No. 21-8110

In the Supreme Court of the United States

Wesley Mark Sudbury,
Petitioner

v.

United States of America,
Respondent

On Motion for Leave to File Petition for Writ of Mandamus or Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF MANDAMUS

/s/ Wesley M Sudbury
Wesley Sudbury, *pro se*
Prisoner Number: 99288-022
FDC Honolulu
PO Box 30080
Honolulu Hawaii 96820

QUESTIONS PRESENTED

1. Whether a statute enacted by Congress titled **Prohibition of use as evidence of intercepted wire or oral communications**, intended to establish a right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

2. Whether a statute enacted by Congress titled **Litigation concerning sources of evidence,** intended to establish a right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

3. Whether this court, in establishing the **collateral order doctrine** intended allowing appeals from interlocutory rulings (i.e., preceding final judgment) so long as those rulings conclusively decide an issue separate from the merits of the case and would be effectively unreviewable after final judgment.

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The title page contains the names of the only parties to the proceedings.

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Mr. Sudbury moved the District Court, under Title 18 USC 3504(A)(1) for an order requiring that the Government shall affirm or deny the occurrence of the alleged unlawful acts, that the DEA Agent had admitted in the affidavits in support of the search warrants.

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included in the order. These statements included the court's addition of new requirements that were not included in the statute. Mr. Sudbury filed a motion in which he requested clarification from the court as to specific statements the court included in the order. This motion was also denied.

Mr. Sudbury included in each motion a request that the court certify the questions for interlocutory appeal. The court declined to certify the orders for interlocutory appeal.

Mr. Sudbury filed an interlocutory appeal of a final order under the collateral order doctrine, or alternatively for the court to construe the petition as a writ of mandamus.

The Ninth Circuit dismissed the interlocutory appeal, and held, "the court lacks jurisdiction over this appeal because the district court's order clarifying and denying reconsideration of its order denying appellant's motion for relief under 18 U.S.C. § 3504(a) is not a final judgment or an order that comes within the collateral order doctrine. *See* 28 U.S.C. § 1291; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (in criminal cases, finality requirement generally "prohibits appellate review until after conviction and imposition of sentence").

To the extent that this appeal can be construed as a petition for a writ of mandamus, the petition is denied because appellant has not shown that he is entitled to the extraordinary remedy of mandamus relief. *See Bauman v.*

United States Dist. Ct., 557 F.2d 650, 654-55 (9th Cir. 1977). Mr. Sudbury's counsel agreed to file a petition in this court to review the Ninth Circuit's decision dismissing the interlocutory appeal. But apparently was not cleared to file in the Supreme Court.

E. Jurisdiction

A writ of certiorari to the Supreme Court may be granted under 28 U.S.C. Section 1651 when it arises from a decision by a court of appeals that rejects an appeal, and the Supreme Court may weigh the merits of the questions that would have been decided by the appeals court.

In addition to granting a writ of certiorari under 28 U.S.C. Section 1651, the Supreme Court also may grant a certificate of probable cause for petitions that appear to have merit, even if a lower court did not authorize an appeal in the case.

As the Court expressly decided in 1945, the Supreme Court has jurisdiction under 28 U.S. C. 1651. In House v. Mayo, 324 U.S. 42, the Court conceded that it lacked certiorari jurisdiction under the predecessor to 1254, but squarely held that the All Writs Act, now 28 U. S.C. 1651, authorized the Court to "grant a writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it" and to review the "questions on the merits sought to be raised by the appeal." [454 U.S. 911 , 913]

The Ninth Circuit dismissed Mr. Sudbury's interlocutory appeal of a final order under the collateral order doctrine, or alternative for the court to construe the petition as a writ of mandamus. The Ninth Circuit held, "the court lacks jurisdiction over this appeal because the district court's order clarifying and denying reconsideration of its order denying appellant's motion for relief under 18 U.S.C. § 3504(a) is not a final judgment or an order that comes within the collateral order doctrine. *See* 28 U.S.C. § 1291; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (in criminal cases, finality requirement generally "prohibits appellate review until after conviction and imposition of sentence").

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F. Constitutional and Statutory Provisions Involved

1. 18 USC 2515. Prohibition of use as evidence of intercepted wire or oral communications.

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." 18 USC 2515.

2. 18 USC 3504. Litigation concerning sources of evidence.

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States-

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

3. Collateral order doctrine allowing appeals from interlocutory rulings (i.e., preceding final judgment) so long as those rulings conclusively decide an issue separate from the merits of the case and would be effectively unreviewable after final judgment.

G. Extraordinary and Compelling Reasons this Petition is filed pro se.

Mr. Sudbury received notice from his attorney, on Tuesday, May 17, 2022, that Mr. Sudbury would have to file this petition himself, because Mr. Sudbury's attorney has not been approved to file in the Supreme Court.

Mr. Sudbury believed it would be impossible to request additional time from the Supreme Court before the deadline of 90 days would expire on May 19, 2022. The Order dismissing the interlocutory appeal was filed February 18, 2022.

Under these extraordinary and compelling circumstances, Mr. Sudbury is forced to try to prepare this petition and present it for mailing to the guard

where he has been confined for the last ~~seven~~ six WMS years, by sometime May 19, 2022, and try to arrange to meet all of the requirements necessary to the filing.

Mr. Sudbury believes that his attorney has been prevented from filing the petition by reasons outside his control, and does not believe it is the fault of Mr. Sudbury's counsel.

