19-6533

No. _____

ORIGINAL

In The
Supreme Court of the United States

KALEB LEE BASEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Kaleb Lee Basey
17753-006 Cardinal Unit
Federal Medical Center Lexington
P.O. Box 14500
Lexington, KY 40512-4500
Petitioner in Pro Se

QUESTION PRESENTED

Whether the warrantless preservation of private emails by an Internet Service Provider pursuant to a government request under 18 U.S.C. §2703(f) amounts to a Fourth Amendment search or seizure.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Constitution & Statutes **Page(s)**

Other Authorities **Pages(s)**

Other Authorities **Pages(s)**

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kaleb Lee Basey, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's memorandum decision (Pet. App. 1a-5a) is unpublished, but is available at 2019 U.S. App. LEXIS 24208.

JURISDICTION

The Ninth Circuit issued its opinion on August 14, 2019, and denied Basey's petition for rehearing *en banc* on September 24, 2019. (Pet. App. 21a). This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Stored Communications Act, 18 U.S.C. §2703(f) provides:

> (1) In general.
>
> A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.
>
> (2) Period of retention.
>
> Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

STATEMENT OF THE CASE

Justice Gorsuch recently posed the following question: "Can the government demand a copy of all your emails...without implicating your Fourth Amendment rights?" *Carpenter v. United States*, 138 S. Ct. 2206, 2262 (2018) (Gorsuch, J., dissenting). This case presents essentially the same pressing question of whether the Fourth Amendment is implicated by the government's request to Internet Service Providers (ISPs) to warrantlessly preserve emails under 18 U.S.C. §2703(f).

1. In January 2014, the Alaska State Troopers and the Army

Criminal Investigation Division (CID) began an investigation into the posting of two advertisements listed on the Fairbanks, Alaska, Craigslist website that they believed were solicitations of minors for sex. The investigators traced the internet protocol (IP) address for the initial posting to petitioner Kaleb Basey, a soldier stationed at Ft. Wainwright, Alaska. Pet. App. 16a-17a.

2. In February 2014, an Army CID agent sent a preservation letter under 18 U.S.C. §2703(f) to Yahoo! for Basey's email account. Pet. App. 38a. Yahoo! preserved Basey's emails at that time pursuant to the preservation request.[1] A warrant was not obtained for Basey's emails until November 20, 2014—over 9 months after the Army's preservation request was sent to Yahoo!. Pet. App. 40a.

3. Basey was originally indicted on December 16, 2014, with counts

---

[1] The government conceded in its appeal brief the fact that Basey's emails were preserved by Yahoo! in February 2014. Resp. C.A. Br. at 5 n.2 ("[T]he United States did not dispute below that the preservation request was sent to Yahoo."); Pet. App. 38a (The government stated in the district court: "Records indicate that such a [preservation] letter was sent to Yahoo! by law enforcement in February 2014. ...[C]ontent was held by Yahoo!, and preserved by that private entity at the United States' request.").

unrelated to the search of his Yahoo! email account. A superseding indictment was filed on March 17, 2016, charging Basey with three counts of attempted enticement of a minor in violation of 18 U.S.C. §2422(b), one count receipt of child pornography in violations of 18 U.S.C. §2252(a)(2) and (b)(1), one count of transportation of child pornography in violation of 18 U.S.C. §2252(a)(1) and (b)(1), and one count of distribution of child pornography in violation of 18 U.S.C. §2252(a)(2) and (b)(1). Pet. App. 10a.

4. Before trial, Basey moved for a continuance in order to litigate additional suppression motions. One issue that Basey wanted to address was the unreasonably long seizure of his email account under the government's preservation request. Pet. App. 37a. The government opposed Basey's continuance and briefly addressed the preservation request issue. Pet. App. 38a-39a. The district court denied Basey's continuance ruling that "most, if not all, of the issues that Defendant seeks to address by motion practice already have been addressed and resolved by the Court, and all appear to be without merit on their face." Pet. App. 6a.

5. At trial, the government dismissed all but two of the charges

against Basey. Pet. App. 8a. The government introduced two of Basey's emails obtained from his Yahoo! account to convict Basey on the remaining transportation and distribution of child pornography charges. Pet. App. 47a-51a. The district court sentenced Basey to 180 months imprisonment and lifetime supervised release. Pet. App. 8a-9a.

