

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

LOS ROVELL DAHDA,)
)
) Petitioner,)
)
) v.) No. 17-43
)
) UNITED STATES,)
)
) Respondent.)
)

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9
10 Washington, D.C.
11 Wednesday, February 21, 2018

12
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 11:12 a.m.

16
17 APPEARANCES:

18 KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf
19 of the Petitioner.
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22 on behalf of the United States.

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1 P R O C E E D I N G S

2 (11:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 17-43, Dahda versus
5 United States.

6 Mr. Shanmugam.

7 ORAL ARGUMENT OF KANNON K. SHANMUGAM

8 ON BEHALF OF THE PETITIONER

9 MR. SHANMUGAM: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The federal wiretap statute, Title
12 III, was enacted 50 years ago in response to
13 national concern over wiretapping and the
14 threat it posed to individual privacy.

15 Title III prohibits wiretapping unless
16 a series of detailed requirements is met. And
17 to ensure compliance with those requirements,
18 Title III directs the suppression of the
19 evidence derived from a wiretap order when
20 there is an error in obtaining, issuing, or
21 executing that order.

22 As is relevant here, Title III directs
23 suppression if a judge issues an order that is
24 insufficient on its face; that is, if the order
25 itself fails to comply with any of Title III's

1 requirements.

2 JUSTICE GINSBURG: Mr. Shanmugam, the
3 expression "insufficient to authorize," this
4 order was sufficient to authorize all of the
5 interceptions that were introduced in evidence.
6 The problem was that it authorized more, but
7 that more was never introduced. So I don't
8 understand how you can characterize the -- the
9 order here as in -- insufficient. It was
10 sufficient, but then it went beyond, and that
11 beyond was not operative in this case.

12 MR. SHANMUGAM: Justice Ginsburg, let
13 me go directly to that threshold argument which
14 the government makes for the first time before
15 this Court. To the best of our knowledge, the
16 government --

17 JUSTICE GINSBURG: You -- you said
18 that. But it seems to me that was exactly what
19 the magistrate judge and the district judge
20 went on.

21 MR. SHANMUGAM: The magistrate judge
22 and the district court seemed to conclude that,
23 by virtue of the fact that all of the
24 interceptions that were introduced were
25 interceptions that took place within the

1 court's territorial jurisdiction, that there
2 was no problem, and that, therefore,
3 suppression was not required. I don't think
4 that they really grappled with this argument
5 that the government now makes about the meaning
6 of the term "insufficient."

7 But let me address the merits of that
8 argument directly, Justice Ginsburg. The
9 government seems to make the argument now that
10 these orders were not insufficient on their
11 face because they were merely overbroad. But I
12 don't think that that's the better reading of
13 the phrase "insufficient on its face," either
14 as a matter of plain text or as a matter of the
15 policies that were animating the inclusion of
16 this particular provision.

17 Let me state first what we think
18 "insufficient" means. We think that an order
19 is insufficient on its face if the failure to
20 comply with the requirements of Title III is
21 evident from the four corners of the order
22 itself. And the government now concedes that,
23 under such a standard, the orders here would be
24 invalid because each of the orders here
25 contained jurisdictional provisions that went

1 too far, that went beyond the power of the
2 district court to authorize.

3 CHIEF JUSTICE ROBERTS: But those --
4 those weren't --

5 JUSTICE KENNEDY: But it was fully
6 sufficient for what, in fact, happened, other
7 than Missouri, and we'll have leave that out.

8 MR. SHANMUGAM: But, Justice Kennedy,
9 if the statute merely prohibited the
10 introduction of evidence from unlawful
11 interceptions, I might be inclined to agree
12 with you. But, of course, we know that the
13 suppression provision here does more.

14 It not merely prohibits and requires
15 suppression where there is an unlawful
16 interception; it goes further and refers to
17 some category of cases where the order is
18 insufficient on its face.

19 Now the government attempts to make
20 this plain language distinction between orders
21 that are overbroad and orders that are somehow
22 otherwise insufficient. But I think if you
23 look at the very dictionary definitions that
24 the government now relies on for the word
25 "insufficient," you'll see that those

1 definitions essentially define the terms
2 "insufficient" and "inadequate" and "invalid"
3 effectively synonymously.

4 CHIEF JUSTICE ROBERTS: Well, I
5 understand "inadequate" being the same as
6 "insufficient," but I don't understand
7 "invalid." I mean, if you have a requirement,
8 you know, you must have these four things in
9 your -- in your order, and you have -- and you
10 fill them out and you've got all four, and then
11 you've got another one that's not required, it
12 seems to me that that might be invalid, but --
13 but you can't say it's insufficient. You've
14 got everything you have to -- have to have.

15 And yet, you're saying if you add
16 something else, it's insufficient. It seems to
17 me it might be invalid under the statute as you
18 say, you can't do what the fifth thing says,
19 but I don't see why -- why it would be
20 insufficient.

21 MR. SHANMUGAM: Well, Mr. Chief
22 Justice, I suppose that one could try to draw
23 fine distinctions between all of these terms.
24 I think each of the three dictionaries on which
25 the government relies defines the term

1 "invalid" to mean "inadequate," and they define
2 "inadequate" to mean "insufficient."

3 But I think even if you think --

4 CHIEF JUSTICE ROBERTS: Yeah, but you
5 need them to define "insufficient" to mean
6 "invalid."

7 MR. SHANMUGAM: But I'm happy to -- to
8 -- to fight this case on the ground that we're
9 talking about insufficiency or, as you put it,
10 inadequacy. We believe that these orders --

11 CHIEF JUSTICE ROBERTS: Well, what
12 about invalidity? Forget I said inadequacy.
13 You have to say that "insufficient" -- you have
14 to say that "invalid" is the same as
15 "insufficient."

16 MR. SHANMUGAM: I don't think that
17 that's necessarily true, Mr. Chief Justice. I
18 think you could say that these orders were
19 insufficient precisely because they lacked a
20 valid limitation. In other words, the --

21 JUSTICE KENNEDY: Could the orders
22 have been used for anything?

23 MR. SHANMUGAM: No. If an order is --

24 JUSTICE KENNEDY: Well, then it's
25 invalid.

1 MR. SHANMUGAM: Well, correct. I
2 mean, in other words, I -- I'm -- we certainly
3 take the view that those terms are, in fact,
4 synonymous here; and, indeed, that's the view
5 that the government took below when it referred
6 to the potential facial invalidity of these
7 orders.

8 But I think my point --

9 CHIEF JUSTICE ROBERTS: You didn't --
10 the -- the order didn't need any statement with
11 regard to the territorial limitation, did it?

12 MR. SHANMUGAM: We believe that --

13 CHIEF JUSTICE ROBERTS: If that were
14 not in this order, the order would still be
15 sufficient, correct?

16 MR. SHANMUGAM: We believe that the
17 orders would still be insufficient if they did
18 not contain that; in other words, we believe
19 that the better reading of this statute is that
20 it requires the jurisdictional limitation to
21 appear on the face of the order. But, of
22 course, here, the orders --

23 CHIEF JUSTICE ROBERTS: Any -- do you
24 have any authority for that?

25 MR. SHANMUGAM: I -- I would rely on

1 the language of the statute itself.

2 CHIEF JUSTICE ROBERTS: Do you have
3 any judicial authority interpreting the
4 statute?

5 MR. SHANMUGAM: So I'm not aware of
6 any case that presents the question of what
7 would happen if a jurisdictional limitation
8 were entirely omitted, and my understanding in
9 Mr. Tripp's --

10 JUSTICE KAGAN: Where do you see it in
11 the statute as requiring that?

12 MR. SHANMUGAM: So I would point to
13 2518(3) itself. And while it is certainly true
14 that 2518(3) is not worded in terms of what an
15 order shall specify, I think in some sense it
16 goes even further. This is the one requirement
17 that Congress thought was so foundational that
18 it included it in the very provision that
19 authorizes a judge to enter a wiretap order in
20 the first place.