H. Background Facts

Mr. Sudbury has been a pretrial detainee in the Federal Detention Center in Honolulu, Hawaii for the past ~~seven~~ six WMS years. As an indigent criminal defendant, he has been appointed a number of attorneys in the past seven years, but only his current attorney developed the discovery and found that three affidavits filed in federal court, in application for search warrants to intercept and record conversations, admitted the evidence used for the warrants was intentionally obtained unlawfully, in intentional violation of federal statutes, and in intentional violation of state statutes.

Mr. Sudbury, through counsel, filed a motion for relief under Title 18 U.S.C. 3504(a)(1), as the party aggrieved, and made the claim that all the evidence against him in this criminal proceeding is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act.

This evidence was discovered in the three affidavits in support of the

federal electronic surveillance search warrants, sworn to by DEA Agent Sze. The affidavits indicated the only information Agent Sze had, in applying for the search warrants, was information from a person hired by (HCPD) Hawaii County Police Department, working for financial compensation only, as an individual, to intentionally invade the private areas of the home and private areas of the church, and surreptitiously record conversations, photograph, and video, everyone there without their knowledge or consent, knowing at the time that it intentionally violated Hawaii revised statutes, and the Hawaii Constitution, and intentionally violated Federal Criminal Statutes, and the Constitution of the United States. The affidavits admitted this was conducted without search warrants, and without requesting any authority to apply for search warrants.

The affidavits admitted the evidence was unlawfully obtained by the person working for the State as an individual, working for compensation only, and turned over to the DEA Agent to use in applying for the three federal search warrants to intercept wire and oral communications.

The use of this evidence was prohibited by the Supreme Court, in the decision overturning the silver platter doctrine, where evidence unlawfully obtained by the state was turned over the to the United States to use in a federal case. Elkins v. United States, 364 U.S. 206 (1960).

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I. Statements

The violation of the specific wording and intent of Congress in enacting 18 USC 2515, would be effectively unreviewable after final judgment in a criminal trial, because the intent of the statute is "Prohibition of use as evidence of intercepted wire or oral communications, and any evidence derived therefrom in any proceeding," If it is in violation of the chapter (18 USC 2510-2515).

The wording and intent of Congress in enacting 18 USC 3401, was to protect the right to discover whether there had been interception of wire or oral recordings, by merely requesting an order under 18 USC 3401. The violation of the specific wording and intent of Congress, in enacting 18 USC 3401, would be effectively unreviewable after final judgment in a criminal

trial, because the intent of the statute is disclosure and production before trial. Denial of an order requested under 18 USC 3401 would prevent the use of 18 USC 2515, to see if the chapter had been violated.

Both of the two above statutes, 18 USC 2515 and 18 USC 3401, were enacted by Congress with intent to establish a right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Mr. Sudbury cannot find where this Court has previously considered whether the denial of a motion for an order under 18 USC 3504(a)(1) during the pretrial stage, should be considered as an interlocutory appeal, or as a petition for a writ of mandamus, due to the wording and intent of Congress in enacting these statutes.

The Court of Appeals for the District of Columbia Circuit has concluded that the government's obligation to affirm or deny the occurrence of electronic surveillance under section 3504(a)(1) 'is triggered . . . by the mere assertion that unlawful wiretapping has been used against a party.' In re Evans, 146 U.S.App.D.C. 310, 452 F.2d 1239, 1247 (1971). The Court of Appeals for the Second Circuit has agreed. United States v. Toscanino, 500 F.2d 267 (1974). This construction adopts the ordinary meaning of the language of the statute predicating the government's obligation to affirm or

deny upon a simple 'claim of inadmissibility. It is supported by the legislative history, which suggests that subsection (a)(1) was added to give to persons under interrogation the legal right to require on mere motion that which the Department of Justice informed Congress it had been affording voluntarily without demand-- namely, an examination by the government of its files to determine whether any wiretaps or eavesdropping had occurred.

The Supreme Court referred to the relevant legislative history in Gelbard v. United States, 408 U.S. 41, 56, 92 S.Ct. 2357, 2365, 33 L.Ed.2d 179 (1972):

> Subsection (a)(1) (of Section 3504) was added at the suggestion of the Department of Justice. At that time the Department followed the practice of searching Government files for information about wiretaps and eavesdropping. The Department advised the Senate Judiciary Committee that while it had been 'conduct(ing) such examinations as a matter of policy even in cases where no motion had been filed . . . defendants should be assured such an examination by a specific requirement of law rather than hav(ing) to rely upon the continued viability of a current policy.' Id., at 553. The Senate report on 3504 explained that 'since (subsection (a)(1)) requires a pending claim as a predicate to disclosure, it sets aside the present wasteful practice of the Department of Justice in searching files without a motion from a defendant.'

Finally, as Judge Bazelon pointed out in In re Evans, supra, there are a number of compelling reasons why Congress would think it wise to require the prosecution to affirm or deny electronic surveillance on no more than a demand by persons who would be aggrieved by such surveillance if it had occurred.

Requiring the government to affirm or deny the existence of illegal surveillance of witnesses imposes only a minimal additional burden upon the government, but requiring a witness to establish the existence of such surveillance may impose a burden on the witness that he can rarely meet, since, to be effective, electronic surveillance must be concealed from its victim. Requiring more than a claim may encourage the development of more secretive means of illegal surveillance, rather than encourage elimination of such unlawful intrusions. Moreover, requiring a witness to disclose details regarding specific conversations that may have been subjected to surveillance would in itself be an invasion of privacy. See In re Evans, 146 U.S.App.D.C. 310, 452 F.2d 1239, 1247-1250 (1971).

