No. _____

IN THE
Supreme Court of the United States

ERIC J. PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether subsection (f) of the Stored Communications Act, 18 U.S.C. § 2703, which requires provider of wire or electronic communications to preserve user account information upon the request of a government agency pending the issuance of a warrant or other court process, is unconstitutional on its face because it allows law enforcement to conduct warrantless searches and seizures in the absence of any recognized exception to the warrant requirement of the Fourth Amendment.

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TABLE OF CITED AUTHORITIES

Supreme Court Cases:

Statutes:

List of Parties:

United States of America

Eric J. Perez

List of Directly Related Proceedings:

United States of America v. Eric J. Perez
United States District Court for the Eastern District of Washington
2:16-cr-00063-SMJ-1
Judgment and Sentence entered December 18, 2017

United States of America v. Eric J. Perez
Ninth Circuit Court of Appeals
No. 18-30004
Memorandum opinion filed February 21, 2020

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

Petitioner respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered on February 21, 2020.

OPINIONS AND ORDERS BELOW

Petitioner entered a conditional plea of guilty to seven counts of child pornography, coercion and enticement of a minor to engage in sexual activity, and child sex trafficking reserving his right to appeal the District Court's denial of his motion to suppress evidence. (App.1-7) On appeal, the Ninth Circuit Court of Appeals affirmed the decision of the District Court. (App. 17-21)

BASIS FOR JURISDICTION

The Court of Appeals had jurisdiction under 18 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> 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.

STATEMENT OF THE CASE

On November 17, 2015, Officer Pannek of the Quincy, Washington, Police Department, received a report of alleged inappropriate contact with a female Junior High School student by an adult male. That same day, Officer Pannek interviewed the students who had made the report, one of whom was the sister of the alleged victim. During that interview, Pannek was shown messages on the alleged victim's Facebook messenger account that had prompted the sister and her friend to make the report. Officer Pannek then had the sister take screen shots of the conversation and email them to him. Later that same day, Pannek interviewed the alleged victim at her home. She confirmed what had been relayed to Panneck by her older sister.

The following day, Officer Pannek submitted a preservation request to Facebook pursuant to 18 U.S.C. § 2703(f). Upon receiving the request, Facebook made of copy of Perez's account information, which consisted of Perez's personal information and other data, including photographs and private messages. On November 19, 2015, Pannek applied for and obtained a warrant to search Perez's Facebook account. The warrant was uploaded to Facebook that same day. Several weeks later, Pannek received notification that the warrant had been "fulfilled."

Ultimately, Pannek received over 6,000 pages of data from Facebook in response to the warrant. The data included personal identifying information from Perez's account. Review of that information resulted in charges being brought against Perez.

Prior to trial, Perez moved to suppress all of the evidence obtained from Facebook on the grounds that the preservation request made by Pannek constituted an unlawful

seizure under the Fourth Amendment. Perez also argued that 18 U.S.C. § 2703(f) was unconstitutional because it requires the provider of wire or electronic communications services to preserve records and other evidence without a finding of probable cause.

The district court denied the motion without deciding whether the preservation request resulted in a seizure under the Fourth Amendment or whether § 2703(f) was constitutional. Instead, the district court concluded that there was no causal connection between the preservation request and the evidence sought to be suppressed because Perez had not shown that he had attempted to change or delete any information in his account prior to Facebook receiving the warrant. The court reasoned that absent any attempt by Perez to alter or delete information in his account, the information obtained by the government in response to the warrant would have been the same with or without the preservation request. (App. 6-7) Therefore, even if Facebook's response to the preservation request resulted in an unconstitutional search of the account, the evidence sought to be suppressed was not obtained as a result of that search and suppression was not required.

Perez entered a conditional plea of guilty to 7 separate counts preserving his right to appeal the denial of his motion to suppress. He was sentenced to a term of 25 years. (App. 9)

On appeal, the Ninth Circuit Court of Appeals affirmed, but on different grounds. The Ninth Circuit held that Perez had failed to establish in the record that the data provided to Officer Panneck came from the copy made by Facebook in response to the preservation request. That is, Facebook might have provided data in response to the

search warrant by creating "a contemporaneous, new copy" of Perez's Facebook account. (App. 20) The Court of Appeals reached that conclusion despite the fact that the government had acknowledged both before the District Court and the Court of Appeals that the data provided to Panneck was the data contained in the copy made in response to the preservation request. By basing its decision on a strained reading of the record, the Court of Appeals avoided the need to address the constitutionality of 18 U.S.C. § 2703(f).

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal constitutional law that has not been, but should be, settled by this Court. The use of wire and electronic communications has become ubiquitous in modern society. Emails, text messages, voice messaging, and other forms of electronic communications via cellular phone networks and the internet constitute the "papers and effects" of contemporary life that the Fourth Amendment was intended to protect from unreasonable government intrusions. Subsection (f) of the Stored Communications Act expressly allows any government agency to conduct warrantless searches and seizures of such communications without probable cause, without reasonable suspicion of criminal activity, and without first obtaining a warrant or other court order.

This Court should issue the writ in this case and reverse the decision of the Ninth Circuit Court of Appeals by holding that 18 U.S.C. § 2073(f) is unconstitutional on its face and that any evidence obtained by the government through a preservation request made under that statute is inadmissible in any subsequent criminal prosecution.

