No. 17-2

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE TO THE UNITED STATES'S MOTION TO VACATE AND REMAND WITH DIRECTIONS TO DISMISS AS MOOT

Bradford L. Smith
David M. Howard
Julie Brill
John Frank
Jonathan Palmer
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052

James M. Garland
Alexander A. Berengaut
Lauren K. Moxley
COVINGTON & BURLING LLP
850 10th Street NW
Washington, DC 20001

E. Joshua Rosenkranz
Counsel of Record
Robert M. Loeb
Brian P. Goldman
Evan M. Rose
Hannah Garden-Monheit
Alec Schierenbeck
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Respondent

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RESPONSE TO MOTION

Microsoft has argued from the beginning of this case that Congress is the proper branch to update the Electronic Communications Privacy Act of 1986. Congress alone, we insisted, has the tools to address the question whether, and when, law enforcement may demand access to private electronic communications stored in other countries. We have similarly maintained that updated agreements between nations will best foster international harmony, as well as respect foreign nations' essential protections for privacy and human rights. With the CLOUD Act, Congress has now enacted a nuanced legislative scheme that both creates a modern legal framework for law-enforcement access to data across borders and expressly incentivizes the negotiation of new international agreements that balance legitimate law-enforcement interests, individual privacy rights, and foreign sovereignty. Microsoft agrees with the Government that the CLOUD Act defines a new approach.

The Government has now withdrawn the warrant that was at the center of this dispute, and obtained a new warrant issued under the CLOUD Act. That action moots this case. Microsoft will, in the ordinary course, evaluate the new warrant as it evaluates all warrants that law-enforcement entities serve on it. Meanwhile, Microsoft agrees with the Government that there is no longer a live case or controversy between the parties with respect to the question presented, which involves interpreting the prior version of the Stored Communications Act.

Accordingly, Microsoft does not oppose the Government's request that this Court "vacate the judgment of the United States Court of Appeals for the Second Circuit and remand the case to that court with instructions to vacate the district court's contempt finding and to direct the district court to dismiss the case as moot," Gov't Mot. 1, provided that the Court similarly vacates the opinion of the magistrate judge (as adopted by the District Court) that the Second Circuit reversed in this case (Pet. App. 73a-98a, 99a-102a; 15 F. Supp. 3d 466). The Government has authorized us to represent that it does not oppose vacating the magistrate judge's opinion and the District Court's judgment adopting it.

STATEMENT

The Government attempted to use a warrant issued under the Stored Communications Act, 18 U.S.C. § 2703, to require Microsoft to assist with the search and seizure of private correspondence in an individual's email account stored on a computer outside the United States. Microsoft moved to vacate that warrant on the ground that it would be an impermissible exterritorial application of § 2703. A magistrate judge denied that motion and ordered Microsoft to retrieve the customer's correspondence from Ireland and turn it over to the Government. Pet. App. 73a-98a. The District Court summarily affirmed, *id.* at 99a-102a, and held Microsoft in contempt for its refusal to comply, *id.* at 103a.

On appeal, a unanimous panel of the Second Circuit reversed. *Id.* at 1a-72a. As the court explained, in enacting the SCA, Congress did not expressly provide

for extraterritorial reach—a point the Government has conceded. And there were several indications that the SCA was meant to apply only to domestically stored communications. *Id.* at 4a. Indeed, there was no indication that the Congress of 1986 would have envisioned today's globally connected internet. *Id.* at 14a. Concurring, Judge Lynch "emphasize[d] the need for congressional action to revise a badly outdated statute," and called on "the Justice Department [to] respond to this decision by seeking legislation." *Id.* at 49a, 71a.

The Government then petitioned for a writ of certiorari. In opposing certiorari, Microsoft stressed that review was inappropriate because the Second Circuit properly deferred to Congress's authority by applying the presumption against extraterritoriality, and because all parties—and every judge to have considered the question—recognized the need for congressional action. Br. in Opp. 14-26. Microsoft noted that the Government itself had "propos[ed] legislation" to update the SCA, and "Congress [was] actively considering … proposed reforms." *Id.* at 1, 3. The Government replied that the "possibility of eventual legislative action" was "speculative" and did not "diminish[] the acute and present need for this Court's review." Cert. Reply 2.

This Court granted the Government's petition. The Court heard oral argument on February 27, 2018. At oral argument, the Government again insisted that any congressional solution was speculative. Tr. of Oral Arg. 15-16.

Less than one month later, on March 23, 2018, following active advocacy from both the White House and the Department of Justice, Congress enacted the Clarifying Lawful Overseas Use of Data Act (CLOUD Act). Consolidated Appropriations Act, 2018, H.R. 1625, Div. V, 115th Cong., 2d Sess. (2018). The CLOUD Act amends the SCA to provide a highly reticulated scheme governing a service provider's obligation to comply with a warrant issued under § 2703 when "such communication, record, or other information is located … outside of the United States." CLOUD Act § 103(a).