6. On appeal, a three-judge panel of the Ninth Circuit affirmed. Pet. App. 1a-5a. The panel held that Basey failed to show good cause for the continuance he sought to litigate additional suppression issues, thus, the district court did not abuse its discretion in denying Basey's continuance motion. Pet. App. 2a n.1. The panel felt that despite the district court's statement that Basey's motions "all appear to be without merit on their face," the district court actually based its ruling on untimeliness and did not reach any of the merits of the proposed motions. *Id.*

7. Basey petitioned the Ninth Circuit for a rehearing *en banc* to address the issue of whether the preservation of private emails under an 18 U.S.C. §2703(f) request amounted to a search or seizure under the Fourth Amendment. Pet. App. 26a. Basey's petition was denied on September 24, 2019. Pet. App. 21a.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

A. The district court erred in ruling that Basey's Fourth-Amendment challenge of his preserved emails lacked facial merit.

The district court denied Basey's Fourth-Amendment challenge of the preservation of his emails because it lacked facial merit. Pet. App. 6a. The district court erred for the following reasons.

1. *ISPs become government agents under 18 U.S.C. §2703(f).*

At the outset, 18 U.S.C. §2703(f) creates an agency relationship between the ISP and the government bringing the ISP's preservation within the scope of the Fourth Amendment analysis. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614 (1989) ("Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government."). A mandatory obligation is placed on ISPs to preserve information by inclusion of the word "shall" in 18 U.S.C. §2703(f)(1). " '[S]hall'...normally creates an obligation."

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998); BLACK'S LAW DICTIONARY 1375 (6th ed. 1990) (defining "shall" as "imperative or mandatory" in character).

By compelling an ISP to preserve information pursuant to this statute, ISPs are dragooned into being agents of the government under the common law and various other standards set by the Circuits. *See generally United States v. Ackerman*, 831 F.3d 1292, 1301 (10th Cir. 2016) (Opinion by Gorsuch, J.) (discussing various government agency tests).

2. *Preservation of emails under 2703(f) amounts to a seizure.*

Lower courts consider emails as papers or effects protected by the Fourth Amendment. *E.g.*, *Ackerman*, 831 F.3d at 1304 ("[A]n email is a 'paper' or 'effect' for Fourth Amendment purposes....").[2] Email users have a right to exclude others from emails within their accounts by

---

[2] Notably, this Court has not explicitly held that computer data is an "effect" or "paper" under the Fourth Amendment. *See* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 955-56 & n.29 (2016) (When asked at a lecture whether computer data was an "effect" under the Fourth Amendment, Justice Scalia stated: "That's something that may well come up. It's a really good question.").

means of password protection. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). When the government makes an ISP preserve emails it "meaningful[ly] interfere[s] with an individual's possessory interests in that property." *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (my alteration).

Once Basey's emails were preserved by Yahoo! and, by extension, the government, Basey no longer had his possessory interests in *exclusive* use, possession, and disposition of his emails. "Possessory interest" is defined as "the present or future right to *exclusive* use and possession of property." BLACK'S LAW DICTIONARY 1284 (9th ed. 2009) (emphasis added). Thus, preservation of Basey's emails meaningfully interfered with Basey's possessory interests resulting in a seizure under the Fourth Amendment. *Soldal*, 506 U.S. at 61.

3. *Preservation of emails under 2703(f) amounts to a search.*

Email accounts are also property the customer has a right to exclude others from due to password protection. *See, e.g., Ajemian v.*

