expense.

15 During the parties’ numerous attempts to resolve this discovery dispute, Facebook  
16 repeatedly has represented that records responsive to the State’s subpoena—in particular, the non-  
17 content subscriber information sought in Request No. 8—have been deleted. *E.g.*, Grayson Decl.  
18 Ex. 14 at 2 (“Facebook objects to the Subpoena on the grounds that it is unduly burdensome to the  
19 extent it[] . . . seek[s] information that is not reasonably available to Facebook, such as deleted  
20 records.”). Even after making such representations, however, Facebook represented as recently as  
21 September 30, 2021, that it was conducting another search to locate responsive information.  
22 Grayson Decl. Ex. 17. Given that Facebook is a one-trillion-dollar company that makes a  
23 substantial part of its profits from subscriber data, the State presumes that the company has invested  
24 heavily in technology that electronically stores information after it has been deleted, which is  
25 commonplace at much smaller and less deep-pocketed or technologically sophisticated companies.<sup>6</sup>

26  
27  
28 <sup>6</sup> See Ben Gilbert, *How Facebook Makes Money from Your Data*, in *Mark Zuckerberg’s Own Words*, Bus. Insider (Apr. 11, 2018), <https://perma.cc/DG3P-3XJ9>.



1 Beyond Facebook’s status as a technology and data-collection titan, there are additional  
2 reasons to doubt that the company would permanently delete and be unable to recover non-content  
3 subscriber information, especially under the circumstances surrounding the takedown of the  
4 accounts enumerated in the State’s subpoena. Facebook has instituted an appeals process for  
5 accounts that have been disabled or removed<sup>7</sup> and compiles regular reports with statistics reflecting  
6 the company’s enforcement of its community-standards policies, including action taken on accounts  
7 “engaging in terrorist activity or organized hate.”<sup>8</sup> Moreover, Facebook took down the accounts in  
8 question in connection with its “Dangerous Individuals and Organizations” policy, *see* Dammassa,  
9 *supra* note 2; Davis, *supra* note 2, because the company—correctly—classifies NMCG as a  
10 “Militarized Social Movement” and an “Armed Militia Group,” Facebook Dangerous Individuals  
11 and Organizations List, *supra* note 4. Facebook therefore appears to have concluded—again,  
12 correctly—that NMCG “engage[s] in violations of [the company’s] Hate Speech or Dangerous  
13 Organizations policies on-or-off the platform or demonstrate[s] strong intent to engage in offline  
14 violence in the near future.” *Dangerous Individuals and Organizations*, *supra* note 3. Information  
15 about groups and individuals that traffic in hate speech and violence is of obvious interest to a range  
16 of actors—from law enforcement, to state legislatures, to Congress, to private individuals who may  
17 have been harmed by the groups and individuals in question. Moreover, Facebook has publicly  
18 promoted its use of artificial intelligence to proactively detect and remove content that violates its  
19 policies, which presumably requires it to retain a certain amount of content and non-content  
20 information.<sup>9</sup>

21 If, on the other hand (and as the State suspects), Facebook does have the ability to recover  
22 deleted records that are responsive to this request, then it is presumptively obligated to produce  
23 them. Under California law, a subpoenaed entity may “oppose production of electronically stored  
24

---

25 <sup>7</sup> *Appealing Content Decisions on Facebook and Instagram*, Oversight Board,  
26 <https://perma.cc/YD8F-GEXB> (last visited Nov. 3, 2021).

27 <sup>8</sup> *Community Standards and Enforcement Report*, Facebook Transparency Center,  
28 <https://perma.cc/SV33-8MYC> (last visited Nov. 3, 2021).

<sup>9</sup> *The Shift to Generalized AI to Better Identify Violating Content*, Facebook AI,  
<https://perma.cc/TB7F-7F88> (Nov. 9, 2021).

