

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,)
)
) Petitioner,)
)
) v.) No. 17-2
)
MICROSOFT CORPORATION,)
)
) Respondent.)

Pages: 1 through 64

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10 Washington, D.C.

11 Tuesday, February 27, 2018

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 10:21 a.m.

16

17 APPEARANCES:

18 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

19 Department of Justice, Washington, D.C.; on

20 behalf of the Petitioner.

21 E. JOSHUA ROSENKRANZ, ESQ., New York, New York; on

22 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:21 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-2,
5 United States versus Microsoft Corporation.

6 Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE PETITIONER

9 MR. DREEBEN: Mr. Chief Justice, and
10 may it please the Court:

11 Section 2703 of the Stored
12 Communications Act focuses on classically
13 domestic conduct. It requires disclosure in a
14 court order by the United States of information
15 related to a United States crime and, here, by
16 a United States service provider.

17 JUSTICE SOTOMAYOR: It actually
18 requires a search. It's -- the disclosure here
19 is really a substitute for the government's
20 searching. The Act permits the government to
21 have a warrant and go in and search for these
22 materials or, in the alternative, to ask the
23 source to do its own search and then turn the
24 materials over.

25 So why -- you describe it as if it's

1 only a disclosure, but it's really a search.

2 MR. DREEBEN: So, Justice Sotomayor,
3 it -- it's a hybrid instrument that has two
4 functions. The first function operates
5 directly on the provider. It requires a
6 provider to make disclosure of information.
7 That is a function that's classically performed
8 by a subpoena or a discovery order. It does
9 not authorize the government to go in, sit down
10 at Microsoft's facilities, put hands on
11 keyboards --

12 JUSTICE SOTOMAYOR: Well, actually, it
13 does. If you read -- if you read the
14 provision, it's an -- an alternative for that,
15 meaning the provision provides for a warrant
16 that presumably would let the government do
17 just that if it chose.

18 MR. DREEBEN: So, presumably, not
19 because the statute actually says that the
20 government can get a warrant requiring
21 disclosure. The act that -- that occurs in the
22 case is an act on the provider. And the
23 fundamental distinction between a search and a
24 subpoena-type instrument is that in a search
25 the government does go right in and grab the

1 information.

2 In a subpoena context, the instrument
3 operates on a person and it places an
4 obligation on that person to make disclosure.
5 Once it gets to the government, once the
6 government has the account in hand, it executes
7 the warrant aspect of the order, which is a
8 probable-cause-based order, allowing the
9 government to search the account.

10 So it's essentially analogous to if
11 the government knew that an individual had a
12 laptop computer and it wanted to obtain that
13 computer and search it, it could serve a
14 subpoena on the individual, requiring the
15 production of the laptop.

16 Once the government gets the laptop
17 into its custody, it needs a search warrant to
18 get in and look at the information. And here a
19 single order achieves both functions under a
20 statute whose structure and language makes
21 clear that it places disclosure obligations on
22 a provider and it then authorizes the
23 government to conduct the search.

24 JUSTICE SOTOMAYOR: Mr. Dreeben --

25 JUSTICE GINSBURG: Mr. Dreeben, may I

1 ask you a broader question? I think the
2 starting point all would agree in, what was it,
3 1986, no one ever heard of clouds. This kind
4 of storage didn't exist.

5 And there are good arguments that can
6 be made either way, but a court can say either
7 you are right, all right, or the other side is
8 all right, and there's nothing nuanced about
9 it. If Congress takes a look at this,
10 realizing that much time and -- and innovation
11 has occurred since 1986, it can write a statute
12 that takes account of various interests. And
13 it isn't just all or nothing.

14 So wouldn't it be wiser just to say
15 let's leave things as they are; if -- if
16 Congress wants to regulate in this brave new
17 world, it should do it?

18 MR. DREEBEN: Well, Justice Ginsburg,
19 a couple of responses. First, I agree that the
20 Court is construing a statute passed in 1986
21 and then amended subsequently. And we think
22 the Court should leave things as they are with
23 the instrument that Congress authorized,
24 operating on a person, and requiring that
25 person to produce information regardless of

1 whether it's stored overseas.

2 Microsoft here made a unilateral
3 decision to move information overseas. Nothing
4 in the law requires it. Nothing in the law
5 prohibits it.