Yahoo!, Inc., 478 Mass 169, 170 (2017) *cert. denied*, 200 L. Ed. 2d 526 (2018) (finding email accounts to be a "form of property referred to as a 'digital asset' "). When emails are preserved by the ISP, electronic impulses are sent into the customer's password-protected account and email files therein to obtain information—a copy of the customer's emails. "When 'the Government obtains information by physically intruding on persons, houses, papers, or effects, a "search" within the original meaning of the Fourth Amendment has undoubtedly occurred.' " *Florida v. Jardines*, 596 U.S. 1, 5 (2013) (quoting *United States v. Jones*, 565 U.S. 400, 406-07, n.3 (2012)). The transmission of electrons into Basey's password-protected account and email files therein is sufficiently physical to constitute at least a trespass to chattels. *See Ackerman*, 831 F.3d at 1308 (collecting cases where "courts have already applied the common law's ancient trespass to chattels doctrine to electronic, not just written, communications"); *see also Eysoldt v. Pro Scan Imaging*, 194 Ohio App.3d 630, 638 (2011) (permitting conversion action of web account as intangible property). Thus, the government committed a search by making Yahoo! trespass

into Basey's email account as its agent to obtain a copy of Basey's emails or otherwise secure future access to this information.

Even if preservation of email files is not sufficiently physical enough under *Jardines* and *Jones*, it is still sufficiently analogous to the opening and copying of traditional mail. Whatever else it may do, the Fourth Amendment must "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). The case of *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765), was "well known to the men who wrote and ratified the Bill of Rights,"[3] and informed them in drafting the Fourth Amendment. Lord Camden wrote in *Entick*, "Papers are the owner's goods and chattels; they are his dearest property;...where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass...." *Id.* at 1066. Thus, this Court should find that preservation of emails is sufficiently analogous to how traditional mail would be preserved, i.e., by trespassing into a closed envelope to obtain the contents of the letter.

---

[3] Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393, 397 (1995).

See Ex Parte Jackson, 96 U.S. 727, 733 (1878) ("The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.").

Additionally, an invasion of one's privacy occurs when emails are copied or otherwise preserved by an ISP even if the government has not looked at the emails. Emails are less private simply by being under government dominion. *Cf. United States v. Karo*, 468 U.S. 705, 735 (1984) (Stevens, J., concurring in part and dissenting in part) ("A bathtub is a less private area when the plumber is present even if his back is turned."); *Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) ("[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person.").

The government maintained in the lower courts that the Fourth Amendment does not apply to preservation requests under 18 U.S.C. §2703(f). Pet. App. 38a-39a; Resp. C.A. Br. at 17-26. But as explained above, it does. Without guidance from this Court, email users "cannot know the scope of his constitutional protection, nor can a policeman

know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459-60 (1981).

B. The volume and increasing frequency of preservation requests highlights the importance of the question presented.

This is not an isolated or occasional concern. Law enforcement make staggering amounts of 18 U.S.C. §2703(f) preservation requests every year. For instance, since at least July 2014, Google has annually received tens of thousands of preservation requests under 18 U.S.C. §2703(f) seeking preservation of multiple user accounts—including 8,698 preservation requests affecting 22,030 accounts in the first half of 2018 alone.[4] In that same six-month period, Facebook received 57,000 preservation requests for 96,000 different accounts.[5] In recent years, those numbers have been rising. Comparing the six-month period between July and December 2017 with the period between January and June 2018, Google and Facebook together experienced between 20% and 30% increases in preservation requests and affected accounts.

---

[4] Google, *Transparency Report: Requests for User Information (United States)*, https://perma.cc/MP98-8SCP (last visited Oct. 19, 2019).

[5] Facebook, *Transparency Report: Government Requests (United States)*, https://perma.cc/TVV5-QYW9 (last visited Oct. 19, 2019).

In some instances, police eventually meet the constitutional and statutory standards required to search and seize private account data by subsequently serving timely and appropriate legal process on ISPs. Yet it is often the case that such legal process comes after a long delay—if it comes at all. Many preservation requests may be unreasonable under the Fourth Amendment due to such delays. *See United States v. Jacobsen*, 466 U.S. 109, 124 (1984) ("[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.' "); *United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009) (21-day delay between warrantless seizure of computer and obtaining of a search warrant held to be unreasonable under Fourth Amendment).