1 information ‘on the basis that the information is from a source that is not reasonably accessible  
2 because of undue burden or expense.’” *Vasquez v. Cal. Sch. of Culinary Arts, Inc.*, 230 Cal. App.  
3 4th 35, 42 (2014) (citations and footnote omitted) (quoting Cal. Civ. Proc. Code § 1985.8(e)). But  
4 the subpoenaed entity “bears the burden of establishing such inaccessibility.” *Id.* “Even if the  
5 subpoenaed person establishes that the electronically stored information is not reasonably accessible  
6 because of undue burden or expense, the court may order its production if the court finds good  
7 cause for doing so.” *Id.* California courts “will not automatically assume that compliance with a  
8 subpoena is unduly burdensome because it requests the production of electronically stored  
9 information. *Id.* at 43 (citing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y.  
10 2003)); *see also id.* at 42 (noting that California courts “look . . . to federal case law on the  
11 discovery of electronically stored information”).

12 Facebook has not come close to meeting its burden to establish that the purportedly deleted  
13 but responsive records in question cannot be recovered without “undue burden or expense.” Cal.  
14 Civ. Proc. Code § 1985.8(e). Its objection letter states only that Request No. 8 is “unduly  
15 burdensome” because it seeks “information that is not reasonably available to Facebook, such as  
16 deleted records.” Grayson Decl. Ex. 14 at 2. The objection letter says nothing about any attempts  
17 to recover the requested information and instead suggests—contrary to California discovery law—  
18 that requests for electronically stored information are per se unduly burdensome. *But see Vasquez*,  
19 230 Cal. App. 4th at 42–43. If Facebook now belatedly attempts to argue that recovering the  
20 information in question would be unduly burdensome, this Court should evaluate such protests with  
21 great skepticism. The State attempted to resolve this discovery dispute by requesting a declaration  
22 from Facebook’s Chief Technology Officer, Mike Schroepfer, certifying that Facebook (1) deleted  
23 the non-content subscriber information in question; (2) attempted to recover that information; and  
24 (3) was unable to do so. *See* Grayson Decl. Ex. 22. Facebook refused to execute such a  
25 declaration. Grayson Decl. Ex. 24. Any attempt by Facebook now to plead undue burden is too  
26 little, too late.

27 But even if this Court were inclined to entertain a tardy protest of undue burden, “good  
28 cause” supports an order requiring Facebook to produce the non-content subscriber information in

1 question. As explained above, *supra* pp. 2–4, linking the Facebook content that the State has  
2 archived to NMCG is critical to the State’s efforts to enforce New Mexico law, and only Facebook  
3 has access to the information in question. The requested information is therefore necessary to  
4 ensure that NMCG and its members never again terrorize New Mexico communities or chill First  
5 Amendment rights by deploying to protests and demonstrations to engage in paramilitary conduct or  
6 to falsely assume law-enforcement duties.

7 **II. The State’s Subpoena Is Valid Under the Stored Communications Act.**

8 Facebook contends that the State’s subpoena is barred *in its entirety* by the Stored  
9 Communications Act (SCA), 18 U.S.C. §§ 2701 *et seq.* Grayson Decl. Ex. 14 at 3–4. The SCA  
10 “lessen[s] the disparities between the protections given to established modes of private  
11 communication and those accorded new communications media” by “protect[ing] the privacy of  
12 stored electronic communications *except where* legitimate law enforcement needs justify its  
13 infringement.” *O’Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1444 (2006) (emphasis in  
14 original). Only Request No. 8, which seeks non-content subscriber information associated with  
15 NMCG-affiliated Facebook accounts, even arguably implicates the SCA. Facebook incorrectly  
16 contends that the SCA prohibits the Second Judicial District Attorney’s Office (the “DA’s Office”),  
17 as a governmental entity, from obtaining the requested metadata through a civil-discovery  
18 subpoena.<sup>10</sup> Grayson Decl. Ex. 14 at 3–4. The other seven categories of documents requested by  
19 the State are neither subscribers’ content nor even associated non-content subscriber information.  
20 Rather, the other records that the State requests are all Facebook’s own policies, procedures, and  
21 communications. Facebook nevertheless contends that the SCA shields those non-subscriber  
22 documents from disclosure.