21 The Court will be aware of that
22 language. It's at pages 16a to 17a of the
23 government's brief. And it says that the judge
24 may enter an order authorizing interception of
25 communications within the territorial

1 jurisdiction of the court in which the judge is
2 sitting. Now to get --

3 JUSTICE GINSBURG: So if the -- if the
4 -- if the application just says telephone X
5 pursuant to whatever it is, whatever the --
6 cites the statutory section, but doesn't say
7 District of Kansas?

8 MR. SHANMUGAM: I think that that
9 would still be insufficient.

10 But, Mr. Chief Justice, to get back to
11 your question that started this discussion, I
12 don't think that the Court needs to answer that
13 question whereas, here, you have a provision
14 that goes further. It affirmatively --

15 JUSTICE BREYER: It doesn't go -- wait
16 -- wait just a second, because I -- I might be
17 missing this. I don't see anywhere in this
18 order, which is in your Joint Appendix, Volume
19 2 -- are -- you must be telephone number 1 or
20 telephone number 2?

21 MR. SHANMUGAM: Yes. I mean, we're
22 talking about --

23 JUSTICE BREYER: Who are you telephone
24 number 1 or number 2, one of those two?

25 MR. SHANMUGAM: You know, there were

1 multiple communications pursuant to --

2 JUSTICE BREYER: I know that, but I
3 mean for purposes of this order.

4 MR. SHANMUGAM: Yes.

5 JUSTICE BREYER: Okay. Now where does
6 it say in this order in respect to telephone
7 number 1 or telephone number 2 that they can
8 intercept within the jurisdiction of the
9 issuing magistrate?

10 MR. SHANMUGAM: So the orders -- and
11 let me take you to page 97 of the Joint
12 Appendix.

13 JUSTICE BREYER: That's what I'm on.

14 MR. SHANMUGAM: Okay.

15 JUSTICE BREYER: And it says -- it
16 doesn't say anything about -- it talks about
17 outside the territorial jurisdiction in the one
18 -- in the relevant full paragraph on page 97.
19 I don't see here anywhere.

20 I mean, if what you said was true, why
21 didn't you challenge this on the ground that
22 it's insufficient because it does not claim or
23 put in words that, in respect to telephone
24 number 1 and telephone number 2, you have
25 authority to intercept within the jurisdiction

1 of the issuing magistrate, which I think was
2 New York, wasn't it, or was it?

3 MR. SHANMUGAM: So the judge who
4 entered this was a judge in Kansas.

5 JUSTICE BREYER: Kansas. In Kansas.

6 MR. SHANMUGAM: Right. And --

7 JUSTICE BREYER: Yeah.

8 MR. SHANMUGAM: And I think that this
9 language --

10 JUSTICE BREYER: All right. Where
11 does it say they have jurisdiction to intercept
12 in Kansas?

13 MR. SHANMUGAM: Well, I think it's --
14 that is implicit in the paragraph --

15 JUSTICE BREYER: No.

16 MR. SHANMUGAM: -- on page 97.

17 JUSTICE BREYER: No. Read the
18 paragraph. It says in the -- in the event that
19 they "are transported outside the territorial
20 jurisdiction of the court, interception may
21 take place in any other jurisdiction within the
22 United States."

23 It nowhere says that you have
24 authority to interpret jurisdiction -- to
25 intercept in Kansas. Does it?

1 MR. SHANMUGAM: Well, you know, I -- I
2 --

3 JUSTICE BREYER: I take from your
4 hesitation it does not.

5 MR. SHANMUGAM: No. Well, I think
6 that it is at a minimum implicit in that --

7 JUSTICE BREYER: Implicit that it says
8 other --

9 MR. SHANMUGAM: -- that if the
10 telephone is in the territorial jurisdiction,
11 that interception may take place in the
12 territorial jurisdiction.

13 JUSTICE BREYER: All right. But aside
14 from those words.

15 MR. SHANMUGAM: But I think our -- but
16 I think our argument would be the same, Justice
17 Breyer. In other words, our argument here is
18 that this provision goes too far. The judge is
19 exceeding his power when he enters an order
20 that authorizes effectively nationwide
21 jurisdiction over the tapping --

22 JUSTICE BREYER: All right.

23 MR. SHANMUGAM: -- of these phones and
24 the other phones.

25 JUSTICE BREYER: The reason -- see, I

1 -- I can't ask my question because you've
2 stopped me cold; that is, what I thought was
3 that we'd have an order which says you can tap
4 in Kansas and you can also tap outside of
5 Kansas.

6 And I find the paragraph which says
7 you can tap outside of Kansas. Okay? But I
8 can't find the paragraph which says you can tap
9 in Kansas.

10 So the first thing you say is, well,
11 it's insufficient if an order does not say you
12 can tap in Kansas -- yeah, that's what you
13 cite, you just said that -- and so I never
14 thought of that.

15 And -- but, lo and behold, I never
16 thought of it, although I read the briefs in
17 this case, and I read the opinion below, and
18 they never said anything about it.

19 So I started where the -- where --
20 where -- I think, I can't remember who asked
21 the question, I started saying it doesn't have
22 to say that because that's not listed in Title
23 IV. That's in Title III. Right?

24 MR. SHANMUGAM: Yeah. So --

25 JUSTICE BREYER: So you see my

1 puzzlement?

2 MR. SHANMUGAM: I -- I do see your
3 point, Justice Breyer. So let me explain how,
4 you know, again, we think that all of this
5 should work. And I think that our position is,
6 you know, a simple one that I think courts have
7 consistently accepted, at least up until now
8 when the government is suddenly making this
9 argument.

10 That is, first of all, that
11 "insufficient" here really does comport -- does
12 imply a failure to comply with any of Title
13 III's requirements. And here the government
14 concedes that this provision does not comply
15 with those requirements because it goes further
16 than even the language in the statute
17 authorizing these telephone interceptions.

18 JUSTICE BREYER: All right. Well,
19 suppose I said this. There is one paragraph
20 here saying, which I just read you, which says
21 you can tap outside of Kansas. Your clients
22 had nothing to do with that. They were never
23 outside or whatever. Okay?

24 So what we do is we excise that
25 paragraph. It's called severability. Excise

1 it and send the case back to see, with that
2 paragraph excised, whether there's some other
3 reason why this warrant could not be granted.
4 What about that?

5 MR. SHANMUGAM: Well, I mean, you can
6 do that, Justice Breyer. In other words, I
7 think that the failure expressly to authorize
8 interception within the jurisdiction would, at
9 most, be an additional reason why this is
10 defective.

11 Again, our view, as I indicated in
12 response to Justice Kagan, is that when you
13 take a look at Section 2518(3), it indicates
14 that this is an additional requirement.
15 Indeed, as I said earlier, really sort of the
16 foundational requirement.

17 JUSTICE KAGAN: Is your -- is your
18 view dependent on our accepting that, that it's
19 not only a foundational requirement but that
20 it's a foundational requirement that has to be
21 on the face of the order?

22 MR. SHANMUGAM: No, because of the
23 overbreadth of the orders. In other words, as
24 I indicated to Justice Breyer, I certainly
25 think that, to the extent that the failure

1 specifically to refer to Kansas matters, it
2 would only help our argument.

3 But at bottom, our argument is that
4 because the order exceeds the Court's
5 territorial jurisdiction, it's facially
6 inadequate and, therefore, insufficient.

7 Now the government --

8 JUSTICE ALITO: I -- I tried to --

9 JUSTICE KAGAN: Well, irrespective --
10 irrespective of whether the jurisdiction has to
11 be stated on the face of the order?

12 MR. SHANMUGAM: Yes, that is correct.
13 In other words, our view is that because there
14 is a conceded failure to comply with one of
15 Title III's requirements, that's all that's
16 needed.

17 And I think that the government's
18 argument would really lead to strange and
19 anomalous results here.

20 In our reply brief, we give the
21 example of an order that authorized
22 interception for 180 days rather than 30 days.
23 I think the government would take -- I think
24 the government would take the same position:
25 That that order would not be facially

1 insufficient because it would merely be
2 overbroad, in Justice Ginsburg's words.

3 JUSTICE ALITO: Yeah, but in that
4 situation, if the -- if there were
5 interceptions beyond the period that's allowed
6 by the statute, then -- then those would be
7 suppressed under, I guess it's subsection (1),
8 right, so it was acquired illegally?