6 What Congress did was act against a
7 backdrop of law dating back to this Court's
8 *Societe Internationale versus Rogers* decision
9 in 1958 and running through the *Aerospatiale*
10 decision in 1987, under which the basic rule of
11 both domestic and international law is that
12 when a court has personal jurisdiction over an
13 individual before the court and issues an order
14 requiring disclosure of information, that
15 person must comply with the order regardless of
16 where it has chosen to store the information
17 over which it has control.

18 JUSTICE KENNEDY: In that sense, is it
19 -- is it correct to say that the parties agree
20 that the Act does not have extraterritorial
21 application?

22 MR. DREEBEN: Yes, Justice Kennedy.

23 JUSTICE KENNEDY: And is that just a
24 concession you make for purposes of this case,
25 or do you read the statute that way?

1 MR. DREEBEN: We read it against the
2 backdrop of this Court's decision in Morrison
3 and RJR, which provide that unless the statute
4 clearly has extraterritorial application in its
5 text, structure, or operation, it has none.

6 And we're not here arguing that this
7 application is extraterritorial and
8 permissible. What we're saying is that it has
9 always been the rule from decisions in this
10 Court and decisions in the lower court in a
11 basically unbroken line that when a party is
12 before a U.S. court and a court issues an order
13 to that party that says produce information,
14 that's domestic conduct.

15 It's viewed as domestic conduct not
16 only in United States law reflected in this
17 Court's decisions; it's viewed as domestic
18 conduct in international law.

19 JUSTICE GORSUCH: Mr. -- Mr. --

20 JUSTICE GINSBURG: But something has
21 to happen abroad. I mean, there are computers
22 in Ireland, and something has to happen to
23 those computers in order to get the e-mails
24 back to the United States.

25 MR. DREEBEN: Yes. And this Court has

1 a test for determining whether an application
2 of a statute that has some domestic conduct and
3 some foreign conduct is domestic or
4 extraterritorial.

5 And as Justice Alito put it for the
6 Court in the RJR opinion, one has to look at
7 the focus of the statute. If the focus of the
8 statute has domestic conduct in view, then it
9 is a domestic application of the statute,
10 either if -- even if other conduct must occur
11 abroad.

12 JUSTICE ALITO: And to --

13 JUSTICE GORSUCH: Mr. Dreeben, why
14 would that be the case using the focus test
15 that we wouldn't take cognizance of the fact
16 that the information must be collected abroad
17 and transmitted from abroad to the United
18 States before it could then be disclosed? I
19 mean, there's a chain of activity that's
20 required here.

21 MR. DREEBEN: There --

22 JUSTICE GORSUCH: Why should we
23 divorce the first half from the second?

24 MR. DREEBEN: Because I think the way
25 that the Court has approached this, Justice

1 Gorsuch, is to look at the language of the
2 statute and the actual text and try to identify
3 from that text what is the focus of the
4 statute.

5 JUSTICE GORSUCH: I understand that,
6 and disclosure -- I understand your argument.

7 MR. DREEBEN: Yes.

8 JUSTICE GORSUCH: But in order to
9 disclose, it anticipates necessarily certain
10 antecedent conduct.

11 MR. DREEBEN: Yes, it does, but --

12 JUSTICE GORSUCH: And you'd ask us to
13 ignore that, I think. Is that -- is that your
14 position?

15 MR. DREEBEN: Well, I think this
16 Court's case law provides a test that says that
17 if the activity that's within the focus of the
18 statute occurs in the United States, the fact
19 that there may be antecedent or other conduct
20 abroad doesn't detract from a domestic
21 application.

22 And I have an example that I think
23 will help illustrate that point. Suppose that
24 a defendant in federal court were convicted and
25 ordered to pay a fine and the defendant said, I

1 can't do that with my domestic assets. They're
2 all located abroad.

3 I am fairly confident that the courts
4 would say the obligation falls on you. How you
5 raise the money is your concern. It's not an
6 extraterritorial application of the statute to
7 say bring the money home and pay the fine.

8 And that's the same that we're asking
9 to happen with the warrant. In fact, the text
10 of the statute says nothing about
11 extraterritorial conduct.

12 JUSTICE SOTOMAYOR: Mr. Dreeben, I
13 don't know that you fairly answered Justice
14 Ginsburg's question.

15 This is a 1986 statute. The reality
16 in 1986, if you look at the statute and its
17 reference to stored records, to stored
18 communications, was -- it's a past technology,
19 old concept. But I think it's fair to say that
20 back then they were thinking that where these
21 materials were stored had a geographic
22 existence in the United States, not abroad or
23 nowhere else, and that they were protecting the
24 communications that were stored in particular
25 locations.