23  
24  
25  
26  
27 <sup>10</sup> Although the SCA provides some statutory safeguards for disclosure of non-content subscriber  
28 information, “subscriber information provided to an internet provider is not protected by  
the Fourth Amendment’s privacy expectation.” *People v. Stipo*, 195 Cal. App. 4th 664, 669 (2011)  
(quoting *United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir. 2008)).

1           **A.     The SCA Does Not Bar the State from Obtaining Subscriber Information**  
2                           **Through a Civil-Discovery Subpoena.**

3           The SCA permits government entities like the DA’s Office to obtain non-content subscriber  
4 information from service providers like Facebook through a variety of investigative tools.  
5 Specifically, a “provider of electronic communication service or remote computing service” must  
6 provide specified non-content subscriber information to “a governmental entity” pursuant to “an  
7 administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or  
8 trial subpoena.” 18 U.S.C. § 2703(c)(2). Facebook incorrectly contends that the SCA prohibits it  
9 from producing the information sought in Request No. 8 because the State’s subpoena allegedly  
10 does not fall within any of those enumerated investigative mechanisms.

11                           **1.     Civil Subpoenas Are the Functional Equivalent of Administrative**  
12   **Subpoenas Under New Mexico Law.**

13           In crafting the SCA, Congress intended government entities to be able to obtain non-content  
14 subscriber information relevant to investigations pursuant to those entities’ criminal- or civil-  
15 enforcement power, assuming that they are able to meet the evidentiary standard needed to employ  
16 one of the investigative tools enumerated in the statute. Law-enforcement agencies investigating  
17 criminal wrongdoing can obtain such information using a warrant, a grand-jury subpoena, or a SCA  
18 court order, *id.* § 2703(c)(1)(A)–(B), (2), (d), while government-agencies exercising civil-  
19 enforcement power can obtain non-content subscriber information using an administrative  
20 subpoena, *id.* § 2703(c)(2).

21           Oftentimes, government agencies that exercise civil-enforcement power possess explicit  
22 administrative-subpoena power. *E.g.*, NMSA 1978, § 57-12-12 (authorizing the New Mexico  
23 Attorney General to issue “civil investigative demand[s]” relevant to enforcing the state’s laws  
24 governing unfair trade practices). New Mexico district attorneys, however, possess sweeping  
25 authority to “prosecute . . . for the state” all civil cases “in which the state or any county in his  
26 district may be a party or may be interested” that is not limited to specified subject matter such as  
27 unfair trade practices. NMSA 1978, § 36-1-18(A)(1). Accordingly, New Mexico law does not  
28 explicitly provide district attorneys with administrative-subpoena power. Instead, New Mexico

1 district attorneys carrying out their civil-enforcement duties must, as the DA’s Office has done here,  
2 use ordinary discovery tools to conduct civil investigations. Thus, when it comes to New Mexico  
3 district attorneys exercising civil-enforcement power, civil-discovery subpoenas functionally are  
4 administrative subpoenas.

5       Because New Mexico district attorneys exercising their civil-enforcement authority lack  
6 traditional administrative-subpoena authority, they must file a lawsuit before wielding any legal  
7 process in their civil investigations, and a defendant can potentially avoid being subject to such an  
8 investigation by moving to dismiss based on any jurisdictional defect or because the complaint does  
9 not state a claim. *See* Rule 1-012 NMRA. By contrast, a government entity that possesses more  
10 traditional administrative-subpoena authority can conduct an investigation undergirded by legal  
11 process before filing suit, so long as “the inquiry is within the authority of the agency, the demand  
12 is not too indefinite and the information sought is reasonably relevant.” *United States v. Morton*  
13 *Salt Co.*, 338 U.S. 632, 652 (1950). New Mexico law therefore implicitly provides more privacy  
14 protections to the subjects of civil investigations conducted by district attorneys than a more  
15 traditional administrative subpoena would offer.

16       By enumerating several investigative tools in the SCA, Congress did not intend to deny the  
17 ability to collect relevant, electronically stored evidence in investigations conducted by law-  
18 enforcement agencies like the DA’s Office that wield broad civil-enforcement power that is not  
19 restricted to particular topics. The State is aware of no case holding that such government entities  
20 are barred from obtaining non-content subscriber information under the SCA.