9 MR. SHANMUGAM: Well, I'm not sure
10 about that, Justice Alito. In other words, if
11 Subsection 1 were to apply in that context,
12 there would still be the additional inquiry
13 about the core concerns of the statute that
14 this Court mandated in Chavez and Giordano.

15 But I think that that example really
16 points out --

17 JUSTICE SOTOMAYOR: I thought the
18 circuit split that we had granted on was
19 whether the core concern analysis applied to
20 subdivisions (ii) and (iii), three. Isn't that
21 the circuit split that we granted?

22 MR. SHANMUGAM: That is the question
23 on which this Court granted cert. And, again,
24 I don't mean to --

25 JUSTICE SOTOMAYOR: Well, it wasn't

1 the question presented, but that seemed to be
2 the focus of the entire briefing in this case,
3 with the exception of the government's new
4 argument that this wasn't insufficient, but --

5 MR. SHANMUGAM: Yes. And the --

6 JUSTICE SOTOMAYOR: -- putting that
7 aside, I thought that we granted cert on that.

8 MR. SHANMUGAM: That is the question
9 on which the circuits are divided. And I don't
10 mean to fight too hard the Court's addressing
11 this threshold argument that the government is
12 now making. The government did make it, albeit
13 in passing, in its brief in opposition.

14 I think that the Court really did
15 grant cert on the premise that these orders
16 were insufficient, but I think that it's no
17 surprise that, before this Court, on the actual
18 question on which this Court granted review,
19 the government has comparatively little to say.

20 JUSTICE ALITO: But, you know, if we
21 --

22 JUSTICE GINSBURG: But why -- why
23 should we, if -- if we think that the phrase
24 "insufficient" doesn't mean overbreadth, why
25 should we proceed to base a decision on a

1 premise that we think is wrong?

2 MR. SHANMUGAM: Well, first --

3 JUSTICE GINSBURG: And -- and -- and
4 your point about -- why was the district court
5 wrong when it said simply, "the government did
6 not actually intercept communications outside
7 this court's jurisdiction;" therefore, as
8 applied, the orders did not violate the
9 statute. That seems to make good sense.

10 MR. SHANMUGAM: I think that that is a
11 regime that Congress could have enacted. But I
12 don't think, Justice Ginsburg, that that is the
13 regime that Congress did enact.

14 In other words, Congress did not enact
15 a regime in which the sole focus was whether or
16 not a particular application was unlawful. If
17 that had been what Congress had intended, it
18 would have stopped after subparagraph (1). But
19 instead --

20 JUSTICE ALITO: I mean, I tried to
21 figure out where this "insufficient on its
22 face" language came from, because it is
23 somewhat curious. And I'm sure that you have
24 probably researched this more thoroughly, but
25 the best I could come up with was that it was

1 taken from old Rule 41(e) of the Federal Rules
2 of Criminal Procedure.

3 So, if that's the case, should we look
4 to the way that rule was applied?

5 MR. SHANMUGAM: So I don't think that
6 we know that that is where the phrase came
7 from. It does not appear anywhere else in the
8 United States Code, to which -- as far as I'm
9 aware.

10 But I think, quite frankly, I would
11 not go -- I would not think that the Court
12 would need to go any further than looking to,
13 again, the plain meaning of the term
14 "insufficient" but also the policies animating
15 the inclusion of this provision.

16 And I do think it would lead to highly
17 anomalous results to limit insufficiency and to
18 exclude cases in which language is overbroad
19 but yet concededly violative of the statute.

20 JUSTICE ALITO: I mean, if you -- if
21 -- do you think that if this situation had been
22 presented to the Congress that enacted the --
23 the 1968 legislation, which was basically
24 anti-crime legislation, that they would have
25 said, yes, in this case, Mr. Dahda can't be

1 convicted even though what happened here had no
2 effect whatsoever on him?

3 MR. SHANMUGAM: I do think so, and I
4 think so precisely because of what Congress, or
5 the Senate, to be more precise, said in the
6 Senate report, where -- where the Senate made
7 quite clear -- and this is at page 96 of the
8 report -- that it intended to compel
9 compliance, strict compliance, with the
10 requirements of the statute.

11 And, again, as I indicated at the
12 outset, Title III was enacted against the
13 backdrop of a vigorous national debate over
14 whether wiretapping should even be permitted in
15 the first place.

16 And I think, as part of the compromise
17 that was struck when Congress enacted Title
18 III, it included a very muscular suppression
19 provision.

20 Now I think what the government tries
21 to do throughout its brief, and I suspect
22 you'll hear this from my friend Mr. Tripp
23 today, is to try to get this Court to think
24 about this case in traditional Fourth Amendment
25 terms where the Court is always taking into

1 account broader principles of prejudice and
2 causation and the like.

3 And I think that where this is
4 clearest is in the government's argument that
5 the Court should somehow sever the invalid
6 applications of the orders from valid ones.

7 JUSTICE GINSBURG: But there was no
8 invalid application. The only intercepts that
9 were introduced were in -- from the District of
10 Kansas. So the -- the order authorized an
11 invalid application, but there was no such
12 invalid application.

13 MR. SHANMUGAM: Well, in fact, there
14 were. There were communications that were
15 intercepted from a wire room in St. Louis. In
16 response to the motion to suppress, the
17 government, I think quite wisely, indicated
18 that it was not going to introduce those
19 communications.

20 But I think, more broadly, I would say
21 two things about that, Justice Ginsburg.
22 First, I would say that when you have a
23 facially insufficient order, any communications
24 that are intercepted pursuant to that order are
25 unlawfully intercepted. I think that that was

1 the premise of this Court's decisions in Chavez
2 and Giordano.

3 And, second, that to the extent that
4 the government is making this back-end argument
5 about a severance principle and seeking to
6 introduce a severance principle that the lower
7 courts have recognized in the exclusionary rule
8 context into Title III, that there's just
9 simply no textual footing for that. The
10 statute --

11 JUSTICE GINSBURG: But you -- you --
12 you did recognize that if that paragraph were
13 deleted, this order wouldn't be sufficient?

14 MR. SHANMUGAM: Potentially. Leaving
15 aside our argument that you would have to
16 affirmatively state a jurisdictional
17 limitation.

18 But I think, more broadly, if you
19 agree with us on the issue of facial
20 insufficiency, the government's fallback
21 argument, leaving aside its relatively cursory
22 argument on the actual question presented, is
23 that you should apply a severance principle.
24 And not only does that principle have no
25 footing in the actual text of Title III's

1 suppression provision, I think that that would
2 really sort of effectively all but read
3 subparagraph (2) out of that statute.

4 What the government is attempting to
5 do -- do through these various arguments is to
6 create a regime under which only when there is
7 unlawful interception and the fruits of that
8 unlawful interception are introduced, can there
9 be suppression.

10 Again, if that were true, why did
11 Congress go on to say in subparagraph (2)
12 essentially that even if communications were
13 lawfully intercepted, there should be
14 suppression when an order is insufficient on
15 its face.

16 And, again, the severance principle on
17 which the government relies, and the government
18 cites various lower court decisions for that
19 proposition, is a principle that was not well
20 established in the law in 1968. No federal
21 court of appeals, as far as I'm aware, had even
22 recognized that principle.

23 And, of course, that principle is
24 animated by concerns about the harsh effects of
25 the judicially created exclusionary rule.

1 JUSTICE BREYER: No -- I mean, but
2 here's the problem that -- look, first, if I
3 look at this, what that -- what you just
4 pointed to says you have to have in this
5 document the nature and location of where the
6 authority to intercept is granted. Doesn't it?
7 Yes.

8 You just pointed to that. So I look
9 at the last page and it says District of
10 Kansas. It says it. The judge puts his title,
11 District of Kansas. There is the authority
12 that that's what they want, exactly what you
13 said, that's where the authority comes from,
14 and Title III makes clear they can't go beyond
15 that authority, except in some circumstances
16 that are not present here.