One week later, on March 30, 2018, the Government informed Microsoft that it had returned the warrant underlying this case to the District Court, and had obtained a new warrant issued under the CLOUD Act for the same email content. The Government has now moved to vacate the decision below and remand with instructions to dismiss as moot in light of the CLOUD Act and its unilateral action with respect to the underlying warrant.

ARGUMENT

Microsoft agrees the current case is moot and there is no reason for this Court to resolve a legal issue that is now of only historical interest. The Government's unilateral decision to return the old warrant means that warrant is a dead letter. So there is no longer any live dispute between the parties with respect to Microsoft's challenge to that warrant issued under a now-superseded version of the Stored Communications Act. *See Already, LLC. v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

Although the Government has served Microsoft with a new warrant, the enforceability of that warrant is not an issue before this Court. Microsoft's analysis of the new warrant issued under the new law—and its assessment of whether it is obligated to comply—would necessarily involve different questions from those presented in this case. As the Government acknowledges, the CLOUD Act both establishes a "statutory comity analysis" for use in specified circumstances and otherwise preserves "the availability or application of a common-law comity analysis" under which a service provider may move to modify or quash a warrant. Gov't Mot. 4-5; *see* CLOUD Act § 103(b), (c). As with every warrant it receives, Microsoft will carefully review the new warrant, including the nature and scope of the warrant, the current facts of the account location and use, and any potential grounds for objection.

Because the Government has abandoned its pursuit of the original warrant, Microsoft does not object to the Government's motion to "vacate the judgment of the United States Court of Appeals for the Second Circuit and remand the case to that court with instructions to vacate the district court's contempt finding and to direct the district court to dismiss the case as moot." Gov't Mot. 1. As the Government implicitly recognizes in the second part of its request, vacating the Second Circuit's decision without also directing it to vacate the District Court's contempt finding would be inappropriate, as doing so would leave in place an order deeming Microsoft a contemnor while denying Microsoft's ability to appeal that ruling on the ground that it was correct to resist the warrant issued under the prior version of the law.

For the same reasons, however, this Court should additionally direct the Court of Appeals to vacate the decisions of the magistrate judge and the District Court. Left in place, those decisions could result in collateral estoppel in any future dispute between Microsoft and the Government. And both decisions turned on a badly mistaken view of the presumption against extraterritoriality upon which other courts should not rely for guidance. The way this case has played out shows exactly why the Second Circuit was correct to hold that the Stored Communications Act did not yet reach communications stored in other countries: Only Congress could "create nuanced rules" like those in the CLOUD Act that properly bring the SCA into the 21st century. Pet. App. 69a (Lynch, J., concurring).

Under these circumstances, "vacatur down the line is the equitable solution." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). Especially because the Government itself mooted the case it brought to this Court and has requested vacatur of the Second Circuit's decision reversing the District Court, it would be improper to allow the Government to retain any benefits from the District Court's judgment.[1] *Id.*; *see also Heckler v. Kuehner*, 469 U.S. 977

[1] Indeed, as the Government recognizes, when the party seeking review moots a case, it is sometimes disentitled to vacatur *at all*. Gov't Mot. 10 (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994)). Similarly, when intervening legislation renders the question presented in a case one of only "isolated significance," this Court will simply dismiss the writ of certiorari as improvidently granted. *Rice v. Sioux City*

(1984) (mem.) (vacating the judgment of the court of appeals and remanding down to the district court with directions in light of new legislation). The Government has authorized us to represent that it does not oppose vacating the magistrate judge's opinion and the District Court's judgment adopting it.

CONCLUSION

The Court should vacate the Court of Appeals' judgment and remand with instructions to vacate the District Court's contempt finding, vacate the opinions of the magistrate judge and District Court, and dismiss the case as moot. If, however, the Court deems vacatur and remand improper in these circumstances, it should dismiss the writ of certiorari as improvidently granted: Congress was always the proper forum for updating the 1986 law, and Congress has now acted.

Mem'l Park Cemetery, 349 U.S. 70, 76-77 (1955); *see also Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971) (per curiam); *id.* at 498-99 (Harlan, J., concurring); *Sanks v. Georgia*, 401 U.S. 144, 147 (1971). But in the interest of facilitating this Court's resolution of the case, Microsoft does not press those outcomes.

Respectfully submitted,

Bradford L. Smith
David M. Howard
John Frank
Julie Brill
Jonathan Palmer
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052

James M. Garland
Alexander A. Berengaut
Lauren K. Moxley
COVINGTON & BURLING LLP
850 10th Street, NW
Washington, DC 20001

E. Joshua Rosenkranz
Counsel of Record
Robert M. Loeb
Brian P. Goldman
Evan M. Rose
Hannah Garden-Monheit
Alec Schierenbeck
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

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