21       Indeed, few cases have addressed the applicability of the SCA to government entities, and  
22 those that have held that the SCA bars government entities from obtaining information highlight  
23 alternative avenues for such entities to obtain needed information. For example, *Doe v. City of San*  
24 *Diego*, No. 12-cv-0689-MMA (DHB), 2013 WL 2338713 (S.D. Cal. May 28, 2013), concerned a  
25 government *defendant*, not a government entity exercising enforcement power. In that case, in  
26 which a plaintiff alleged sexual misconduct by a police officer, the court held that the SCA barred  
27 the defendant municipality from obtaining the plaintiffs’ texts from a cellular provider, but it noted  
28 that the municipality could obtain the texts by issuing a request for production to the plaintiff. *Id.* at

1 \*1, \*4. In *FTC v. Netscape Communications Corp.*, 196 F.R.D. 559 (N.D. Cal. 2000), a district  
2 court held that the SCA barred the Federal Trade Commission from obtaining non-content  
3 subscriber information associated with two email accounts pursuant to a civil discovery subpoena.  
4 *Id.* at 559, 561. Yet the FTC has sweeping administrative-subpoena authority. *See* 15 U.S.C. § 49.  
5 Thus, *Netscape* did not have the effect of depriving a government entity of the ability to obtain  
6 electronically stored information necessary to carry out its civil-enforcement duties. Congress did  
7 not intend the SCA to function in a manner so inimical to the public interest.

## 8                   2.       **The Term “Trial Subpoena” Encompasses Pretrial Subpoenas.**

9           The State’s subpoena also is encompassed by the term “trial subpoena” as it is used in the  
10 SCA. *See* 18 U.S.C. § 2703(c)(2). Although the California Court of Appeal rejected that argument  
11 in *O’Grady*, *see* 139 Cal. App. 4th at 1443 (holding that the SCA does not expressly or implicitly  
12 “authorize disclosure pursuant to civil subpoenas”), there is reason to believe that *O’Grady*’s  
13 holding is no longer good law.

14           In concluding that the SCA prohibits disclosure pursuant to civil subpoenas, the Court of  
15 Appeal relied heavily on the U.S. District Court for the Northern District of California’s analysis in  
16 *Netscape*. The *Netscape* court found the FTC’s argument that “Congress must have intended the  
17 phrase ‘trial subpoena’ to encompass all Rule 45 subpoenas” to be “logical” because “[i]f Congress  
18 had meant to limit [§ 2703 (c)(2)] to ‘trial-worthy’ information procured pursuant only to a trial  
19 subpoena,” it would not have “allow[ed] government agencies to use administrative subpoenas,”  
20 which “are employed in the discovery setting without significant judicial supervision and often cast  
21 a wide net.” 196 F.R.D. at 560–61. Nevertheless, and despite the lack of “case law interpreting the  
22 phrase ‘trial subpoena’ in the context of [the SCA] and no relevant legislative history,” the *Netscape*  
23 court rejected the FTC’s argument. *Id.* In doing so, the court noted that Rule 45 of the Federal  
24 Rules of Civil Procedure, as it existed at that time (and at the time the California Court of Appeal  
25 decided *O’Grady*), explicitly distinguished between trial and discovery subpoenas. *Id.* at 560; *see*  
26 *also* Fed. R. Civ. P. 45(a)(1)(D)(2) (2006) (repealed in 2013) (specifying different courts that must  
27 issue subpoenas “for attendance at trial,” “for attendance at a deposition,” and “for production,”  
28 respectively).