Mr. Sudbury believes this Petition for Writ of Mandamus or Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

J. Argument

1. The State of Hawaii, including the HCPD, knew electronic monitoring of conversations in Hawaii was preempted by federal law.

The State of Hawaii has known for more than 40 years, that the Supremacy Clause gives Congress the power to preempt state law. A statute may contain an express preemption provision,[1] but state law must also give

[1] see, *e.g., Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582 (2011).

way to federal law in at least two other circumstances. First, States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance.[2] Intent can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[3] Second, state laws are preempted when they conflict with federal law, including when they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[4]

The State of Hawaii knew that electronic monitoring of conversations in Hawaii was preempted by federal law.[5] The State knew that access to information electronically stored in cell phone, computers, and others, was preempted by federal law,[6] and the State knew that the use of Pen Registers and Trap and Trace Devices was preempted by federal law.[7]

2. Preemption and the Supremacy Clause

a. Preemption

The preemption doctrine derives from the Supremacy Clause of the

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[2] See *Gade* v. *National Solid Wastes Management Assn.,* 505 U. S. 88 (1992).
[3] *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947).
[4] *Hines* v. *Davidowitz*, 312 U. S. 52. (1941) Pp. 7–8.
[5] Electronic Communications Privacy Act, 18 USC 2510 et seq.
[6] Stored Wire and Electronic Communications and Transactional Records, 18 USC 2701 et seq.
[7] Pen Registers and Trap and Trace Devices, 18 USC 3171 et seq.

Constitution which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This means, of course, that *any* federal law--even a regulation of a federal agency— trumps *any* conflicting state law.

Preemption can be either express or implied. When Congress chooses to expressly preempt state law, the only question for courts becomes determining whether the challenged state law is one that the federal law is intended to preempt.

b. Occupation of the field.

Federal "occupation of the field" occurs, according to the Supreme Court, in *Pennsylvania v Nelson*,[8] when there is "no room" left for state regulation. Courts are to look to the pervasiveness of the federal scheme of regulation, the federal interest at stake, and the danger of frustration of federal goals in making the determination as to whether a challenged state law can stand.

c. Supremacy of Acts of Congress

[8] 350 U.S. 497 (1956).

Since the Supremacy Clause provides that the Constitution, and the laws of the United States made in pursuance thereof shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding,[9] an act of Congress constitutionally passed within the limits of its authority[10] becomes a part of the supreme law of the land in connection with the Federal Constitution itself.[11] Federal statutes operate essentially as a part of the law of each state and are as binding on its authorities and people as are its own local constitution and laws[12] in the same manner as if they were actually embodied in the Federal Constitution,[13] and are controlling over state

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[9] US Const Art VI Cl 2.

[10] The Constitution is the supreme law of the land, and all legislation must conform to its principles;
when an act of Congress is appropriately challenged, the judicial branch has the duty of determining whether such act conforms to such principles. *United States v Butler*, 297 US 1, 80 L Ed 477, 56 S Ct 312, 4 Ohio Ops 401, 102 ALR 914.

[11] *Bunch v Cole*, 263 US 250, 68 L Ed 290, 44 S Ct 101; *Flint v Stone Tracy Co.*, 220 US 107, 55 L Ed 389, 31 S Ct 342; *House v Mayes*, 219 US 270, 55 L Ed 213, 31 S Ct 234; *Northern Secur. Co. v United States,* 193 US 197, 48 L Ed 679, 24 S Ct 436; *Van Brocklin v Tennessee*, 117 US 151, 29 L Ed 845, 6 S Ct 670; *California State Board of Equalization v Goggin* (CA9 Cal) 191 F2d 726, 27 ALR2d 1211, cert den 342 US 909, 96 L Ed 680, 72 S Ct 302; *Re Guerra*, 94 Vt 1, 110 A 224, 10 ALR 1560.

[12] The several states are subject to the supremacy of the laws made in pursuance of the Federal Constitution. *Northern Secur. Co. v United States*, 193 US 197, 48 L Ed 679, 24 S Ct 436; *Poindexter v Greenhow*, 114 US 270, 29 L Ed 185, 5 S Ct 903; Gibbons v Ogden, 22 US 1, 6 L Ed 23; *M'Culloch v Maryland*, 17 US 316, 4 L Ed 579; *Exchange Nat. Bank v United States*, 147 Wash 176, 265 P 722, 62 ALR 139, affd 279 US 80, 73 L Ed 621, 49 S Ct 321.

[13] While states are really sovereign as to all matters which have not been

constitutional[14] or statutory[15] provisions.

Regulations and orders of state administrative agencies may not prevail where they conflict with valid enactments of Congress, apart from any question of the directness of the effect of such regulations or orders upon interstate commerce.[16] The supremacy of federal law is binding on judicial[17] and executive offices as well as on the legislature,[18] and whenever a writ of error will lie to the United States Supreme Court, the decisions of that court will be followed by the state courts in preference to their own. A state law,

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granted to United States, Constitution and laws of the latter are supreme law of the land, and when they conflict with state laws, they are of paramount authority and obligation. *Ex parte Siebold*, 100 US 371, 25 L Ed 717.