17 So what we have with the paragraph
18 you're pointing to is an addition. It says:
19 In addition, you can go outside of Kansas.
20 That is wrong. And, by the way, they didn't go
21 outside of Kansas insofar as your client is
22 concerned and anything that was introduced into
23 evidence is concerned.

24 So everybody's instinct, or at least
25 mine, to say, well, sever that, is -- maybe the

1 judge wrote poetry on the wrong paper, you
2 know? I mean, maybe he -- he -- he wrote down
3 a joke. Maybe he -- he wrote something that
4 was totally extraneous that had nothing to do
5 with the case.

6 We wouldn't look at that; we'd just
7 say forget it, it has nothing to do with this
8 case. And why shouldn't we do the same thing
9 with this paragraph?

10 MR. SHANMUGAM: I understand that
11 instinct, Justice Breyer, because that would be
12 a natural Fourth Amendment instinct. In other
13 words, lower courts who have looked at the
14 issue have pretty universally now concluded
15 that when you're in the traditional
16 exclusionary rule context and when, say, you
17 have an order that authorizes -- a warrant that
18 authorizes the search of two apartments and
19 there's probable cause as to one and not as to
20 the other, you sever.

21 I think that the only problem with
22 that, and in our view, it's a dispositive
23 problem, is the actual language of the statute.
24 The statute draws a direct line between an
25 invalid, insufficient order and the suppression

1 of any communications obtained pursuant to that
2 order.

3 CHIEF JUSTICE ROBERTS: Well, You keep
4 --

5 JUSTICE KAGAN: Mr. Shanmugam --

6 CHIEF JUSTICE ROBERTS: You keep
7 mixing, as you just did, "insufficient" and
8 "invalid." And I want to make sure I
9 understand your view on it.

10 If somebody told you to bring to a
11 party apples, bananas, and pears; and you
12 brought apples, bananas, pears, and cherries,
13 the person would not say that's insufficient.
14 Right?

15 MR. SHANMUGAM: I think that a person
16 might say that that's insufficient. In other
17 words, I think that --

18 CHIEF JUSTICE ROBERTS: Who would do
19 that? I'm sorry.

20 (Laughter.)

21 MR. SHANMUGAM: I mean, I don't think
22 you would -- I don't think in that context, you
23 know, you would ordinarily talk about
24 insufficiency. And I'm willing to also
25 recognize, Mr. Chief Justice, that there are

1 circumstances in which insufficiency
2 necessarily means that something is lacking.

3 I mean, I think that when we think
4 about, say, evidentiary insufficiency, that
5 ordinarily, you know, you can't have too much
6 evidence; you can only have too little. I
7 think that this is a somewhat unusual
8 formulation. And, again, it's a formulation,
9 as I indicated to Justice Alito, doesn't appear
10 anywhere else in the United States Code.

11 And I do think that the definition of
12 the term "insufficient," even if you view
13 "insufficient" to mean "lacking," could easily
14 mean lacking a valid limitation. It doesn't
15 necessarily mean lacking a provision that the
16 order is required by statute to contain.

17 I see that my yellow light is on, so
18 I'll just say one thing about the actual
19 question presented here and the government's
20 argument. I think that if this Court were to
21 read a core concerns requirement or a
22 fundamental defect requirement into
23 subparagraph (2), it would essentially be
24 creating the very problem that this Court
25 addressed when it adopted that requirement in

1 Chavez and Giordano.

2 And I think it's really no accident
3 that, for that reason, the government devotes
4 most of its brief to these arguments that it
5 had not previously made and that really don't
6 go to that question.

7 And with that, I'll reserve the
8 balance of my time. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Tripp.

12 ORAL ARGUMENT OF ZACHARY D. TRIPP
13 ON BEHALF OF THE UNITED STATES

14 MR. TRIPP: Mr. Chief Justice, and may
15 it please the Court:

16 I think, as most of the questioning
17 has already picked up, the -- the best way to
18 encapsulate our basic position in this case is
19 -- is just to imagine what would have happened
20 if everything was exactly the same except this
21 -- this language was missing from the orders,
22 it didn't add this additional authority telling
23 us that we could put the wire room outside
24 Kansas.

25 If that had happened, there would

1 clearly be no basis for suppressing any of the
2 evidence we relied on here. It was all
3 lawfully intercepted inside Kansas. The orders
4 say everything Title III requires them to say
5 to allow us to intercept --

6 JUSTICE SOTOMAYOR: I'm sorry, let's
7 go back to that point. Justice Breyer is
8 correct. I don't find in this order saying you
9 can intercept in Kansas. It doesn't say it
10 directly, all right?

11 So how is that sufficient? Is it your
12 position that every order does not have to say
13 it's limited to Kansas? Forgetting that it
14 says you can go outside.

15 MR. TRIPP: It's not the -- so Title
16 III says in no uncertain terms what every Title
17 III order "shall specify." It's in 2518(4).
18 It's on 17a of the --

19 JUSTICE SOTOMAYOR: 25 -- yes, and I
20 was reading that.

21 MR. TRIPP: And -- and -- and the --
22 the -- the location of the place where we're
23 going to put our wire room is not one of those
24 items. Instead, the -- the venue provision
25 that we've been talking about here appears on

1 the -- on the previous page, on 16a, and -- and
2 -- and it says, right, that the -- obviously,
3 that the -- the interception needs to --

4 JUSTICE SOTOMAYOR: It's actually in
5 subdivision (3).

6 MR. TRIPP: Right, on 16a of our --
7 our gray brief, yeah.

8 JUSTICE SOTOMAYOR: And it says "may
9 enter an ex parte order as requested or as
10 modified," et cetera, "within the territorial
11 jurisdiction of the court in which the judge is
12 sitting."

13 You take that "within" to mean that
14 the judge has to be within that jurisdiction?

15 MR. TRIPP: Well, so -- wait -- wait,
16 sorry.

17 JUSTICE SOTOMAYOR: Or that the order
18 has to be within that jurisdiction?

19 MR. TRIPP: So we -- we now agree --
20 there -- there was dispute in the lower courts
21 about whether a tapped mobile phone qualified
22 as a mobile interception device within the next
23 clause of that, saying that we could put our
24 wire room anywhere in the country. We now
25 agree with Petitioner that the answer is no, we

1 can't; the wire room needs to be in the same
2 judicial district.

3 JUSTICE SOTOMAYOR: I -- I -- I'm
4 sorry. Do you agree that the order has to be
5 within the -- for interceptions within the
6 jurisdiction? Except for a mobile device, and
7 you agree this is not a mobile --

8 MR. TRIPP: Yes, so an -- an order
9 from the District of Kansas, we need to put our
10 wire room in the District of Kansas.

11 JUSTICE SOTOMAYOR: All right. Are
12 you taking the position that the order does not
13 have to say, at all, that it's within the
14 jurisdiction?

15 MR. TRIPP: Yeah, that is absolutely
16 our position.

17 JUSTICE SOTOMAYOR: That's your
18 position?

19 MR. TRIPP: Yeah, absolutely. I think
20 that that --

21 JUSTICE SOTOMAYOR: All right.

22 MR. TRIPP: -- follows just straight
23 from the text of the statute. It is enough
24 that this is in --

25 JUSTICE SOTOMAYOR: So you're saying

1 only a violation of those four -- of -- of
2 subparagraph (4), even though the whole process
3 of ordering is premised on it being an order
4 within the jurisdiction of the Court?

5 MR. TRIPP: Well, I -- I -- so this is
6 obviously an order from the Kansas court. I
7 don't think there's any dispute about that.
8 And then the question was just: Where do we
9 put our wire room?

10 I think I was trying --

11 JUSTICE SOTOMAYOR: That's such a
12 strange position, though, that you would have
13 an order that wouldn't tell you where you could
14 do this.

15 MR. TRIPP: I -- I -- I think it -- it
16 just follows. It's a -- it's a background rule
17 that follows from the statute.

18 When you get an order that says that
19 it's coming from the District of Kansas, then
20 the rule is you can either intercept inside the
21 District of Kansas or outside the District of
22 Kansas if you're using a mobile interception
23 device. That's the rule in every single Title
24 III case.