1 The current Rule 45, however, contains no such distinction. *See* Fed. R. Civ. P. 45(a)(2) (“A  
2 subpoena must issue from the court where the action is pending.”). In light of that change, the logic  
3 of the FTC’s argument should prevail. The term “trial subpoena,” as used in the SCA, must  
4 encompass discovery subpoenas, especially where a contrary reading would deprive government  
5 entities that possess civil-enforcement power but lack explicit administrative-subpoena authority of  
6 the ability to obtain non-content subscriber information critical to their investigations.<sup>11</sup>

7 Moreover, state-level analogues to the SCA suggest that states understand the statute’s use  
8 of the term “trial subpoena” to encompass discovery subpoenas. Both California’s and New  
9 Mexico’s SCA analogues, for example, specifically permit government entities to obtain non-  
10 content subscriber information through discovery subpoenas. NMSA 1978 § 10-16F-3(M)(3)  
11 (authorizing a “government entity” to obtain “subscriber information” from “a service provider”  
12 pursuant to a “trial *or civil discovery* subpoena” (emphasis added)); Cal. Penal Code § 1546.1(i)(3)  
13 (“This section does not limit the authority of a government entity to use an administrative, grand  
14 jury, trial, or *civil discovery subpoena* to . . . [r]equire a service provider to provide subscriber  
15 information.”). Because state laws cannot conflict with the SCA, which is the “supreme Law of the  
16 Land” when it comes to the privacy of electronically stored communications, U.S. Const. art. VI,  
17 states like California and New Mexico have therefore interpreted the SCA to permit government  
18 entities to obtain non-content subscriber information using discovery subpoenas. This Court should  
19 follow suit.

20 **B. None of the Other Requested Information Implicates the SCA.**

21 In addition to arguing that the SCA bars disclosure of the non-content subscriber  
22 information sought in Request No. 8, Facebook also contends that the statute precludes disclosure  
23 of any of the company’s own policies, procedures, or communications sought in Request Nos. 1–7.  
24 The State’s subpoena specifically notes that Request Nos. 1–7 “do[] not seek any content or non-  
25 content subscriber information” and permits redaction of such content or information to the extent  
26

27  
28 <sup>11</sup> There also is no logical policy reason why Congress would have permitted government entities to  
obtain relevant non-content subscriber information at trial but at no earlier stage in civil litigation.

1 that it is incidentally incorporated into any records responsive to those requests. Grayson Decl. Ex.  
2 13, Req. No. 1 n.2. Nevertheless, Facebook maintains the SCA prohibits disclosure of those records  
3 responsive to Request Nos. 1–7 because they “*necessarily implicate* the content of user-generated  
4 communications.” Grayson Decl. Ex. 14 at 4 (emphasis added).

5 Facebook’s novel and sweeping gloss on the SCA has no foundation in the statute’s text.  
6 The SCA regulates “disclosure by a provider of electronic communication service of the contents of  
7 a wire or electronic communication . . . *pertaining* to a subscriber” and “other information  
8 *pertaining* to a subscriber . . . (not including the contents of communications)” to a government  
9 entity. 18 U.S.C. § 2703(a), (c)(1) (emphasis added). “Pertain” means “to belong as a part,  
10 member, accessory, or product.” *Pertain*, Merriam-Webster’s Online Dictionary,  
11 <https://perma.cc/93V9-W385> (last visited Nov. 4, 2021). In other words, the SCA applies only to  
12 records for which an entity is serving as “a kind of a data bailee” to whom the electronic content “is  
13 entrusted for delivery and secure storage.” *O’Grady*, 139 Cal. App. 4th at 1447. “Implicate,” by  
14 contrast, means “to involve as a consequence, corollary, or natural inference” and therefore is not  
15 synonymous with “pertain” and suggests a much more attenuated relationship. *Implicate*, Merriam-  
16 Webster’s Online Dictionary, <https://perma.cc/ZM33-ZVQQ> (last visited Nov. 4, 2021).