1 Things have changed. But what you're
2 asking us to do is to imagine what Congress
3 would have done or intended in a totally
4 different situation today. And the problem
5 that Justice Ginsburg alludes to is the fact
6 that, by doing so, we are trenching on the very
7 thing that our extraterritoriality doesn't want
8 to do, what our jurisprudence doesn't want to
9 do, which is to create international problems.

10 Now I understand there's a bill that's
11 being proposed by bipartisan senators that
12 would give you most of what you want but with
13 great protections against foreign conflicts.
14 There are limitations involving records that
15 are stored abroad.

16 Why shouldn't we leave the status quo
17 as it is and let Congress pass a bill in this
18 new age --

19 MR. DREEBEN: So the --

20 JUSTICE SOTOMAYOR: -- that addresses
21 the potential problems that your reading would
22 create?

23 MR. DREEBEN: So I've got to start
24 with the last part of your question and then
25 come back to the first because otherwise I'll

1 probably forget what the last part is.

2 There is not an international problem
3 here. This is largely a mirage that Microsoft
4 is seeking to create. For the 20 or so --

5 JUSTICE SOTOMAYOR: You mean all those
6 amici who have written complaining about how
7 this would conflict with so much foreign law.
8 We've got a bunch of amici briefs telling us
9 how much this conflicts.

10 MR. DREEBEN: No foreign government
11 has come to this Court saying that the order
12 that we seek would conflict with its law. The
13 State Department and the Office of
14 International Affairs in the Justice Department
15 have heard no complaints from foreign
16 governments about the way that we have
17 typically operated under 2703 for decades.

18 In fact, the complaints all run the
19 other way. The complaints are that when
20 foreign governments need information from U.S.
21 providers, they come here under a Mutual Legal
22 Assistance Treaty, an MLAT, and they depend on
23 the United States pursuant to a statute to go
24 into court, invoke 35 -- 2703 and seek the
25 information from the provider wherever it may

1 be located.

2 And the Microsoft decision has caused
3 grave interference with our ability to help our
4 foreign law enforcement partners enforce their
5 own laws. It is -- the Microsoft decision also
6 puts us out of compliance with our
7 international obligations.

8 The Budapest Cybercrime Treaty, which
9 is joined by over 50 nations, including most of
10 the European nations, requires courts to -- in
11 -- in particular jurisdictions to have the
12 authority to require providers to furnish
13 information in response to court requests
14 regardless of where the information is stored.

15 That's Section 18.1(a) of the Budapest
16 Convention. So the international baseline here
17 is exactly what the government is arguing for,
18 and we are the ones who are really urging the
19 status quo.

20 JUSTICE SOTOMAYOR: Let's assume
21 because there's been a lot of back and forth,
22 and I -- I tend to disagree, there's an open
23 question on the Budapest Treaty, but putting
24 that disagreement aside, assuming the point
25 I've made, there is a bill. Can you tell me

1 where it is in the legislative process? It's
2 bipartisan. It's supported by the Department
3 of State and the Department of Justice.

4 It does deal with certain rights and
5 limitations to the access to this information
6 when it's stored in foreign locations. Why
7 shouldn't we wait for that bill?

8 MR. DREEBEN: Well, first of all, this
9 Court's duty is to interpret the statute under
10 its own statutory interpret -- interpretation
11 canons. I don't think that any --

12 JUSTICE SOTOMAYOR: There's no circuit
13 split. We granted cert before a circuit split,
14 which is an unusual act to start with.

15 MR. DREEBEN: Well, there are a couple
16 of reasons for that. No other court that has
17 issued a written opinion since Microsoft has
18 agreed with the Second Circuit. And the Second
19 Circuit's decision has caused grave and
20 immediate harm to the government's ability to
21 enforce federal criminal law.

22 But as to the question about the CLOUD
23 Act, as it's called, it has been introduced.
24 It's not been marked up by any committee. It
25 has not been voted on by any committee. And it

1 certainly has not yet been enacted into law.

2 And I think this Court's normal
3 practice is to decide cases before it based on
4 the law as it exists, rather than waiting for
5 an uncertain legislative process.