As the ACLU observed in its amicus brief in the Ninth Circuit, ISPs receive thousands more preservation requests than they do subsequent legal process to actually search the accounts. Pet. App. 67a-68a. For example, in the first half of 2018, Facebook received a total of 57,000 preservation requests, but only received 23,801 search

warrants, 9,369 subpoenas, and 942 section 2703(d) court orders.[6] Even assuming—implausibly—that legal process is always tied to an account previously targeted by a preservation request, investigators never demonstrated any basis for their demands to preserve accounts on almost 23,000 occasions over six months. From this data, it appears the government's actual use of 18 U.S.C. §2703(f) is not primarily about preservation of evidence where legal process is actively being sought. Rather, preservation requests appear to be used as insurance just in case probable cause develops later or a warrant is sought at some point—months later in Basey's case. This radically transforms 18 U.S.C. §2703(f)'s intent as a way to freeze evidence while a warrant is speedily sought,[7] and turns it into a way to stockpile a wealth of information about the suspect just in case police decide they want to look at it later.

One recent case from the District of Kansas provides anecdotal evidence that police rarely seek warrants in the statutory 90-day and

---

6 Facebook Transparency Report, *supra.*

7 *See Missouri v. McNeely*, 569 U.S. 141, 154-55 (2013) (noting that police can now obtain warrants more easily due to advances in technology); *id.* at 173 (Roberts, C.J., joined by Breyer and Alito, JJ., concurring in part and dissenting in part) ("Judges have been known to issue warrants in as little as five minutes.").

extended 180-day retention periods. *In the Matter of the Search of the premises known as: Three Hotmail Email Accounts*, No. 16-MJ-8036-DJW, 2016 WL 1239916, *12 n.78 (D. Kan. March 28, 2016) *overruled in part on other grounds*, 212 F. Supp. 3d 1023 (D. Kan. 2016). The court noted that it was "the first time the Court can remember the government indicating it renewed its preservation request" within the allotted 90 days. *Id.* According to the court, it was also "the first time the Court can remember the government *seeking* a search warrant within that one-time renewal period, as seems to be the intent of subsection (f)." *Id.* As both data and anecdote demonstrate, law enforcement officers regularly send preservation requests as a "matter of course," copying and preserving troves of personal data for months at a time, without any showing of cause or exigency.[8]

Police can now freeze the entire contents of an email account from the comfort of their desks using self-service websites for preservation

---

[8] Orin S. Kerr, *The Fourth Amendment and Email Preservation Letters*, Wash. Post: The Volokh Conspiracy, Oct. 28, 2016, https://wapo.st/2IdmLjv ("[T]he preservation authority is routinely used by the government to preserve the contents of communications. ...And it turns out that a lot of investigators and prosecutors issue such letters often.")

requests. *United States v. Rosenow*, 2018 U.S. Dist. LEXIS 198054, *12-13 (S.D. Cal. Nov. 20, 2018) (describing Facebook's Law Enforcement Online Request System (LEORS) for processing preservation requests). It is time that this Court address the "appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power...." *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring). This Court's intervention is needed now to stem the tide of increasing, arbitrary preservation requests so that the Fourth Amendment is not rendered a dead letter for digital information stored online.

C. This Court's recent decisions have properly recognized a need to reexamine traditional understandings of Fourth Amendment protection in the digital age.

Thrice in recent terms this Court has confronted crucial questions regarding the application of the Fourth Amendment in the digital age. *See Carpenter v. United States*, 138 S. Ct. 2206 (2018) (collection of cell site location information is a Fourth Amendment search generally

requiring a warrant); *Riley v. California*, 134 S. Ct. 2473 (2014) (warrant required for search of cell phones seized incident to lawful arrest); *United States v. Jones*, 565 U.S. 400 (2012) (tracking a car with a GPS device is a Fourth Amendment search). Basey's case presents an important next step in the ongoing effort to reconcile enduring Fourth Amendment principles with the reality of a new digital world.

1. In *United States v. Jones*, this Court addressed the pervasive location monitoring made possible by GPS tracking technology surreptitiously and warrantlessly attached to a vehicle. All members of this Court agreed that attaching a GPS device to a vehicle and tracking its movements constitutes a search under the Fourth Amendment. In so holding, the Court made clear that the government's use of novel digital surveillance technologies not in existence at the framing of the Fourth Amendment does not escape the Fourth Amendment's reach. 565 U.S. at 406 ("[W]e must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' ") (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2011)).