25 JUSTICE SOTOMAYOR: What did it do

1 with the requirement of every warrant that you
2 have to give a time, place? We know the rule
3 requires a time, a place.

4 MR. TRIPP: Right. So --

5 JUSTICE SOTOMAYOR: But there's no
6 place here.

7 MR. TRIPP: No, the -- the -- the --
8 so if you look at the checklist of items that
9 -- that the statute expressly requires every
10 order to contain, it -- it does all of those
11 things. It tells you many times --

12 JUSTICE SOTOMAYOR: How about if the
13 judge fails to make the required findings under
14 (3)? Would the order be insufficient if he
15 didn't do what subparagraph (3) requires?

16 MR. TRIPP: I -- I think actually that
17 is a classic example of something that would
18 fall within prong 1. It -- it -- it -- it's
19 hard to think of a situation where you would
20 have an order where on its face it's clear from
21 the order that the judge didn't make any of
22 those requisite findings, really for two
23 reasons.

24 One is, again, those findings don't
25 actually need to appear in the order. Title

1 III doesn't require that.

2 And then the other is, you know, in
3 practice, they actually quite often recite a
4 probable cause finding.

5 JUSTICE SOTOMAYOR: Uh-huh. So that's
6 your position. Your position is, if the
7 jurisdiction is missing, it falls under prong
8 1?

9 MR. TRIPP: If jurisdiction is --

10 JUSTICE SOTOMAYOR: (i), I should say,
11 not 1, under --

12 MR. TRIPP: Sorry, an important point.
13 So, if jurisdiction is missing and we sought to
14 introduce evidence that was intercepted from
15 outside the jurisdiction, right, if we had --
16 if there had been no language in this case, in
17 -- in these orders --

18 JUSTICE SOTOMAYOR: This is a more
19 interesting argument --

20 MR. TRIPP: It is.

21 JUSTICE SOTOMAYOR: -- what you're --
22 because I can't figure out how you could have
23 an order that doesn't have jurisdiction. It
24 seems to me that that's a requirement of every
25 warrant.

1 MR. TRIPP: So I -- I think --

2 JUSTICE SOTOMAYOR: So, if it's not
3 correctable somewhere, it makes no sense to me.

4 MR. TRIPP: The -- the -- it does not
5 need to say where the wire room needs to be
6 located. Indeed, I'll -- I'll -- I'll say that
7 the applications in this case didn't even say
8 where we were going to put the wire room, that
9 that went to how we were going to implement the
10 order of the Kansas court.

11 The jurisdiction that flowed from
12 those orders flow -- flowed from the fact that
13 it was an order of the District of Kansas. It
14 said District of Kansas across the top.

15 And so the -- the upshot of that is
16 that we either needed to put the wire room
17 inside Kansas or we could put it outside if we
18 were using a mobile interception device, which
19 we -- which we weren't doing here.

20 JUSTICE KAGAN: But, Mr. Tripp, if --
21 if -- if you -- if the order doesn't have to
22 include anything about territorial
23 jurisdiction, how is anybody to know whether it
24 approves interception only within the
25 territorial jurisdiction or instead outside

1 that jurisdiction?

2 I mean, there's a -- there's a --
3 there's a choice here, depending on whether
4 there's a mobile interception device, right?
5 If there's a mobile interception device, you
6 can approve interception more widely than if
7 there's not a mobile interception device.

8 So I would think looking at this
9 statute -- and I recognize that it's not
10 included in one of the things that's said in
11 Number (4), but that Number (3), you know, just
12 implicitly requires a court to say which one it
13 is, is it just within the jurisdiction or is it
14 outside the jurisdiction, because there's a
15 mobile interception device at issue.

16 MR. TRIPP: So I -- I -- I think our
17 first response is that the statute doesn't
18 require it to appear in the order because the
19 statute doesn't say that.

20 And then I think the -- the second is
21 that the background --

22 JUSTICE KAGAN: Well, how is -- I
23 guess what I'm saying is -- I appreciate
24 that -- but how is anybody to know unless the
25 court says that?

1 MR. TRIPP: So I think --

2 JUSTICE KAGAN: I mean, they're not
3 going to know what they're -- they can do
4 unless the court says what they can do.

5 MR. TRIPP: Right. So I -- so I think
6 it's clear to everybody that in all these cases
7 that we can put the wire room inside Kansas,
8 right, that flows from -- from this just sort
9 of background jurisdictional principle, and the
10 harder question in all of these cases is -- or
11 that -- that prompted this line of cases was:
12 Well, what about the -- what is a mobile
13 interception device? When can you put it
14 outside?

15 And in this case, we got advance
16 judicial approval from the district court of
17 the government's view at the time, that when
18 you were tapping a cell phone, that qualified
19 as a mobile interception device. We could put
20 the -- the wire room outside Kansas.

21 JUSTICE GINSBURG: But you -- you were
22 wrong about that.

23 MR. TRIPP: We were wrong.

24 JUSTICE GINSBURG: Am I -- am I right
25 that that's an obsolete thing? The mobile

1 interception device you thought was the mobile
2 phone, but it's really the bug.

3 MR. TRIPP: It's really the bug,
4 that's right.

5 JUSTICE GINSBURG: And now they don't
6 use bugs anymore, do they?

7 MR. TRIPP: Not -- not never, but, you
8 know, you -- you -- you might install a bug
9 inside a car or something to track all the
10 communications in the car, not just the
11 communications over a phone.

12 It's just a different kind of case and
13 -- and -- and would -- none of that --

14 JUSTICE KAGAN: But let me say this
15 another way, Mr. Tripp. On 17a, it says: Each
16 order authorizing or approving the interception
17 shall specify.

18 And you're right, the jurisdictional
19 thing does not appear in this list.

20 But then, if you look at 16a, what is
21 an order authorizing or approving the
22 interception, on 16a in paragraph (3), it says,
23 well, the judge enters an order authorizing or
24 approving interception, either within the
25 territorial jurisdiction or outside that

1 jurisdiction, depending on whether there's this
2 mobile interception device.

3 So it just does seem to me that that's
4 just got to be a necessary part of an order
5 authorizing the interception.

6 MR. TRIPP: Well, I --

7 JUSTICE KAGAN: Where is the
8 interception supposed to take place?

9 MR. TRIPP: So --

10 JUSTICE KAGAN: Either within the
11 jurisdiction or outside, depending on whether
12 there's a mobile interception device. It's
13 just got to be in the order because, otherwise,
14 how would you know --

15 MR. TRIPP: So I --

16 JUSTICE KAGAN: -- which of those two
17 possible things is true?

18 MR. TRIPP: So I -- and two follow-ups
19 on that. It -- it doesn't say either/or. It
20 -- it -- it -- it's "and," right, and so we can
21 do it inside the territorial jurisdiction and
22 outside if we're using a mobile interception
23 device.

24 JUSTICE KAGAN: Well, no, but it is an
25 either/or because if it's -- if there's a

1 mobile interception device, it's both. And if
2 it's not a mobile interception device, it's
3 only one.

4 MR. TRIPP: Right, and I think --

5 JUSTICE KAGAN: And that's a
6 disjunctive thing, it's only one or it's both?

7 MR. TRIPP: Yes, but -- but that is
8 something that goes to how the government is
9 going to implement the order, how we're going
10 to go about intercepting the communications.
11 It -- it -- it is not a -- a -- a determination
12 that the judge needs to make up front when
13 issuing the order.

14 Actually, I think another thing that
15 drives that home is in (3), (3) goes on and
16 lists a number of things that come after this
17 jurisdictional provision that the judge must
18 determine on the basis of facts submitted by
19 the applicant. And jurisdiction is not one of
20 those things, because the application doesn't
21 need to say --

22 JUSTICE BREYER: It does say --

23 MR. TRIPP: -- whether we're using a
24 mobile interception device. We -- that -- that
25 -- that's not part of the process.

1 JUSTICE BREYER: This was a new --

2 JUSTICE GINSBURG: Mr. Tripp, how do
3 you -- how do you answer Mr. Shanmugam's
4 positing, suppose this order had authorized the
5 interception to continue for 180 days when the
6 statute says only 30 days?