6 And as to the --

7 JUSTICE KAGAN: Mr. Dreeben --

8 MR. DREEBEN: If I can just make one
9 final point on this.

10 JUSTICE KAGAN: Please.

11 MR. DREEBEN: As to the bill itself,
12 it does not retrench on the authority that the
13 government says is part of the legal fabric
14 here today. It actually endorses in an
15 unqualified manner the government's ability to
16 get information from a provider over whom it
17 has jurisdiction, regardless of the location of
18 the data.

19 It goes on to provide very useful
20 mechanisms for bilateral cooperation that will
21 facilitate other nations' ability to get
22 information from our providers and our ability
23 to get information from their providers with
24 safeguards.

25 But those are supplementary

1 protections that do not exist apart from the
2 fundamental 2703 obligation, which, I would
3 add, does have built-in protections to address
4 Justice Ginsburg's concerns.

5 Lower courts have confronted this
6 problem in a variety of other contexts. This
7 is not a new problem. In the banking area, the
8 government has been very active in putting
9 subpoenas on branch offices of foreign banks
10 that have access to --

11 JUSTICE GORSUCH: Mr. Dreeben, you
12 used the word "subpoena," and -- and we've
13 talked about that a lot. And could you help me
14 out with the fact that when we're focusing on
15 the text, here the statute uses the word
16 "warrant," which typically has a very limited
17 and narrow understanding territorially.

18 MR. DREEBEN: Yes.

19 JUSTICE GORSUCH: Unlike subpoenas.

20 MR. DREEBEN: Yes.

21 JUSTICE GORSUCH: And elsewhere in the
22 statute Congress used the word "subpoenas."

23 MR. DREEBEN: Yes.

24 JUSTICE GORSUCH: So we know it -- it
25 knew the difference.

1 MR. DREEBEN: Yes.

2 JUSTICE GORSUCH: Help me out with
3 that.

4 MR. DREEBEN: Okay. So I'm glad that
5 you brought up the text, because I think the
6 text is actually the government's friend here.

7 What the statute does is create
8 obligations of disclosure. It puts an
9 obligation on a provider to make disclosure.

10 What a warrant does, if it's in its
11 ordinary form, under Rule 41 of the Federal
12 Rules of Criminal Procedure, apart from this
13 statute, a warrant is a authorization to a law
14 enforcement officer to go in and search.
15 Doesn't need the cooperation of anybody.
16 Doesn't put the obligations to do anything on
17 anybody else. It puts the government in the
18 driver's seat.

19 This statute says --

20 JUSTICE GORSUCH: It doesn't do that.
21 I -- I got you. But -- but it uses the word
22 "warrant." So what are we supposed to make of
23 that?

24 MR. DREEBEN: I think what you make of
25 it is that the structure of the statute

1 provides three mechanisms for the government to
2 obtain disclosure: A subpoena; a 2703(d)
3 order, which is the intermediate form of
4 process that's at issue in the Carpenter case;
5 and a warrant.

6 And those three different instruments
7 correlate with the different levels of
8 sensitivity of information that Congress
9 perceived, and, therefore, it ratcheted up the
10 showing that the government had to make in
11 order to get the disclosure order.

12 And so, instead of saying just go get
13 a warrant, it says get a warrant using the
14 procedures of Rule 41, not all of Rule 41. The
15 territorial limitations of Rule 41 are not
16 incorporated into the statute. In fact, the
17 statute has its own territorial provision which
18 provides for nationwide service of disclosure
19 orders.

20 And it goes on to specify that this
21 disclosure obligation applies regardless of the
22 instrument, be it subpoena, 2703, or a warrant.
23 It all falls on the provider to make
24 disclosure.

25 And I think that that's an important

1 fact because, when you have an order to a
2 provider, it allows the provider to do what my
3 friend here did: Come into court and make an
4 ex-ante objection before the instrument is
5 executed.

6 With a warrant, parties don't get that
7 opportunity. Under United States versus
8 Grubbs, the government shows up with a warrant.
9 The citizen's obligation is to comply.

10 It also ensures that -- that the --
11 that the recipient has the obligation to raise
12 various objections about burdensomeness, which
13 are also features associated with subpoenas,
14 not warrants.

15 And, finally, it avoids the
16 intrusiveness of a warrant. A warrant allows
17 the government to just come right in. If we
18 had a warrant, and we could get a Rule 41
19 ordinary warrant if we wanted to, we would go
20 to Microsoft headquarters and ask the gentleman
21 sitting at the keyboard to step aside and sit
22 down and do the work ourselves.