Basey's case, by comparison, also involves technology not in existence at the framing. But the government's use of the preservation

request in Basey's case is more egregious because 18 U.S.C. §2703(f) lacks a notice requirement. "[S]urreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment." *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986).

In *Jones*, the government at least supplied the defendant with the invalid search warrant that authorized the GPS tracking. In contrast, criminal defendants who are targets of prior preservation requests may *never* realize the government searched and seized their emails. Since the government regards 18 U.S.C. §2703(f) as outside the scope of the Fourth Amendment, criminal defendants may not receive any meaningful information regarding such requests as part of their Fed. R. Crim. P. 16 case discovery material. For example, Basey was provided tens of thousands of pages of discovery material, yet only a few sentences mentioned the preservation of his emails—it was a proverbial needle in a haystack. Should this Court grant certiorari, prosecutors will know whether to disclose such requests so criminal defendants can contest the reasonableness of any given preservation request.

2. In *Riley v. California*, the Court addressed Americans' privacy

rights in the contents of their cell phones, unanimously holding that a warrantless search of the contents of a cell phone incident to a lawful arrest violates the Fourth Amendment. In so doing, the Court rejected the government's inept analogy to other physical objects that have historically been subject to warrantless search incident to arrest. 134 S. Ct. at 2489 ("Cell phones differ in both quantitative and qualitative sense from other objects that might be kept on an arrestee's person.").

As in *Riley*, Basey's case will also require this Court to distinguish its earlier cases. The government argued below that the copying of emails was no different than the copying of a serial number from the turntable in *Arizona v. Hicks*, 480 U.S. 321, 324 (1987), which held the copied number was not a seizure. *See* Resp. C.A. Br. at 24-25. The government's proposition, however, "is like saying a ride on horseback is materially indistinguishable from a flight to the moon." *Riley*, 134 S. Ct. at 2488. Email accounts implicate possessory and privacy concerns far beyond those implicated by copying a string of numbers or the

preservation of banking records for that matter. *Cf. California Bankers Association v. Shultz*, 416 U.S. 21 (1974).[9]

3. In *Carpenter v. United States*, this Court addressed warrantless collection of cell site location information (CSLI) used to track individual's over an extended period of time. This Court held that the acquisition of Carpenter's cell site records was a Fourth Amendment search. In so holding, this Court explained that CSLI tracking had many of the qualities of the GPS monitoring considered in *Jones*—it is "detailed, encyclopedic, and effortlessly compiled." *Carpenter*, 138 S. Ct. at 2216.

Preservation requests for email accounts also result in detailed, encyclopedic, and effortlessly compiled information. But preservation requests are not restricted in scope. While requests for CSLI are limited in time, a preservation request may seize years of information in one fell swoop. Moreover, "[a]n email address is required for almost every online service, including Facebook, Twitter, Instagram, Amazon, Foursquare, LinkedIn, and TurboTax. Because of this, an email account

---

[9] *See* Resp. C.A. Br. at 24 (citing *California Bankers Association* for the proposition that "[r]elated Supreme Court case law reinforces the conclusion that preservation requests are not seizures").

may contain such an aggregate of information from each online service so as to constructively contain an image of those outside accounts." *In re search of premises known as: Three Hotmail Email accounts*, 2016 U.S. Dist. LEXIS 40545, *43.

The district court in Basey's case stated that Basey's challenge to the preservation of his emails pursuant to 18 U.S.C. §2703(f) was "without merit on [its] face." Pet. App. 6a. But it is only this Court who can ultimately decide whether Basey's emails were subject to a search and seizure by re-examining its precedents. Basey requests the Court to address the question presented and remand for consideration of whether the search and seizure of Basey's emails was unreasonable and, if so, whether exclusion is necessary.