17 Facebook’s own policies, procedures, and communications clearly do not “belong” to any of the  
18 company’s subscribers and have not been “entrusted” to Facebook in its capacity as a “data bailee”;  
19 they belong to Facebook itself. And, in a sense, every document Facebook generates “implicates”  
20 subscribers’ content. After all, Facebook’s entire business model is to “build[] technologies that  
21 help people connect, find communities, and grow businesses.” *Introducing Meta: A Social*  
22 *Technology Company*, Meta (Oct. 28, 2021), <https://perma.cc/7EHY-GAT9>. If this Court were to  
23 accept Facebook’s expansive interpretation of the SCA, the company—and a host of other social-  
24 media, telecommunication, and internet providers—would be categorically exempt from virtually  
25 all subpoenas in furtherance of governmental civil enforcement actions. Particularly at a time when  
26 Facebook’s conduct has showcased the pressing need for more—not less—scrutiny, this Court  
27 should decline the invitation to further insulate the company from routine civil discovery of its own  
28 policies, procedures, and communications.



1 **III. None of Facebook’s Other Objections Have Merit.**

2 Facebook also contends that Request Nos. 1–7 “are not proportionate to the needs of the  
3 case or . . . relevant to any party’s claims or defenses.” Grayson Decl. Ex. 14 at 1 (citing Cal. Civ.  
4 Proc. Code § 2017.010). Under California’s Civil Discovery Act, “any party may obtain discovery  
5 regarding any matter, not privileged, that is relevant to the subject matter involved in the pending  
6 action or to the determination of any motion made in that action, if the matter either is itself  
7 admissible in evidence or appears reasonably calculated to lead to the discovery of admissible  
8 evidence.” Cal. Civ. Proc. Code § 2017.010. “Discovery . . . is not confined to the actual issues  
9 framed by the pleadings.” *Anti-Defamation League of B’nai B’rith v. Superior Court*, 67 Cal. App.  
10 4th 1072, 1095 (1998). “Section 2017.010 and other statutes governing discovery must be  
11 construed liberally in favor of disclosure unless the request is clearly improper by virtue of well-  
12 established causes for denial. This means that *disclosure is a matter of right unless statutory or*  
13 *public policy considerations clearly prohibit it.*” *Yelp Inc. v. Superior Court*, 17 Cal. App. 5th 1, 15  
14 (2017) (emphasis in original) (internal quotation marks and citations omitted).

15 As explained above, *supra* at p. 4, Request Nos. 1 and 2 are directly relevant to the State’s  
16 case against NMCG. Because Facebook took down NMCG-affiliated Facebook accounts on or  
17 around August 19, 2020, pursuant to the company’s “Dangerous Individuals and Organizations”  
18 policy, Facebook employees at some point must have determined which accounts were associated  
19 with NMCG.<sup>12</sup> Any communications memorializing that decision-making process (Request No. 1)  
20 are therefore of significant relevance to the State’s case. If Facebook truly is unable to recover any  
21

---

22  
23 <sup>12</sup> Facebook objects to the State’s subpoena to the extent that it requires the company to identify  
24 additional accounts associated with NMCG beyond those enumerated in the subpoena. Grayson  
25 Decl. Ex. 14 at 3 (citing Grayson Decl. Ex. 13, Req. No. 1). But in addition to taking down  
26 NMCG’s Facebook page on or around August 19, 2020, Facebook also took down affiliated  
27 accounts. For example, Facebook simultaneously took down the Facebook account with the  
28 username “Jason-P-Bjorn” that is believed to have belonged to NMCG’s founder. Facebook  
therefore appears to have already identified Facebook accounts that are affiliated with NMCG. To  
the extent that Facebook is already aware of accounts affiliated with NMCG beyond those  
enumerated in the State’s subpoena or is able through reasonable efforts to identify them, the  
subpoena requests the non-content subscriber information associated with those accounts and the  
specified communications concerning them.

1 of the requested non-content subscriber information, those communications are all the more  
2 important because they would help the State establish that the Facebook content it has preserved  
3 was in fact generated by individuals affiliated with NMCG. Likewise, any communication that  
4 Facebook has had with law-enforcement agencies about the Facebook accounts in question  
5 (Request No. 2) are likely to help the State tie the content associated with those accounts to NMCG.