[14] People ex rel. Happell v Sischo, 23 Cal 2d 478, 144 P2d 785, 150 ALR 1431; *Schaffer v Leimberg*, 318 Mass 396, 62 NE2d 193.

[15] Whenever any conflict arises between enactments of United States and state, those of national government have supremacy. *Tarble's Case*, 80 US 397, 20 L Ed 597; *Ervin v Conn*, 225 NC 267, 34 SE2d 402; *Huddy v Railway Express Agency*, 181 SC 508, 188 SE 247, 107 ALR 1437. Any legislation of the state, although in pursuance of acknowledged power reserved to it, which conflicts with actual exercise of the power of Congress over the subject must give way before supremacy of national authority. *Re Squires*, 114 Vt 285, 44 A2d 133, 161 ALR 349.

[16] *Rice v Board of Trade*, 331 US 247, 91 L Ed 1468, 67 S Ct 1160; *Public Utilities Com. v United Fuel Gas Co.*, 317 US 456, 87 L Ed 396, 63 S Ct 369, reh den 318 US 798, 87 L Ed 1162, 63 S Ct 557; *Cloverleaf Butter Co. v Patterson*, 315 US 148, 86 L Ed 754, 62 S Ct 491; *New Jersey Bell Tel. Co. v Communications Workers, etc.*, 5 NJ 354, 75 A2d 721.

[17] Supremacy is not supremacy for defining or establishing general jurisdiction of state courts, but it is supremacy which requires that state courts should not, in exercise of their general jurisdiction, discriminate against rights arising under federal law. *Bowles v Barde Steel Co.*, 177 Or 421, 164 P2d 692, 162 ALR 328.

[18] *Re Romaine*, 23 Cal 585.

even if passed in the exercise of the state's acknowledged powers, must yield, in case of conflict, to the supremacy of the Federal Constitution.[19]

No act of a state legislature which is repugnant to the Constitution of the United States can be of any validity.[20] Under the supremacy clause of the United States Constitution (Art VI, cl 2), all state provisions conflicting with the constitution and laws of the United States are without effect.[21]

d. Mandatory Federal Criminal Statutes

The Electronic Communications Privacy Act of 1986 (ECPA) was enacted by the United States Congress to extend explicit federal statutory restrictions over the interception of all wire and oral communications, and electronic communications, to include transmissions of electronic data by computer (18 U.S.C. § 2510 *et seq.*), added new provisions prohibiting access

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[19] No state law is above the Federal Constitution. *Milliken v Bradley*, 418 US 717, 41 L Ed 2d 1069, 94 S Ct 3112, on remand (ED Mich) 402 F Supp 1096, affd, cause remanded (CA6 Mich) 540 F2d 229, affd 433 US 267, 53 L Ed 2d 745, 97 S Ct 2749 and on remand (ED Mich) 460 F Supp 299 and on remand (DC Mich) 411 F Supp 943, affd.

[20] Legislative acts of a state which are hostile in their purpose or mode of enforcement to the authority of the national government or which impair the rights of citizens under the Constitution are invalid and void. *Taylor v Thomas*, 89 US 479, 22 L Ed 789. In determining whether a local ordinance imposes such unreasonable conditions upon the use or enjoyment of property as to violate due process, a state court, if it finds the ordinance invalid under the state constitution, is free to hold it unconstitutional regardless of the Fourteenth Amendment to the Federal Constitution, but if it finds the enactment invalid under the amendment, although valid under the state constitution, it must nullify the ordinance. *East Coast Lumber Terminal, Inc. v Babylon* (CA2 NY) 174 F2d 106, 8 ALR2d 1219.

[21] *Maryland v Louisiana* (1981, US) 68 L Ed 2d 576, 101 S Ct 2114.

to stored electronic communications, i.e., Stored Communications Act (SCA, 18 U.S.C. § 2701 *et seq.*), and added the so-called pen trap provisions that permit tracing of telephone communications (.). ECPA was an amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (commonly referred to as the Wiretap Statute), which was primarily designed initially to prevent unauthorized government access to private electronic communications.

Congress has shown that they chose to preempt all States and to occupy the entire field of the interception and disclosure of wire, oral, and electronic communications, by enactment of the Electronic Communications Privacy Act of 1986 (ECPA), and placing the entire Act within the mandatory federal criminal statutes. These mandatory federal criminal statutes state in words that are clear and requirements that are mandatory, that explicitly prohibit intercepting, recording and disclosing any conversations, by any person, in any state, unless they comply with every letter of each of the entire mandatory federal criminal statutes that permit that interception, recording and disclosure.[22] (Emphasis added)

e. The Discovery appears to provide proof of the State's intent.

The three affidavits filed in federal court, in application for search warrants to intercept and record conversations, admitted the evidence used for

[22] 18 U.S.C. § 2510 *et seq.*

the federal search warrants was intentionally obtained unlawfully, in violation of mandatory federal statutes, and in intentional violation of state statutes.

This case presents a question concerning suppression of evidence in criminal cases—not just under the judge-made rules applicable to the Fourth Amendment, and under Article I section 14, but rather under statutory provisions specifically governing facially insufficient wiretap orders.

In Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[23] Congress established a scheme under which courts may authorize the government to intercept wire, oral, and electronic communications in certain "circumscribed" circumstances.[24] To safeguard against unwarranted invasions of privacy, "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint." *Id.* at 515. And to ensure that wiretap orders comply with its detailed requirements, Title III requires the suppression of evidence derived from an order that is "insufficient on its face."[25]

In Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[26] Congress established a detailed scheme regulating the interception of

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[23] Since the initial enactment of Title III in 1968, Congress amended Title III with the Electronic Communications Privacy Act of 1986.
[24] See *United States* v. *Giordano*, 416 U.S. 505, 512 (1974).
[25] 18 U.S.C. 2518(10)(a)(ii).

wire communications. Title III permits courts to authorize the government to intercept oral, wire, and electronic communications in connection with the investigation of enumerated serious crimes. "[A]lthough Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern."[27] Congress accordingly specified in detail who may apply for a wiretap order, what circumstances justify approval of a wiretap application, and what information must appear in the application and the order authorizing the interception.[28] Congress prohibited all interceptions of oral and wire communications except those specifically permitted by the Act.[29] (Emphasis added)

f. The State of Hawaii knew a specific state statute was required to authorize interceptions.

The United States Code, Congressional and Administrative News, 90th Congress, Second Session (1968), Vol. 2, Legislative History, p. 2187, in speaking of the proposed 18 U.S.C. 2516 (2), states:

"No application [for wiretap or electronic surveillance orders] may be authorized unless a specific State statute permits it. The State statute must

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[26] 18 U.S.C. 2510-2521.
[27] *Gelbard* v. *United States*, 408 U.S. 41, 48 (1972).
[28] See 18 U.S.C. 2516, 2518; *Giordano*, 416 U.S. at 515.
[29] See *Giordano*, 416 U.S. at 514. Recording without warrants do not comply with mandatory requirements of the Act of Congress. The mandatory requirements of these federal criminal statutes, provide substantive proof that the evidence gathered in this case was illegally obtained. (Emphasis added)

meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation. State legislation enacted in conformity with this chapter should specifically designate the principal prosecuting attorneys empowered to authorize interceptions." (Emphasis added)

g. Violation of the Constitution or Laws of the United States

18 U.S. Code § 2516 - Authorization for interception of wire, oral, or electronic communications states, in relevant parts, as follows:

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping [3] human trafficking, child sexual exploitation,

child pornography production, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses. (Emphasis added)

h. Federal "occupation of the field", interceptions of wire, oral, or electronic communications, explicitly prohibits the interceptions of wire, oral, or electronic communications in any state, unless, and until, there is full and complete compliance with every letter of the Electronic Communications Privacy Act of 1986 (ECPA). This is shown in 18 U.S. Code § 2511 - Interception and disclosure of wire, oral,[30] or electronic communications prohibited. (1) Except as otherwise specifically provided in this chapter (18 U.S. Code § 2510 - § 2522). (Emphasis added)

The only authorization for interception of wire, oral, or electronic communications under the above statute, by any person, is under the following statute:

18 U.S. Code § 2516 - Authorization for interception of wire, oral, or

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[30] Oral communication is defined in 18 U.S. Code § 2510 as follows: (2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

electronic communications. The only portion of that statute that authorizes recording of wire, oral, or electronic communications in any state by any person is under section (2).

(2) The principal prosecuting attorney of any State,[31] or the principal prosecuting attorney of any political subdivision thereof,[32] if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction[33] for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute[34] an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the

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[31] The principal prosecuting attorney of Hawaii is the Attorney General.
[32] Principal prosecuting attorney of any political subdivisions of Hawaii would be the prosecuting attorney for each Judicial District, and no intent in the statute for subdelegating that authority.
[33] State court "Judge of competent jurisdiction" is defined in 18 U.S. Code § 2510 as follows:
(9)"Judge of competent jurisdiction" means—
(a) a judge of a United States district court or a United States court of appeals; and
(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications.

offense of murder, kidnapping human trafficking, child sexual exploitation, child pornography production, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses. (Emphasis added)

The State of Hawaii recognizes a right to privacy in the Hawaii Constitution, and enacted Hawaii Revised Statutes Division 5. Crimes and Criminal Proceedings § 711-1111. Violation of privacy in the second degree, to prevent eavesdropping. The Haw. Rev. Stat. § 803-42: Any wire, oral or electronic communication (including cellular phone calls) can lawfully be recorded by a person who is a party to the communication, or when one of the parties has consented to the recording, so long as no criminal or tortious purpose exists. Unlawful interceptions or disclosures of private communications are punishable as felonies. A person is guilty of violation of privacy in the second degree if he or she intentionally: Trespasses on property for the purpose of subjecting anyone to eavesdropping or other surveillance in a private place; Installs and/or uses in any private place, without consent, any means or device for observing, recording, amplifying, or broadcasting sounds or events.

Tortious means wrongful. It is the fact that conduct, whether of act or omission, is of such a nature as to subject the actor to liability under the law of torts. Tortious law is a law having the nature of or involving a tort. Tortious act is an act which generates a tort.

The intentional violation of Hawaii Revised Statutes and intentional violation of Hawaii Constitutional rights, and intentional violation of Federal criminal statutes and intentional violation of Federal Constitutional rights is both a criminal and a tortious purpose, in violation of Hawaii statutes and Federal criminal statutes.