7 MR. TRIPP: Yeah. So I -- we actually
8 offered a pretty similar hypothetical to this
9 in our brief at page 37, because I think it's
10 -- it's a good illustration of the practical
11 difference between our position and
12 Petitioner's.

13 So both sides are in full agreement
14 that from days 31 forward we can't use the
15 evidence. It would need to be suppressed.

16 The principal difference between our
17 positions is that what we're saying is that
18 from days 1 to 30, when the order has validly
19 authorized us to intercept those
20 communications, in full conformity with Title
21 III, we have that authority.

22 Whereas, what Petitioners are saying
23 is that, as soon as it goes across the line at
24 all, right, if it said 31 days instead of 30,
25 their -- their position is that you need to

1 throw all of the evidence out, no matter what,
2 even if the government noticed the problem and
3 never did any interception after day 30.

4 So it's really a very extreme
5 position. We offer a --

6 JUSTICE BREYER: I'm a little bit
7 still worried about what we discovered at the
8 outset, that at least they are claiming that
9 this order has to say you have authority to
10 wiretap in Kansas as well as outside.

11 So it occurs -- there are two things
12 which worry me. The first, by the way, it does
13 say in Kansas. Where it says Kansas is under
14 the signature of the district judge.

15 MR. TRIPP: Right.

16 JUSTICE BREYER: So it may be that
17 they're thinking, given (3), you know, given
18 what you read us in -- on page 16a where it
19 says a judge can within his territorial
20 jurisdiction authorize a wiretap, that that's
21 good enough. It says he's in Kansas. It says
22 in the statute that you can authorize it within
23 the state you're in, and, therefore, we know
24 this authorizes Kansas.

25 Now they're going to say, if they --

1 if this were what the argument were about, that
2 isn't good enough. It should say: And you can
3 do it.

4 Now what I'm worried about is that
5 there are thousands, that this is a -- this is
6 a form and that there are thousands of wiretap
7 orders, perhaps, throughout the country which
8 do not say in district X; though it says I am a
9 judge in district X, they did -- do not say
10 that you have authority to tap in district X in
11 those words.

12 I'm worried about that because I
13 wouldn't like this case suddenly to cast doubt
14 without argument, you know, full argument --

15 MR. TRIPP: Right.

16 JUSTICE BREYER: -- on those
17 thousands, if there are those thousands. Do
18 you know?

19 MR. TRIPP: I would say I'm quite
20 worried about that as well. I guess I don't
21 have extensive empirical evidence of how often
22 we were issuing orders that didn't include that
23 precise language in part because it hadn't been
24 the focus of the case.

25 I do know that language like this was

1 quite common at the relevant time in 2012 when
2 the only judicial precedent interpreting the
3 phrase "mobile interception device" had held
4 that it included the tapped cell phone. And so
5 it was quite common for orders to include this
6 language saying, yes, you can also put your
7 wire room outside Kansas.

8 JUSTICE BREYER: Okay. I got that. I
9 see that. There's one other question I have,
10 which is, since that wasn't fully argued, what
11 do you say in response to their argument that
12 these questions of severability and reading, et
13 cetera, while very interesting, were not the
14 subject of any argument below?

15 MR. TRIPP: Well, so, on that, I think
16 I'd like to echo what Justice Ginsburg pointed
17 out earlier, which is that we -- we won on the
18 basis of severability in the district court. I
19 think the clearest indication of that is the
20 magistrate judge's opinion, at page 73a of the
21 Pet. App., where the magistrate judge described
22 it as "academic" whether there was a problem
23 with that additional language in the orders,
24 and then, in the Pet. App. at 64a, the district
25 court said, as applied, the orders did not

1 violate the statute. And we --

2 JUSTICE SOTOMAYOR: Mr. Cox, just so I
3 understand your argument, your argument really
4 is that the core -- the court's approach was
5 right, that the core concern analysis applies
6 to (ii) and (iii), that what we announced in
7 Giordano and -- and -- was it Chavez?

8 MR. TRIPP: Chavez -- yeah.

9 JUSTICE SOTOMAYOR: -- that that
10 inquiry applies to those two subdivisions.

11 MR. TRIPP: I -- I think --

12 JUSTICE SOTOMAYOR: So let -- let's
13 assume for the sake of argument, because I
14 understand you're saying the only thing needed
15 by the order is subparagraph (iv), that if it
16 misses any one of these four things, we apply
17 the core concerns analysis.

18 MR. TRIPP: No, I don't think that's a
19 -- that's an accurate description of our
20 position.

21 JUSTICE SOTOMAYOR: So what is your --
22 your -- your -- your point?

23 MR. TRIPP: So I think it would help
24 if I could clarify what exactly we mean by
25 "insufficient" and "overbroad."

1 JUSTICE SOTOMAYOR: No, I don't want
2 to know those terms. I want what the circuit
3 split is. The D.C. Circuit has said -- taken a
4 position contrary to yours in this case, but
5 the D.C. Circuit has said that the core
6 concerns analysis that we used for subdivision
7 (i) doesn't apply to (ii) and (iii). Do you
8 disagree with that?

9 MR. TRIPP: So the way I -- I like to
10 put it is -- so our front line --

11 JUSTICE SOTOMAYOR: No, just answer my
12 question.

13 MR. TRIPP: We think that the court of
14 appeals -- to the extent the Chavez and
15 Giordano test is relevant, we think the court
16 of appeals put it in the wrong box. There --
17 there is no dispute that once you have an order
18 that is insufficient and you're trying to
19 decide whether to suppress tainted evidence on
20 the grounds that the order is insufficient on
21 its face, that Chavez and Giordano do not come
22 into play at that point.

23 Our -- our -- our --

24 JUSTICE SOTOMAYOR: Your point is that
25 this is not insufficient?

1 MR. TRIPP: Our -- right. Our -- our
2 primary arguments -- our arguments here are
3 that this order was not insufficient and -- and
4 -- and in any event, even you think it was, the
5 error is severable, that --

6 JUSTICE KAGAN: Mr. Tripp -- I'm
7 sorry, finish your sentence.

8 MR. TRIPP: Well, I -- so I just want
9 to be clear about --

10 JUSTICE KAGAN: Well, if you're really
11 going to --

12 MR. TRIPP: Go -- go ahead. Yeah.

13 JUSTICE KAGAN: When you say
14 "insufficient," I mean, you know, the Chief
15 Justice raises a very good point that
16 "insufficient" doesn't usually mean invalid,
17 that it usually means lacking something.

18 So then the question is, well, was
19 this order lacking something? And you say no,
20 it wasn't because it didn't have to have
21 anything about the jurisdictional reach of the
22 interception. And I guess I'm a little bit
23 concerned listening to you, I mean, if we -- if
24 we accepted that, how are these orders supposed
25 to read? We're going to go tell every court

1 you don't have to put anything in your order
2 about whether this is only within the
3 jurisdiction or outside that jurisdiction?

4 Because, again, there are really two
5 choices in the statute depending upon whether a
6 mobile interception device is -- is at issue.
7 And if we say, well, this is not insufficient
8 because you don't have to have that, what are
9 we going to be creating, a world of orders in
10 which the judge doesn't tell anybody whether
11 this is within the jurisdiction or whether it's
12 also outside the jurisdiction?

13 MR. TRIPP: No, I don't think that's
14 the upshot of our position. I think one thing
15 to just point out, as a practical matter, these
16 orders contain a large amount of material that
17 Title III does not actually require them to
18 contain in order for interception of the
19 communications to lawfully occur under Title
20 III.

21 Like the orders in this case, for
22 example, include these recitations of probable
23 cause and necessity and -- and -- and other
24 information that is not strictly required. And
25 -- and the government often asks to have that

1 in -- in these orders because, you know, in
2 practice they are heavily picked over. We like
3 to be sure that the district court knows in
4 advance what it is that we're actually doing.

5 I think actually maybe this is a case
6 where it backfired, where we were, you know,
7 trying to cover our bases, be sure that the
8 district court understand what we -- what we
9 might do in this case. It so happened that we
10 didn't rely on any of the evidence in this
11 trial that was intercepted from outside Kansas,
12 so I think -- I don't think, by the way, it had
13 --

14 JUSTICE KAGAN: I guess --

15 JUSTICE ALITO: If the -- if the -- if
16 you were seeking to use a mobile -- a real
17 mobile interception device, would that appear
18 in the application?

