No. 21-7274 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

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QUESTION PRESENTED

Whether reasonable jurists could disagree with the district court's decision that the initial and continuous, nine-month warrantless preservation of Basey's emails was reasonable under the Fourth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kaleb Lee Basey, respectfully seeks a certificate of appealability ("COA") from this Court or Justice Kagan to review the denial of a COA by the United States Court of Appeals for the Ninth Circuit and the United States District Court for the District of Alaska.

OPINIONS & ORDERS BELOW

The District of Alaska's order denying Basey a COA in his 28 U.S.C. §2255 proceeding is unpublished. App. 2a - 16a The Ninth Circuit's order denying Basey a COA is also unpublished. App. 1a.

JURISDICTION

In United States v. Basey, No. 4:14-cr-00028-RRB (D. Alaska), the district court denied Basey's §2255 motion and denied him a COA on April 13, 2021. App. 15a. The Ninth Circuit denied Basey a COA on January 18, 2021. App. 1a. The Ninth Circuit denied his motion for reconsideration on January 31, 2022. App. 18a. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the denial of a COA. *Hohn v. United States,* 524 U.S. 236 (1998). Alternatively, Justice

Kagan has authority under 28 U.S.C. §2253(c)(1) and Federal Rule of Appellate Procedure 22(b)(1) to grant Basey a COA as she is the Justice for the Ninth Circuit. Section 2253 (c)(1) and FRAP 22(b)(1) do not confer authority on this Court as a whole to render a decision regarding a COA, but rather upon an individual justice as part of his or her circuit justice duties.

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 Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person 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 government 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

This case is simple. To obtain a COA, Basey must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). As explained below, several jurists have done this. Thus, a COA should be granted.

1. In January 2014, law enforcement traced two Craigslist Advertisements believed to be solicitations of minors for sex to applicant, Kaleb Basey. App. 3a.

2. On January 25, 2014, Basey deleted every email in his Yahoo email account and then deleted the account itself. Deleted Yahoo accounts and emails normally remove themselves completely from Yahoo's servers within 40 days. On February 6, 2014, law enforcement asked Yahoo to preserve Basey's account under 18 U.S.C. §2703(f). When Yahoo receives §2703(f) requests, it copies the entire contents of the user's account including deleted emails not yet removed from its servers. App. 3a, 21a - 22a.

3. A warrant was not obtained for Basey's preserved account until

November 20, 2014—over nine months after it was first preserved. App. 3a. The search of Basey's emails revealed two images of child pornography which ultimately formed the sole basis of his federal conviction. App. 3a-4a.

4. After being indicted on federal child pornography charges, Basey asked his attorneys to file a motion to suppress the emails as having been unreasonably seized due to the nine-month delay in obtaining a warrant. App. 28a, 32a. His attorneys either refused or failed to timely file the motion. App. 30a, 34a.

5. The Ninth Circuit affirmed Basey's conviction on direct appeal. *United States v. Basey*, 784 Fed. Appx. 497 (9th Cir. Aug. 5, 2019). The panel found that the district court had not ruled on the merits of the Fourth Amendment issue regarding his preserved emails because of his attorney's failure to timely raise it. *Id.* at 498-99.

6. Basey then filed a motion under 28 U.S.C. §2255. He alleged that His trial attorneys were ineffective for failing to timely move for suppression of his emails and that he was prejudiced by this failure. App. 5a. The district court denied the §2255 motion, *inter alia*, because it believed:

- Yahoo did not act as a government agent when it preserved Basey's emails at the Government's request,
- the initial preservation was reasonable under the exigent circumstances exception, and
- the continued retention of the emails pending the warrant was also reasonable. [App. 11a - 15a.]

The district court denied Basey a COA. App. 15a.

7. Basey sought a COA from the Ninth Circuit and was denied. App. 1a. He filed a motion for reconsideration that was also denied. App. 18a.

REASONS FOR GRANTING THE WRIT

I. REASONABLE JURISTS COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION OF BASEY'S CONSTITUTIONAL CLAIMS

A. Several jurists have already expressed opinions that preservation of emails under 18 U.S.C. §2703(f) can be an unreasonable search and/or seizure.

To obtain a COA, Basey must prove "that jurists of reason could disagree with the district court's resolution of his constitutional claims[.]" *Miller-El*, 537 U.S. at 327. A jurist can be any "person versed in the law, as a judge, lawyer, or legal scholar." Random House

seizures under the Fourth Amendment. Kerr, *The Fourth Amendment and Email Preservation Letters*, Washington Post (Oct. 28, 2016) *available at* https://wapo.st/2U6hikj. The fact that a top-tier, daily publication like the Post would provide Kerr a platform to explain the constitutional implications of a little-known law like §2703(f) indicates the idea was deemed important and reasonable enough to merit publication.

Basey alerted his attorneys to Kerr's views. App. 29a, 34a.

2. Professor Brett Kauffman, Jennifer Granick, and the ACLU.

The ACLU filed an amicus brief in Basey's direct appeal that contradicts the conclusions reached by the district court. App. 40a. [1] The amicus brief was written by NYU law professor, Brett Kaufman, and attorney Jennifer Granick. Building upon Kerr's views, the ACLU argued:

- Yahoo became a government agent in preserving Basey's emails,
- the preservation meaningfully interfered with Basey's possessory interests in his right to exclude and delete his emails,

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[1] Brief of Amici Curiae ACLU, U.S. v. Basey, No. 18-30121 (9th Cir. Feb. 19, 2019) ECF No. 31.

- the initial preservation was unreasonable for want of probable cause, and
- "because the government compelled the retention of Basey's data long past any time period necessary to obtain legal process, that seizure is unreasonable."[2]

Thus, jurists have already expressed views that differ from the conclusion reached by the district court under the facts of this case.

3. Adjunct Professor Armin Tadayon.

Adjunct professor of law at George Mason, Armin Tadayon published a law review in 2020 that surveyed the debate on §2703(f) preservation. Tadayon, *Preservation Requests and the Fourth Amendment*, 44 Sea. U. L. R. 105 (Fall 2020). The article largely reiterates the arguments made in the ACLU's amicus brief from Basey's appeal and gives counter arguments made by the government. But excerpts reveal that Tadayon himself appears to side with Basey. *See Id.* at 147 & n. 226 ("The warrantless seizure of account information pursuant to a §2703(f) letter is unreasonable."). Apparently, the district court read Tadayon's article but cited it as a support for the proposition that "the use of §2703(f) letters remains a law enforcement standard. App. 14a n. 71.

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[2] App. 74a.

The ultimate question in granting a COA "is *debatability* of the underlying constitutional claim, not the resolution of the debate." *Miller-El*, 537 U.S. at 342 (emphasis added). At the very least, the views of these jurists show that the legality of the preservation of Basey's emails is an issue that can be debated. Indeed, the ACLU debated this issue in Basey's favor.

CONCLUSION

Since reasonable jurists have already disagreed with the district court's resolution of Basey's constitutional claims, a COA should be granted on this question:

> Did the district court err in concluding that the initial and continuous warrantless preservation of Basey's emails was reasonable under the Fourth Amendment?

One last thing. The district court acknowledged that the validity of Basey's §2255 hinged on the merit of the Fourth Amendment issues he alleged his attorney did not address. App. 6a - 7a. Thus, the district court did not conduct a full analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). If Basey is successful in the Ninth Circuit, the case may be remanded for further findings under *Strickland*.

Respectfully submitted this 26th day of February, 2022.

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