J. Argument

It is a bedrock principle of American government that the executive must have authorization from Congress before it acts. The Constitution requires legislative authorization for essentially all exercises of executive power, apart from certain inherent powers of the executive that predominantly concern foreign affairs.[35] It is the job of the executive to "take Care that the Laws be faithfully executed," U.S. Const. art. II, §3, not to simply assume that the law has granted power when the executive wants or needs it. The Supreme Court has held fast to the bedrock principle of legislative authorization for well over 200 years.[36]

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[35] *E.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015) (holding that power "to recognize … a foreign state and its territorial bounds resides in the President alone").

When courts evaluate a claim of executive authority—particularly for surveillance or other law enforcement activities—they must find that the legislature has authorized the practice before they can approve it. That is because "[a]ll power should be derived from the people," and "those entrusted with it should be kept in dependence on the people."[37] Our system of government is built on accountability; representative democracy cannot function unless individuals can "readily identify the source of legislation or regulation that affects their lives."[38] Without accountability, "[g]overnment officials can wield power without owning up to the consequences."[39] The requirement of legislative authorization ensures that the power to grant license to police or surveil the public rests with "those responsive to the political process."[40] In doing so, it builds "[t]rust between law enforcement agencies and the people they protect and serve [that] is essential in a democracy."[41]

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[36] *See, e.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804) (Marshall, C.J.) (holding that a naval commander could not use the president's instructions as a defense to liability because those instructions were "not strictly warranted" by Congress's authorization); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952) (invalidating the president's seizure of a steel mill because neither the Constitution nor Congress had authorized the action); *Medellin v. Texas*, 552 U.S. 491, 525 (2008) (holding that absent legislative authorization, the executive may not unilaterally give a non-self-executing treaty domestic effect).

[37] The Federalist No. 37, at 223 (James Madison) (Clinton Rossiter ed., 1961).

[38] *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

[39] *Id.*

[40] *United States v. Giordano*, 416 U.S. 505, 520 & n.9 (1974).

What courts cannot do, conversely, is begin from the opposite premise: namely, that all actions not expressly forbidden by the legislature are therefore available to law enforcement. That turns our system on its head and erodes the democratic processes through which the people govern their agents in law enforcement and establish trust in their work. Although the Framers eventually incorporated a set of protections for personal liberty in the Bill of Rights, they expected the principle of legislative authorization to be the principal safeguard on the people's liberty. In James Madison's words, the legislature would serve as "the confidential guardians of the rights and liberties of the people."[42] Therefore, "[i]f civil rights are to be curtailed ..., it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court."[43] As the Supreme Court explained in *Kent v. Dulles*,[44] absent authorization from Congress "in explicit terms," the executive cannot restrict citizens' liberty to travel freely on account of their political beliefs.[45] That is because if "liberty is to be regulated, it must be pursuant to the lawmaking functions of the Congress."[46]

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[41] President's Task Force on 21st Century Policing, Final Report of the President's Task Force on 21st Century Policing 1 (2015).
[42] The Federalist No. 49, at 313 (James Madison) (Clinton Rossiter ed., 1961).
[43] *Hamdi v. Rumsfeld*, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting).
[44] *Kent v. Dulles*, 357 U.S. 116 (1958).
[45] *Id.* at 130.
[46] *Id.* (internal quotation marks omitted); *accord id.* ("[W]e will construe narrowly all delegated powers that curtail or dilute [individual liberties].").

What is true of executive action generally is paramount with regard to executive action that effects a search or seizure. This is made clear by *Entick v. Carrington*,[47] "the true and ultimate expression of constitutional law with regard to search and seizure,"[48] In holding that the laws of England did not authorize general warrants, the *Entick* court proceeded from the premise that the powers of search and seizure are so serious that "one would naturally expect the law to warrant it should be clear."[49] In this area of fundamental liberty, "[i]f it is law, it will be found in our books" and "[i]f it is not to be found there[,] it is not law."[50] Put otherwise, because the search or seizure power is of such great consequence, "silence o[n] the books is an authority against [the executive]."[51]

The Supreme Court and other federal courts therefore have repeatedly demanded legislative authorization for the executive's conduct in the law enforcement and surveillance arenas. In *United States v. U.S. District Court (Keith)*,[52] the Supreme Court required express legislative authorization before allowing the government to conduct domestic national-security surveillance without obtaining a warrant.[53] The relevant statutory language was

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[47] *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765).
[48] *United States v. Jones*, 565 U.S. 400, 405 (2012) (internal quotation marks omitted).
[49] *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quoting *En-tick*).
[50] *Id.*
[51] *Id.* at 531.
[52] *United States v. U.S. District Court (Keith)*, 407 U.S. 297 (1972).

"essentially neutral"—neither authorizing nor clearly prohibiting the practice.[54] In accordance with the principles above, this Court thus reasoned that silence in granting such serious powers "would not comport with the sensitivity of the problem involved,"[55] It held that unwarranted surveillance was impermissible absent explicit congressional authorization.[56]

In short, the requirement of legislative authorization for law enforcement activity is foundational to republican government, steeped in the history of English common law and in the Supreme Court's precedent, and essential to the healthy functioning of our democracy.

The Legislature Did Not Authorize the Executive Action Here.

Given the foregoing, the question in this case becomes a simple one: Did Hawaii's statutes create an exception to the preemption by Congress, and the mandatory federal criminal statutes, and the answer is No.