II. THIS CASE IS A GOOD VEHICLE FOR THE COURT TO ADDRESS THE QUESTION PRESENTED.

A. Additional percolation would not aid the Court's consideration of the issue.

There is no good reason to delay resolution of the question presented. Section 2703(f) has been on the books for over twenty years and has

only been addressed in suppression motions three times.[10] Moreover, the question of whether digital duplication of one's computer files has not been squarely addressed by this Court. Additionally, legal commentary and scholarship recognize it is high time to address the question

---

10 Besides Basey's case, the other two are *United States v. Perez*, No. 18-30004 (9th Cir. pending oral argument), and *United States v. Rosenow*, No. 17-cr-3430, 2018 WL 6064949, 2018 U.S. Dist. LEXIS 198054, *32 (S.D. Cal. Nov. 20, 2018) (holding that under the particular circumstances of the case, the Fourth Amendment was not implicated). *Rosenow*, unlike *Basey* and *Perez*, only involved the use of preserved subscriber information, not content information.

presented.[11] Americans have waited long enough to know the scope of the Fourth Amendment protection for their online information.

Basey's case is a simple threshold analysis case. Basey is not asking this Court to decide the reasonableness of the warrantless

---

[11] *E.g.*, Note, *Digital Duplications and the Fourth Amendment*, 129 Harv. L. Rev. 1046 (2016) ("[T]here is little Supreme Court guidance on applying the Fourth Amendment to duplications, and lower courts have had to analogize from old caselaw of questionable relevance in the modern context."); Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 Yale L.J. 700, 723-24 (2010) ("[A] government request to an ISP to make a copy of a suspect's remotely stored files and to hold it while the government obtains a warrant would also constitute a seizure."); Mark Taticchi, *Redefining Possessory Interests: Perfect Copies of Information as Fourth Amendment Seizures*, 78 Geo. Wash. L. Rev. 476, 496 (2010) ("The Supreme Court should hold that perfectly duplicating information seizes the information because it deprives the information's owner of her right to exclude others from it."); Brady, *supra* note 2, at 999 n.236 ("The idea that data is an effect is a highly contested position...."); Paul Ohm, *The Olmsteadian Seizure Clause: The Fourth Amendment and the Seizure of Intangible Property (Abridged)*, 2008 Stan. Tech. L. Rev. 1, paragraph 34 (2008) ("In *Hicks*, the Court was wrong about seizure, and the cases which follow its dictum have incorrectly concluded the Seizure Clause does not apply to copies of intangible data."); Alan Butler, *Get a Warrant: The Supreme Court's New Course for Digital Privacy Rights After* Riley v. California, 10 Duke J. Const. L. & Pub. Pol'y 83, 112 (2014) ("Is the copying of a digital device's contents a seizure that triggers Fourth Amendment requirements?"); Paul Ohm, *The Fourth Amendment Right to Delete*, 119 Harv. L. Rev. F. 10 (2005) ("Modern-day police...have tools that duplicate stored records...all from a distance and without need for physical entry...[I]t is unclear whether the Fourth Amendment's restrictions apply to these technologies: Are the acts of duplication and collection themselves seizure?").

search and seizure of his emails which "can only be decided in the concrete factual context of the individual case." *Sibron v. New York*, 392 U.S. 40, 59 (1968). In factually intensive Fourth Amendment cases, many cases may need to be decided before this Court can hew "[a] single, familiar standard [which] is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). For example, whether exigent circumstances existed to make the preservation of Basey's emails reasonable would require fact-specific analysis which would differ from case to case. *See Missouri v. McNeely*, 569 U.S. 141, 150 n.3 (2013) ("[T]he general exigency exception, which asks whether an emergency existed that justified a warrantless search, naturally calls for a case-specific inquiry.").

But the question presented here does not require percolation due to its simplicity. The government has admitted the only fact needed to resolve the question: Basey's ISP preserved his emails pursuant to 18 U.S.C. §2703(f). *See supra* note 1. "[F]actual stipulations are 'formal concessions...that have the effect of withdrawing a fact from issue and

dispensing, wholly with the need for proof of the fact.' " *Christian Legal Soc. Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 676-78 (2010) (quoting 2 K. Brown, McCormick on Evidence §254, p. 181 (6th ed. 2006)). This admission "is binding before both trial and appellate courts." *United States v. Crawford*, 372 F.3d 1048, 1055 (9th Cir. 2004) (en banc).