6         The records sought in Request Nos. 3–7 also are relevant to the State’s case because they  
7 will help probe whether Facebook truly has deleted the non-content subscriber information sought  
8 in Request No. 8 and whether the data is recoverable. Of note, Cal. Civ. Proc. Code § 2017.010  
9 specifically provides that “[d]iscovery may be obtained of the . . . existence, description, nature,  
10 custody, condition, and location of any document[ or] electronically stored information.” Request  
11 Nos. 3–5 all concern policies and procedures relating to Facebook’s “Dangerous Individuals and  
12 Organizations” policy and communications concerning the development of that policy. Information  
13 about the “Dangerous Individuals and Organizations” policy—in particular, any procedures  
14 governing data- and record-retention for accounts taken down pursuant to that policy (Request No.  
15 4)—will help probe the veracity of Facebook’s assertions regarding its inability to produce the  
16 requested non-content subscriber information. Similarly, Request Nos. 6 and 7 concern Facebook’s  
17 policies and procedures governing preservation of data and records that are the subject of law-  
18 enforcement preservation requests and communications concerning one such request made by the  
19 DA’s Office in June 2020. *See* Grayson Decl. Ex. 1. These communications will help establish  
20 whether Facebook complied with its own policies and procedures when it purportedly permanently  
21 deleted records and information that the DA’s Office requested be preserved.

22         Facebook also objects that some of the records sought in Request Nos. 1–7 are  
23 “confidential,” “privileged,” or “*may be* confidential or privileged.” Grayson Decl. Ex. 14 at 1–2  
24 (emphasis added). The Civil Discovery Act states that “[i]f an objection is based on a claim of  
25 privilege or a claim that the information sought is protected work product, the response shall  
26 provide sufficient factual information for other parties to evaluate the merits of that claim,  
27 including, if necessary, a privilege log.” Cal. Civ. Proc. Code § 2031.240(c)(1). Facebook’s  
28 objection letter does not describe any of these purportedly (or potentially) privileged records with

1 particularity; nor has Facebook produced any privilege log. Accordingly, neither the State nor this  
2 Court is able to “evaluate the merits” of those claims.

3 To the extent that Facebook asserts that Request Nos. 1–7 are unduly burdensome because  
4 they seek the company’s proprietary information, the State propounded those requests only because  
5 Facebook maintains that it is unable to produce the requested non-content subscriber information.  
6 Indeed, the DA’s Office originally served a subpoena on Facebook that sought *only* non-content  
7 subscriber information associated with NMCG-affiliated accounts and that requested preservation  
8 of the content associated with those accounts. *See* Grayson Decl. Ex. 2. The State included  
9 Request Nos. 1–7 in the subpoena at issue here only after Facebook represented in its  
10 communications with the State that it had deleted the requested non-content subscriber information.  
11 Before serving that subpoena on Facebook, the State requested an opportunity to speak informally  
12 with a Facebook employee who is familiar with the takedown of the NMCG pages. Grayson Decl.  
13 Ex. 10. Facebook declined that request. Grayson Decl. Ex. 11. Moreover, the State provided a  
14 draft of the subpoena to Facebook in advance of serving it, along with a letter explaining the State’s  
15 skepticism concerning the purported deletion of the requested metadata and inquiring as to  
16 Facebook’s “willing[ness] to participate in informal discovery regarding the records we plan to  
17 request or any subset thereof.” Grayson Decl. Ex. 12. The State served the subpoena at issue here  
18 on Facebook only after it received no response to its inquiry. Facebook cannot credibly claim now  
19 that Request Nos. 1–7 impose an undue burden by seeking proprietary information when it declined  
20 the State’s invitation to meet and confer concerning the information sought in the subpoena. In any  
21 event, the State would agree to an appropriate protective order limiting disclosure of proprietary  
22 information responsive to Request Nos. 1–7.

### 23 CONCLUSION

24 For all of the foregoing reasons, the State respectfully requests that this Court grant its Petition  
25 and compel Facebook to produce the requested records and information.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Respectfully submitted,

DATED: November 15, 2021

By:  \_\_\_\_\_

PUTTERMAN YU WANG LLP  
345 California St., Suite 1160  
San Francisco, CA 94104  
Tel: (415) 685-0826  
Fax: (415) 737-1363  
pwang@plylaw.com  
*Attorney for Petitioner State of New Mexico*