19 MR. TRIPP: I think if we were going
20 to actually seek for approval to put a bug in
21 somebody's car like a mobile interception
22 device in that way, I think it would be clear
23 from the application that that's what we were
24 talking about doing.

25 But the -- the orders -- you know, in

1 the applications and the orders, we didn't
2 explain to the court that we were going to be
3 tapping from a wire room on the -- on the basis
4 of a provider cooperation obtained under a
5 different federal statute that the --

6 JUSTICE ALITO: I mean, when this
7 statute was enacted in 1968, there were no cell
8 phones. So I would think that -- I'm not sure
9 what -- under what circumstances the order
10 would need to specify where the -- the -- the
11 tap was going to be.

12 It would have to -- it would have to
13 say that you're authorized to tap a particular
14 number, which would be registered at a
15 particular place, so it would be taken care of
16 otherwise. Would you need to have a -- would
17 there be circumstances at that time where you
18 needed a separate provision of the order
19 specifying where?

20 MR. TRIPP: No. I think, you know,
21 the manner in which interception has very much
22 changed in the last 50 years with the change in
23 technology, it is, of course -- I think it's
24 undisputed in this case that the interception
25 of a cell phone occurs wherever we put the wire

1 room.

2 And, again, I'd like to emphasize that
3 not only did we only use evidence in this case
4 that was intercepted from inside Kansas, we
5 only used evidence in this case under orders
6 where the interception was exclusively inside
7 Kansas. There were -- there were --

8 CHIEF JUSTICE ROBERTS: Mr. Tripp, one
9 thing that -- one thing that the statute
10 requires is that the order identify the person
11 authorizing the wiretap. Now let's say you put
12 your name down, Zachary Tripp, Assistant to the
13 Solicitor General. You have satisfied the
14 statute. You have identified the person
15 authorizing the wiretap, but you're not allowed
16 to do that.

17 Now is that -- that's invalid. Would
18 you say it's also insufficient?

19 MR. TRIPP: Maybe you could read the
20 statute that way. We -- we don't take it that
21 far. We think that when the statute --

22 CHIEF JUSTICE ROBERTS: So you think
23 something that literally complies with the
24 statute can be insufficient because it's
25 invalid?

1 MR. TRIPP: It -- it's more that I
2 think when the statute says that you need to
3 identify -- so each order needs to identify the
4 identity of the person who approved the
5 application and then when the -- the Title III
6 tells you that that has to be a person of, you
7 know --

8 CHIEF JUSTICE ROBERTS: Right.

9 MR. TRIPP: -- that -- that that
10 incorporates that into the requirement. And so
11 if it were to identify somebody like me or the
12 -- an executive assistant, somebody who clearly
13 didn't have the -- the authority, then, no, it
14 would be insufficient as -- as to that.

15 JUSTICE GINSBURG: Then it would be
16 lacking, lacking something.

17 MR. TRIPP: It would be lacking
18 something that Title III expressly makes
19 necessary.

20 CHIEF JUSTICE ROBERTS: What would it
21 be lacking? It says that you should identify
22 the person authorizing it. You do that. You
23 put your name down there. It's not lacking
24 anything. It's just not authorized.

25 MR. TRIPP: I would -- so --

1 CHIEF JUSTICE ROBERTS: I mean, it's
2 not permitted under the statute.

3 MR. TRIPP: I think -- so our -- our
4 -- our definition of what "insufficient" on its
5 face means is that if it is lacking something
6 that is necessary for the government to
7 actually just rely on the orders to intercept
8 the communications at issue, I think in that
9 case it would be quite clear that the order
10 would be lacking something that is necessary
11 for the government to intercept those
12 communications. The order would tell you on
13 its face that it was approved by an official
14 who -- who lacked the ability to do that.

15 That's actually in -- in response to
16 my brother. That's one of the examples of
17 where we think the -- the suppression under
18 prong 2 can reach some situations where prong 1
19 would not apply, like if -- if, in fact, an
20 appropriate official had approved it
21 notwithstanding what it said on the face of the
22 order.

23 JUSTICE GINSBURG: Mr. Tripp, I'd like
24 to ask you about the Glover case, a D.C.
25 Circuit case which is set up as creating a

1 split with this decision.

2 Am I wrong in my understanding of
3 Glover that the district court in the District
4 of Columbia authorized something that she had
5 no authority to order because she ordered a bug
6 to be attached to a truck in another
7 jurisdiction?

8 So it wasn't a question of
9 overbreadth. It was a question that she didn't
10 have authority to order that a bug be placed on
11 -- in a truck in another jurisdiction.

12 MR. TRIPP: Right. In -- in -- in
13 Glover, that was a case that involved the use
14 of evidence that -- that -- that was, you know,
15 actually squarely obtained pursuant to the
16 order saying that they could do that.

17 And -- and -- and so, yeah, I think
18 that really -- the -- the circuit conflict --
19 I'm not sure there really was a circuit
20 conflict. Obviously, we opposed certiorari
21 here. And I think the -- the sort of -- the
22 trickier questions in this area about, well,
23 what do you do when the government is actually
24 relying on evidence that was obtained outside
25 the jurisdiction, and in particular based on

1 the misreading of the phrase "a mobile
2 interception device," just none of that is
3 presented here.

4 And I think there -- there are two
5 just much easier threshold ways of resolving
6 this case. I think, frankly, the easiest is on
7 the grounds of severability, the
8 straightforward way we won this case below.

9 I think the other is just to say that
10 the orders were not insufficient because they
11 -- they did include everything that Title III
12 required them to contain, an order for the
13 government to perform interception inside
14 Kansas, and that's the only evidence we relied
15 on at trial.

16 I think just one other -- I just want
17 to clarify one other thing I said earlier.

18 JUSTICE KAGAN: I mean, if we're
19 talking about easy ways to resolve this case, I
20 have to say the more I think about this, the
21 more it seems really complicated to me, what's
22 supposed to be in these orders and what's not
23 supposed to be in these orders.

24 The only thing I'm sure of in this
25 case is that there's no core concern

1 requirement.

2 So why isn't that the easy way to
3 decide this case and leave everything else for
4 cases where actually people have briefed and
5 addressed these questions of what has to be in
6 and what has to be out and when you can call
7 something insufficient and when not?

8 MR. TRIPP: So, of course, we agree
9 that the Court could send the case back to the
10 court of appeals on that basis, although I just
11 -- a couple caveats.

12 We agree that, basically as a fall
13 back argument on insufficiency, that the --
14 that the Chavez and Giordano test is -- is
15 appropriately considered as to whether the
16 order is insufficient on -- in -- in the first
17 place. I -- I wouldn't want to leave that out.

18 I think another couple -- couple of
19 points on this is we've been making these
20 arguments about -- that the order is not
21 actually insufficient on its face and that it
22 -- it just doesn't matter here because we
23 didn't use any evidence that was intercepted
24 outside Kansas. We've been making these
25 arguments all along. We won it on this basis

1 in the district court. We preserved these
2 arguments in the court of appeals. It flew by
3 them and -- and -- but I -- I -- I don't think
4 that -- that -- that the right result is -- is
5 to -- is to treat it as if we haven't made
6 these arguments.

7 I think the appropriate course is --
8 is simply to affirm.

9 JUSTICE KENNEDY: On that one point,
10 might it have been true that you did use some
11 of the California intercepts from -- that
12 originate from Missouri as part of your general
13 investigation? Maybe that hasn't been raised
14 in this case.

15 MR. TRIPP: Yeah, and this is -- this
16 is --

17 JUSTICE KENNEDY: It would be, maybe,
18 fruit of the poison tree argument or something
19 like that.

20 MR. TRIPP: Yeah, this is something I
21 wanted to clarify. So -- so we did not use any
22 evidence that was the fruit of the poisonous
23 tree. We did not use any evidence obtained any
24 -- under any order where we did any
25 interception outside Kansas.