Any future case addressing the threshold question of whether 18 U.S.C. §2703(f) implicates the Fourth Amendment will essentially mirror Basey's case with respect to the single fact needed to address the issue. When this Court granted certiorari in *United States v. Jones*, there were only four opinions addressing the propriety of warrantless GPS tracking. *See* Pet. for Writ of Cert. at 20-23, *Jones*, 565 U.S. 400 (No. 10-1259). As in *Jones*, where the only fact needed to address the question of whether the Fourth Amendment was implicated was simple, repeatable, and not requiring percolation; Basey's case is identical. It would be pointless to wait under such circumstances.

Also, the only arguable sub-issue in this case, whether Yahoo! acted as a government agent, is a question of law. *United States v. Ackerman*, 831 F. 3d 1292, 1304 (10th Cir. 2016) (Opinion by Gorsuch,

J.) ("[T]he Fourth Amendment agency question is unquestionably one of constitutional law."). This may require the Court to distinguish the preservation of emails by ISPs from cases dealing with the preservation of banking records[12] and statutes dealing with the preservation of tax records or evidence of crimes.[13] But here the only fact needed to decide the agency question has been admitted by the government.

B. Contrary to the Ninth Circuit's ruling, the question presented was pressed and passed upon below.

This Court's traditional rule in considering issues for certiorari asks whether they were "pressed or passed upon below," a rule that "operates (as it is phrased) in the disjunctive, permitting review of an issue not presented so long as it has been passed upon." *United States v. Williams*, 504 U.S. 36, 41 (1992). Despite the Ninth Circuit's erroneous ruling that Basey forfeited his Fourth-Amendment challenge of his preserved emails, the question presented still meets this Court's criteria for granting certiorari.

---

12 *E.g.*, *California Bankers Association v. Shultz*, 416 U.S. 21 (1974).

13 *E.g.*, 26 U.S.C. §6001 (requiring all taxpayers to keep tax records); 18 U.S.C. §1519 (criminalizing destruction of records with intent to obstruct a federal investigation.).

1. The question presented was pressed below.

This Court "has not deemed an issue waived when it was first raised in a petition for rehearing en banc before a circuit court." *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1160 (9th Cir. 2013). In *United States v. Jiminez Recio*, 537 U.S. 270 (2003), this Court overruled a line of Ninth Circuit cases despite the fact that the government first challenged the cases only in its petition for rehearing *en banc*. *Hernandez-Estrada*, 749 F.3d at 1160. Here, Basey not only pressed the question presented in the district court, but he pressed it in his petition for rehearing *en banc* as well. Pet. App. 26a. Therefore, Basey has not forfeited or waived this issue.

Second, Basey also pressed the issue in the district court. Basey submitted briefing on the issue arguing that a continuance was necessary to address the unreasonableness of the government's seizure of his emails. Basey wrote:

> [T]he execution was unreasonable. On information and belief, Yahoo received a preservation letter in February 2014. This made it impossible for the owners of designated accounts, including Basey, to

> delete material from their accounts. A search warrant ordering the seizure of the contents of the designated accounts was issued approximately nine months later. This was an unreasonable amount of time to interfere with Basey's possessory right to his account. Thus, suppression is required.

Pet. App. 37a. Moreover, both parties addressed the issue in depth in their appellate briefs.[14] Thus, the issue has been pressed enough for this Court to grant certiorari.

2. The question presented was passed upon below.

The district court summarily addressed Basey's claim regarding the Yahoo! preservation request saying that it had "independently studied the matter" and the issue "had been addressed and resolved by the Court" and "appear[ed] to be without merit on [its] face." Pet. App. 6a. Even if the district court did not address the issue of whether suppression was necessary, the district court *did address the threshold issue* of whether the Fourth Amendment was implicated by referring to the lack of facial merit in Basey's claim.[15] This was a summarily

---

[14] Pet. C.A. Br. 7-25; Resp. C.A. Br. 20-27.

[15] Contrary to the Ninth Circuit's ruling that "the court made no findings (explicit or implicit) respecting whether Basey's email account was seized," Pet. App. 2a n.1, the district court implicitly adopted the facts set forth by the government. Pet. App. 22a ("Therefore, *for the reasons set forth by the government* at Docket 172, the Motion to

addressed issue, but " 'even summarily treated issues become the law of the case.' " *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1994) (quoting *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1135 (D.C. Cir. 1994)). The district court summarily passed on the threshold question Basey now presents to this Court.