The Fourth Amendment expressly imposes two requirements: (1) all searches must be reasonable, and (2) a warrant may not issue except upon a showing of probable cause. *Kentucky v. King*, 563, U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). Where law enforcement conducts a search to uncover evidence of criminal wrongdoing, a warrantless search is unreasonable unless the circumstances fall within a recognized exception to the warrant requirement. *Carpenter v. United States*, --- U.S. ---, 138 S.Ct. 2206, 2221, 201 L.Ed.2d 507 (2018). When a warrant is required, the Government must obtain the warrant *before* conducting a search, not after. *Id.* An exception to the warrant requirement applies when the exigencies of the situation and the needs of law enforcement are so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. *Kentucky v. King*, 563 U.S. at 460, *citing Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

A facial challenge to a statute is an attack on the statute itself rather than an attack on its particular application. *City of Los Angeles v. Patel*, 576 U.s. 409, 135 S.Ct. 2443, 2449, 192 L.Ed.2d 435 (2015). In a facial challenge to a statute that authorizes warrantless searches, the proper focus is on what searches the statute actually authorizes. *Id.*, 135 S.Ct. at 2451. Whether a particular search might be permissible under the Fourth Amendment without regard to the application of the statute is irrelevant to a determination whether the statute itself is facially unconstitutional. *Id.* A statute is facially unconstitutional when it unambiguously authorizes searches that violate the Fourth Amendment. *Id.*

It is a simple matter to demonstrate that 18 U.S.C. § 2703(f) is unconstitutional on its face. The very wording of the statute compels a conclusion that obedience to its provisions necessarily results in an unlawful search and seizure of private communications and information. Subsection (f) reads:

> **(f) Requirement to preserve evidence.--**
>
> **(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.

By the its plain language, subsection (f) requires a provider to preserve the private records of its users "pending the issuance of a court order or other process." The provider is required to do whatever is necessary to preserve data containing the private communications and information of its customers so that the data can be provided to the government agency upon the issuance of a warrant or other court order at a later time. The data must be preserved for up to 180 days while the agency seeks to obtain a warrant. Although not expressly stated, the clear intent of subsection (f) is that, if and when a warrant or other court process is ultimately obtained by the requesting agency, it is the preserved data that is to be handed over. Otherwise, the statute would make no sense and would be rendered a complete nullity.

The effect of subsection (f) is to create a kind of time machine that allows law enforcement and other government agencies to go backward in time and seize private information and communications *before* a warrant has been issued. By use of a

preservation request under subsection (f), a government agency can apply for and obtain a warrant, then use the warrant to search and seize data that existed at some time in the past, up to 180 days before the warrant was issued. The information obtained by the agency may not exist at the time the agency actually obtains the warrant, or it may exist, but may no longer be in the place to be searched. Nevertheless, the agency is able to obtain the data because the preservation request has, in effect, frozen time with respect to the existence and location of the data. The result is that the agency is able to conduct a search and seizure that is for all practical purposes identical to a search and seizure conducted as much as 180 days *before* the agency obtained a warrant.

Subsection (f) places no restrictions on when a preservation request can be made by a government agency. A request can be made at any time for any reason. No special circumstances need to exist at the time the request is made. Once the request is made, the provider is required by law to maintain the data as it existed at the time of the request and to provide the data to the agency upon being served with a warrant or other court order. Thus, the statute clearly and unambiguously compels providers to conduct on behalf of the agency a warrantless search and seizure of evidence in the complete absence of any circumstances that would make such a seizure reasonable under the Fourth Amendment.

In the present case, Officer Panneck obtained a warrant the day after submitting the preservation request to Facebook. While the delay in obtaining the warrant here was far less than the 180 days allowed by subsection (f), the length of delay is irrelevant to whether the statute is facial valid. The fact remains that the data provided to Panneck's was not the data that existed when the warrant was issued or when it was served on

Facebook. Instead, the data provided to Panneck was the data that existed at the time Facebook received and responded to the preservation request. It is not known what data would have been obtained by Panneck had Facebook simply responded to the warrant at the time it was served without having first preserved Perez's data as it was required to do under subsection (f).

The Court of Appeals' upheld the District Court's denial of Perez's motion to suppress by reasoning that the data provided to Panneck may have been the data in Perez's account as it existed when the warrant was served. (App. 20-21) The Court of Appeals reasoning is nonsensical and contrary to what the statute actually requires. The whole purpose of subsection (f) is to preserve data so that it can be provided to the requesting agency at a later time pursuant to a warrant or other court order. It would be pointless for Congress to have required providers such as Facebook to preserve account information "pending issuance of a court order or other process" if the provider had no obligation to turn that information over to the agency upon receiving the actual court order or warrant. Clearly, that is what subsection (f) requires. Thus, had Facebook simply made a new, contemporaneous copy of Perez's Facebook account data at the time it received the warrant and provided only that data to Officer Panneck as the Court of Appeals suggests, it would have been in violation of the statute.

Neither the District Court nor the Court of Appeals determined whether exigent circumstances existed at the time Officer Panneck made the preservation request or whether some other exception to the warrant requirement might apply. In any event, such a determination one way or the other would be irrelevant to whether subsection (f) is

facially unconstitutional. The statute unambiguously authorizes the warrantless search and seizure of evidence by compelling a provider such as Facebook to comply with a preservation request and then turn the preserved data over to the requesting agency once a warrant has been issued. The result is a seizure of evidence for the purpose of pursuing a criminal investigation without the existence of any exigent circumstances and without a warrant having been obtain *prior to* the search and seizure. Thus, the statute is unconstitutional on its face, and any evidence acquired by the government as the result of a preservation request constitutes the fruit of an unlawful search and seizure under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that this Court grant the Petition for a Writ of Certiorari, reverse the decision of the Ninth Circuit Court of Appeals, and order the evidence be suppressed.

Respectfully submitted this 12th day of May, 2020.

Richard D. Wall
Attorney for Petitioner