1 There were 10 orders entered in this
2 case. For nine of them, including all the
3 orders covering Petitioner's phones and all the
4 orders we relied on at trial, interception was
5 all in Kansas.

6 For the one remaining order, we did
7 the interception at the DEA headquarters in
8 St. Louis, where there was better Spanish
9 language capability. But we didn't use any
10 evidence under that order at this trial here.

11 I think also one -- one point I really
12 do want to emphasize here is that I think our
13 -- our primary interest in this case is in
14 being sure that the Court not adopt
15 Petitioner's very extreme rule where, as -- as
16 long as there is any statutory violation of any
17 kind apparent on the face of an order, then you
18 automatically and mechanically need to suppress
19 all of the evidence obtained under that order
20 no matter what, even when there's no causal
21 link between the error and the interception of
22 the evidence.

23 That would be very damaging. I think
24 this case is a -- a good example of -- of -- of
25 why that frankly doesn't make all that much

1 sense.

2 I have a lot of trouble imagining --
3 excuse me -- that any Congress would knowingly
4 enact that rule. I admit that this statute is
5 ambiguous. You could potentially read it
6 Petitioner's way.

7 But I think, with all due respect to
8 Petitioners, it is also ambiguous and you could
9 read it our way: That insufficiency only means
10 some errors, not all of them.

11 Only some things make an order
12 insufficient. Some -- this error just made it
13 overbroad, not insufficient. And -- and,
14 regardless, even if you disagree with that,
15 that -- that you can sever the mistake, the
16 orders here were not insufficient to authorize
17 the interception of these communications inside
18 Kansas, and that's the only evidence we relied
19 on in this trial.

20 So, if there's no further questions,
21 I'm asking the Court to affirm.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Four minutes, Mr. Shanmugam.

25

1 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM
2 ON BEHALF OF THE PETITIONER

3 MR. SHANMUGAM: Thank you, Mr. Chief
4 Justice.

5 The district court in this case
6 exceeded its power under Title III by
7 authorizing what was effectively a nationwide
8 wiretap for the phones at issue.

9 And in doing so, the district court
10 entered orders that under the statute it simply
11 lacked the power to order. The orders at issue
12 here were ultra vires.

13 Now the government concedes that the
14 orders did not comply with the jurisdictional
15 requirement, and instead it argues that the
16 communications at issue could have been
17 lawfully intercepted if the district court had
18 only entered narrower orders.

19 But if, in fact, that is sufficient to
20 avoid suppression, it's really difficult to see
21 what purpose subparagraph (2) serves in this
22 statute at all. Subparagraph (2) by its terms
23 must apply in circumstances in which the
24 communications at issue were, in fact, lawfully
25 intercepted.

1 And I would note parenthetically in
2 response to this back and forth both with me
3 and with Mr. Tripp on the issue of what would
4 happen if the orders were completely silent,
5 that it's hard to see how these orders could be
6 silent on something as fundamental as the
7 question of where interception may occur.

8 And, if anything, in 1968, well before
9 the advent of modern mobile telephone
10 technology, you might think that Congress, if
11 anything, would have been more concerned about
12 the risk of forum shopping and more desirous of
13 ensuring that oversight over wiretap orders was
14 performed by the courts with the closest
15 geographic nexus to the investigations at
16 issue.

17 But, again, whatever you think about
18 this question of what would happen when an
19 order is silent, we have orders here that the
20 government no longer defends, that the
21 government recognizes exceeded the district
22 court's power to enter.

23 I would say a -- a -- just a couple of
24 things about the government's argument on the
25 issue of --

1 JUSTICE GINSBURG: On that point, Mr.
2 Shanmugam, there was a legitimate dispute
3 whether the mobile phone itself qualified as
4 whatever the -- the intercept device. There
5 was a -- the -- the government took the wrong
6 position on that, it now admits that it was the
7 wrong position, but the courts were confused
8 whether the mobile phone itself constituted the
9 interception device.

10 MR. SHANMUGAM: That's right, Justice
11 Ginsburg. But the government does not argue
12 before this Court for a good-faith exception.
13 In Footnote 6, the government concedes that
14 that argument was waived below. And that would
15 be the appropriate place to locate any such
16 concern.

17 And so what we're left with is the
18 government really, again, primarily relying on
19 two arguments: The argument about the meaning
20 of insufficiency, and its severance argument.

21 And on the issue of insufficiency, as
22 I indicated in my opening argument, that would
23 really lead to absurd results.

24 And I think the most telling moment in
25 Mr. Tripp's argument was when he was asked

1 about our hypothetical of an order that
2 authorized a 180-day wiretap, and in response
3 to that, tellingly, he didn't attempt to make
4 the argument that that would not fall within
5 the scope of the phrase "insufficient." He
6 turned it to the government's severance
7 argument instead.

8 And I think that that hypothetical,
9 and the Chief Justice's hypothetical of an
10 order authorized by Mr. Tripp itself, really
11 illustrates that narrowing insufficiency to
12 exclude overbreadth would really lead to absurd
13 results.

14 JUSTICE ALITO: I mean, our legal
15 system usually does not give a party relief
16 based on a mistake that had absolutely no
17 effect on the party.

18 Now I understand that the provision
19 that's directly at issue here is an exception
20 to that. It is a -- it is a list. It's some
21 kind of a -- there's some requirements that
22 have to be in the warrant, and whether or not
23 they had any effect whatsoever, the statute
24 says that there has to be suppression.

25 But when you have that kind of a rule

1 that is purely a formal rule, would you not
2 expect to find in the statute a very clear
3 specification of the things that have to be in
4 the warrant, a very clear checklist, so that
5 somebody can be certain that all of those steps
6 are -- are covered, even if they have no
7 effect?

8 MR. SHANMUGAM: Justice Alito, that
9 might be -- may I answer, Mr. Chief Justice?

10 CHIEF JUSTICE ROBERTS: Sure.

11 MR. SHANMUGAM: That might be a better
12 way to write the statute. Congress plainly
13 didn't do that because it scattered those
14 requirements across several subsections.

15 But I think that your question
16 reflects this concern about the harshness of
17 the rule, the extremeness of the rule. And on
18 that, I think that we can be certain that what
19 Congress intended to do, as this Court said in
20 *Giordano*, was to ensure strict compliance with
21 the statute's requirements, and it created a
22 muscular suppression remedy in order to
23 effectuate that goal.

24 And we would ask for reversal of the
25 judgments below. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.

3 (Whereupon, at 12:11 p.m., the case
4 was submitted.)

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<p style="text-align: center;">9</p> <p>96 ^[1] 23:7 97 ^[3] 12:11,18 13:16</p> <hr/> <p style="text-align: center;">A</p> <p>a.m ^[2] 1:15 3:2 ability ^[1] 56:14 above-entitled ^[1] 1:13 absolutely ^[3] 34:15,19 66:16 absurd ^[2] 65:23 66:12 academic ^[1] 47:22 accepted ^[2] 16:7 50:24 accepting ^[1] 17:18 accident ^[1] 31:2 account ^[1] 24:1 accurate ^[1] 48:19 acquired ^[1] 19:8 across ^[3] 38:14 44:23 67:14</p>	<p>actual ^[5] 20:17 25:22,25 28:23 30:18 actually ^[17] 21:6 33:4 36:16,25 37:3 43:14 44:7 51:17 52:4,5,20 56:7,15 57:15,23 59:4,21 add ^[2] 7:15 31:22 addition ^[2] 27:18,19 additional ^[5] 17:9,14 19:12 31:22 47:23 address ^[1] 5:7 addressed ^[2] 30:25 59:5 addressing ^[1] 20:10 admit ^[1] 62:4 admits ^[1] 65:6 adopt ^[1] 61:14 adopted ^[1] 30:25 advance ^[2] 40:15 52:4 advent ^[1] 64:9 affirm ^[2] 60:8 62:21 affirmatively ^[2] 11:14 25:16 ago ^[1] 3:12 agree ^[8] 6:11 25:19 33:19,25 34:4,7 59:8,12 agreement ^[1] 44:13 ahead ^[1] 50:12 albeit ^[1] 20:12 ALITO ^[11] 18:8 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