The question is not what Congress *ought* to have authorized, or even

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[53] *Id.* at 322–24.
[54] *Id.* at 303.
[55] *Id.* at 306.
[56] *Id.*; *see also United States v. Giordano*, 416 U.S. 505 (1974) (holding that Attorney General's executive assistants could not submit wire-tap applications under Title III because statute referred only to Attorney General and Assistant Attorneys General); *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 812 (2d Cir. 2015) (holding that FISA's authorization to collect "relevant" information on individuals was not sufficient to authorize indiscriminate collection of data on all domestic telephone communications, some of which *might* later become "releBaumanvant" respecting an individual).

what it would have been *incongruous* for Congress to omit from its authorization. The question, instead, is what the legislature *did* authorize. And the answer here is: Not this. It Is Not the Role of Courts to Supply Authority in the Absence of Legislative Authorization.

While all of this may sound reasonable, it is decidedly backwards. Law enforcement necessity is not, and cannot be, a substitute for legislative authorization, and the "prudent course of action" is certainly not to allow unauthorized policing techniques until Congress updates a statute to expressly provide otherwise.[57] As explained above, the rule is and must be the opposite: Because the executive cannot act without legislative authorization, a court cannot approve a practice until it determines that Congress in fact authorized it. If, as here, the statute does not map onto the surveillance power requested, the right conclusion is that Congress simply failed to address this situation and so *did not authorize* what the State wants.

At the same time, if history shows anything, it is that when necessity exists—and particularly when public safety is at issue—the executive branch is fully capable of getting from Congress the power it requires. ("Legislatures, moreover, have displayed an enormous willingness to modify the law to ensure that the government can get the assistance it needs for authorized

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[57] *Cf. Ex parte Milligan*, 71 U.S. 2, 124 (1866) (stating that if necessity can substitute for legislative authorization, "republican government is a failure, and there is an end of liberty regulated by law").

investigations."). At the same time, history also shows that, when it grants this power, Congress often attaches greater protections for the people's liberty than a simple warrant requirement. Congress, and Congress alone, can wield the scalpel necessary to balance the competing interests at issue in this case. Accordingly, the best result comes not from this Court doing the work of Congress when that work becomes outdated, but rather from deciding this case in a way that encourages Congress to do its own work.

It is not this Court's role to predict what Congress would want.

Contrary to the State's apparent suggestions, a lacuna in a thirty-year-old statute that has allegedly negative consequences under contemporary conditions does not remotely suggest that Congress (somehow) legislated to avoid those unforeseeable consequences many years ago. Nor is it this Court's function to fix that statute based on the judicial conception of what Congress would have wanted had it had contemporary conditions in mind. This Court frequently and properly expresses aversion to doing just that: As Justice Scalia famously framed it, "[t]he question ... is not what Congress 'would have wanted' but what Congress enacted."[58] "It is for Congress, not the courts, to revise longstanding legislation in order to accommodate the effects of

[58] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 349–50 (2012) (denouncing the "false notion that when a situation is not quite covered by a statute, the court should reconstruct what the legislature would have done had it confronted the issue").

changing social conditions."[59] The Supreme Court reaffirmed that "while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced."[60]

By refusing to do the work of legislators, the Supreme Court not only restrains itself against an inappropriate exercise of legislative authority; it also encourages legislators to do their own work more precisely and actively in areas in which the judgment of the people's representatives is essential. "By pointing out the obscurities, the ambiguities, the Court is trying to encourage Congress to write clearer laws."[61]

Congress can weigh whether and how to respond, in a deliberative process that is essential to our democracy and particularly vital in the context of law enforcement and surveillance. The agencies responsible for the nation's public safety require the trust of the public to sustain them in their vital roles. And that trust comes, in large part, from democratic accountability.

Of course, there can be no guarantee that the executive will get what it

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[59] *United States v. Lorenzetti*, 467 U.S. 167, 179 (1984).
[60] *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).
[61] Interview by Jonathan Faust with Justice Ruth Bader Ginsburg, in Palo Alto, Cal. (Feb. 8, 2017); *see also* Scalia & Garner, *Reading Law* xxviii (explaining that this Court's doctrines of statutory interpretation "discourage legislative free-riding, whereby legal drafters idly assume that judges will save them from their blunders").

wants from Congress, but *that is the point*: "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."[62] The only way to ensure that democratic institutions weigh in on this issue is for the Court to require Congress to act as clearly as possible—and it should do so here not by "allowing the warrants to proceed" until Congress intervenes, but by doing precisely the opposite.

The executive is successful at getting the attention of Congress on policing and surveillance issues.

That is particularly so because, in the face of a compelling claim of necessity, Congress almost invariably gives the executive what it needs. "[T]he legislature is generally a willing partner in government collection of private information."[63] Indeed, it is quite clear that when the Department of Justice speaks, Congress listens. Empirical studies show that no institution is as successful as the federal government at getting Congress to pass legislation in the wake of a statutory decision by the Supreme Court.[64] As the authors of a recent leading study conclude: "If the Department of Justice believes the

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[62] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).
[63] Samuel, *The New Writs of Assistance,* manuscript at 35.
[64] *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 348 (1991).