3. This case is exceptionally important.

Assuming the question presented was neither pressed nor passed upon below, the question presented is exceptionally important enough for this Court to depart from its traditional rule. Preservation requests are sent out tens of thousands of times every year, affecting hundreds of thousands of individuals. "Though [this Court] do[es] not normally decide issues not presented below, [it is] not precluded from doing so." *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (citing *Youakim v. Miller*, 425 U.S. 231 (1976)). Where, as here, the question presented is "an important, recurring issue," *Carlson*, 446 U.S. at 17 n.2, this Court has made exception from the general rule. *See Youakim*, 425 U.S. at 234

Continue Trial is hereby DENIED.") (emphasis added). Moreover, the district court did not need to make factual findings for whether or not Basey's account was seized because the government admitted the only fact needed to reach that threshold decision of law. *See* note 1, *supra*, and Section IIA, *supra*.

(" 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.' ") (quoting *Duigna v. United States*, 274 U.S. 195, 200 (1927)). In fact, at oral argument, the government not only conceded that there was a sufficient factual basis to reach the merits, it pressed the panel to reach the merits of the Fourth-Amendment issue.[16] Further, the government pressed the panel to reach the merits of the good faith exception issue—which is far more than what Basey asks this Court to do.[17] Moreover, this is not a case where a failure to raise the question below results in an inadequate record for review.[18]

---

[16] Oral Argument at 21:50, United States v. Basey (No. 18-30121), *available at* https://www.ca9.uscourts.gov/media/view.php?pk_id=0000034302 ("You can—I think—still resolve this case by ruling in favor of the government that even on the facts most favorable to Mr. Basey, the government would still win for numerous reasons...."); *i.d.* at 23:53 ("But *there is a sufficient basis* to conclude that a preservation...letter does not violate the Fourth Amendment. It's just not a seizure.") (emphasis added).

[17] *I.d.* at 26:50 ("I also think that *it would be entirely appropriate to resolve this issue on the merits* based on the good faith exception.") (emphasis added).

[18] *See Illinois v. Gates*, 462 U.S. 213, 221 (1983) (" 'Questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with these questions in mind.' ") (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)).

4. Plain error

Lastly, "[i]n exceptional circumstances, especially in criminal cases," this Court, "in the public interest, may...notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936); Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). The plain error rule "is not a rigid one, and [this Court] ha[s] less reluctance to...act when rights are asserted which are of such high character as to find expression and sanction in the Constitution and Bill of Rights." *Weems v. United States*, 217 U.S. 349, 362 (1910); *United States v. Walser*, 275 F.3d 981, 985 (10th Cir. 2001) ("We apply the plain error rule less rigidly when reviewing a potential constitutional error.").

Here, the error is plain. Search and seizure of intangible property has been recognized under this Court's precedent since at least *Katz v. United States,* 389 U.S. 347, 353 (1967), which held that "the government's activities in electronically listening to and recording the petitioner's words...constituted a 'search and seizure' within the

meaning of the Fourth Amendment." The search and seizure at issue here implicated substantial rights of a constitutional nature which implicates the fairness and integrity of the judicial process. *See United States v. Nikrasch*, 367 F.2d 740, 743 (7th Cir. 1966) (reviewing a Fourth Amendment challenge under plain error standard and noting that the violation "affected the fairness of the judicial proceedings below"); *United States v. James*, 353 F.3d 606, 612 (8th Cir. 2003) (not reviewing a Fourth Amendment challenge for plain error would "condone a stark violation of Fourth Amendment rights"). On remand, should the search and seizure ultimately be found to have been unreasonable and exclusion warranted, the government will lose its case as Basey's preserved emails were the only basis for his conviction. Thus, Basey has been prejudiced by the error.

CONCLUSION

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

Respectfully submitted this 31st day of October, 2019.

Kaleb Lee Basey

Kaleb Lee Basey
Petitioner in Pro Se
17753-006 Cardinal Unit
Federal Medical Center Lexington
P.O. Box 14500
Lexington, KY 40512-4500