Court's stingy interpretation of a criminal prohibition, penalty, or procedural rule stands in the way of effective implementation of a criminal law regime, it can typically gain the attention of Congress and can often secure an override."[65]

Examples of this phenomenon abound. After the Supreme Court decided in *Katz* and *Berger* that existing authorizations were insufficient for wiretapping, for instance, Congress stepped in with Title III. This Court encouraged legislative action in the field of wiretapping as technology advanced, and Congress responded. In *Berger v. New York*,[66] the Supreme Court invalidated a "blanket grant of permission to eavesdrop ... without adequate judicial supervision or protective procedures."[67] And in *Katz v. United States*,[68] the Supreme Court rejected the government's argument that phone booth surveillance should be exempted from the requirement of advance judicial authorization.[69] Congress responded with the Federal Wiretap Act in 1968, which codified a detailed set of authorization requirements for the government.[70] The Act has governed wiretap practices since.[71]

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[65] Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex. L. Rev. 1317, 1383 (2014).
[66] *Berger v. New York*, 388 U.S. 41 (1967).
[67] *Id.* at 60.
[68] *Katz v. United States*, 389 U.S. 347 (1967).
[69] *Id.* at 358.
[70] Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 18 U.S.C.

While every one of these examples teaches that the Congress stands ready to provide the executive with necessary law enforcement authority when circumstances so require, each also provides another important lesson: namely, that when Congress is called upon to grant these new authorizations, it frequently imposes limitations on the executive beyond a simple warrant requirement. Title III comprehensively regulates wiretapping practices in the United States, providing an exclusive list of the dozens of specific crimes for which the government can obtain a wiretap to investigate.

Authorizing policing practices to assure public safety often involves a trade-off between greater government power and the security and liberty of the people. When the executive faces genuine necessity in the realm of public safety, Congress responds. But it often does so while imposing protections or limitations on the exercise of executive power it is granting.

Legislative authorization of law enforcement activity—as in the current case—requires the sort of nuanced regulation that the courts cannot provide.

The limits of judicial power further support insistence on the authorization requirement. Only the legislature can balance the competing policy interests and craft appropriately tailored solutions to promote

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§§2510–2522).

[71] *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827, 1901 (2015) ("Title III, the federal law governing wiretapping, is, as many recognize, the product of an extended dialogue between Congress and the Supreme Court.").

successful law enforcement with adequate regard for personal security and privacy. "The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them."[72]

The intersection of new technology and law enforcement practices presents uniquely difficult line-drawing problems, in which congressional engagement is essential. As Justice Alito noted in his concurrence in *United States v. Jones*,[73] "[a] legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."[74] Courts can resolve only the controversy in front of them, whereas Congress may consider a wider set of issues and

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[72] *United States v. Gilman*, 347 U.S. 507, 511–13 (1954); *see also Hall v. United States*, 566 U.S. 506, 523 (2012) ("Given the statute's plain language, context, and structure, it is not for us to rewrite the statute, particularly in this complex terrain of interconnected provisions and exceptions enacted over nearly three decades."); *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 513 (1982) (noting Congress's "superior institutional competence" on matters of policy). This is precisely the point Judge Lynch made in his opinion below: "Courts interpreting statutes that manifestly do not address these is-sues cannot easily create nuanced rules."

[73] *United States v. Jones*, 565 U.S. 400, 429–30 (2012), an opinion joined by three other Justices and endorsed as "incisive[]" by another, *see id.* at 415 (Sotomayor, J., concurring).

[74] *See also Riley v. California*, 134 S. Ct. 2473, 2497–98 (2014) (Alito, J., concurring) ("Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.").

solutions, crafting structural protections rather than simply announcing standards and deciding fact patterns *ex post*, one at a time.

The present case makes these concerns abundantly clear. The executive claims authority to compel information by surreptitious recording of conversations. Yet, "there is no evidence that Congress has *ever* weighed the costs and benefits of authorizing court orders of the sort at issue in this case. And unlike this Court, "Congress need not make an all-or-nothing choice. It is free to decide, for example, to set different rules for access to communications." It is just this kind of nuanced solution that is lost when courts ignore the need for legislative authorization and pro-vide a power the legislature has not considered or approved.[75]

The issue in this case presents the perfect illustration of how legislative authorization can lead to more nuanced solutions than courts ever could provide through case-by-case adjudication. The State's conduct in this case requires sensitive consideration of law enforcement interests, individual privacy, and the explicit prohibitions of Congress that preempt the State's conduct in this case. Congress might take account of the severity of the alleged crime, and alternative methods of acquiring the information in determining what authority the government should have to access

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[75] *See* Friedman & Ponomarenko, 90 N.Y.U. L. Rev. at 1875 ("[D]emocratic review is what is necessary to strike the policy balance that rests at the bottom of policing decisions.").

information. But only the legislature could enact those considerations into law.

There are widespread calls for reform of the Electronic Communications Privacy Act (ECPA) on this issue in particular.[76] But that debate involves hard policy choices. One proposal, for example, would "define the legitimacy of ECPA warrants on the basis of the location of the customer"; another simply "amends ECPA to offer partial extraterritoriality for warrants seeking data belonging to U.S. persons regardless of where it is stored."[77] Which is the right course? That is not for the Supreme Court to say. But one thing is certain: Only by abstaining from giving the executive what it wants in this case—but which Congress has not authorized—can this Court compel Congress to do its job.

Conclusion

Wherefore, for the above and foregoing reasons, Mr. Sudbury urges this Court to grant this petition, in the interest of justice.

Respectfully submitted this 19th day of May 2022.

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[76] *See* Caroline Lynch, *ECPA Re-form 2.0: Previewing the Debate in the 115th Congress*, Lawfare, https://perma.cc/K4AL-CB8Y (Jan. 30, 2017) ("Also on deck for ECPA reform is the question of whether the government should be allowed to use the ECPA process to obtain electronic data stored outside the United States.").

[77] *Id.*