23 But we don't do that under 2703. And
24 Congress didn't intend that we do that. What
25 Congress intended was that we have the ability

1 to compel providers to provide information.

2 And the warrant then addresses the
3 customer's privacy interests. So the court
4 below thought that two things were going on:
5 One was we were actually executing a warrant
6 overseas. That's not true. We're putting an
7 obligation on a domestic provider to comply
8 with a domestic court order with information
9 from wherever it's drawn.

10 And, second, the court below thought
11 that we were invading privacy overseas.

12 There are two fallacies, I think, in
13 the view that this is a case about privacy.
14 It's not a case about privacy.

15 The government has the gold standard
16 of an instrument to address privacy interests
17 here: a probable-cause-based warrant issued by
18 a judge that describes with particularity what
19 we want. That is the hallmark in our domestic
20 system of how privacy interests are addressed.

21 JUSTICE ALITO: Mr. Dreeben, do you
22 think that --

23 JUSTICE BREYER: Well, I don't -- I
24 don't know if you want to --

25 JUSTICE ALITO: -- do you think that

1 -- do you think there's anything -- that the
2 Stored Communications Act prevents you from
3 obtaining this information in either of the two
4 conventional ways that you mentioned? One, by
5 getting a grand jury subpoena. If the Stored
6 Communications Act simply doesn't apply here,
7 could you go to a grand jury and get a grand
8 jury subpoena or, two, conduct the kind of
9 search that you just referred to? And if you
10 did that, would Microsoft have any opportunity
11 to contest that search?

12 MR. DREEBEN: So, if we got a ordinary
13 conventional warrant under Rule 41, Microsoft
14 does not have an ex-ante opportunity to contest
15 the search. The government goes in and it
16 takes control of what property it needs to in
17 order to conduct the search.

18 The grand jury subpoena, I think, is a
19 little bit of a more difficult question because
20 the question would be whether 2703 meant to
21 occupy the field in getting information from
22 providers or instead left us free to use grand
23 jury subpoenas in areas that aren't covered by
24 2703.

25 What is clear, I think, though, is

1 that 2703 was meant to build on categories of
2 existing instruments, plus adding a new one of
3 Congress's own device. The subpoena instrument
4 is useful for us in certain circumstances for
5 the content of information under the way that
6 Congress wrote the statute if we give notice to
7 the person whose privacy interests are
8 implicated.

9 It also allows us to get very basic
10 subscriber information. We don't have to go to
11 a court first. We just issue the instrument.
12 The provider has to make disclosures.

13 JUSTICE ALITO: Could I ask you one
14 other question? What is happening when these
15 orders are sought now outside of the Second
16 Circuit? I mean, there's been talk about
17 leaving things alone, but is the rest of the
18 country going -- are the judges everywhere in
19 the country going to follow what the Second
20 Circuit decided? Are they doing that, or are
21 they continuing to issue the kinds of orders
22 that were issued in the past?

23 MR. DREEBEN: Every district court
24 that has written an opinion outside of the
25 Second Circuit has rejected the Second

1 Circuit's approach, and the United States is
2 continuing to compel information from service
3 providers, regardless of where they store it.

4 And in the case of providers like
5 Google, algorithms enable them to move
6 information around the globe in order to
7 maximize the efficiency of their system. And
8 much of the information that we're getting is
9 coming from overseas. And we have heard no
10 protests from foreign governments.

11 JUSTICE ALITO: What is happening when
12 these district courts outside of the Second
13 Circuit are issuing these orders? The Internet
14 service providers are not appealing?

15 MR. DREEBEN: I think that in some
16 cases, there are appeals that are on hold
17 pending this Court's disposition of this issue,
18 so it's not going to go away. And if Congress
19 doesn't enact legislation, we will be here in
20 the exact position we are today, stymied in the
21 Second Circuit, but getting the exact same
22 information from providers all over the
23 country, in the rest of the country. And it's
24 information that's extremely vital to criminal
25 law enforcement because so much criminal law

1 enforcement today is international.

2 JUSTICE BREYER: I see the problem, I
3 think, but what I don't see yet -- maybe I just
4 have to go back and study it -- is -- is your
5 answer to Justice Gorsuch's question, which has
6 been bothering me on both sides. They're with
7 you on this, you know, but I look at the
8 language of the statute, and the statute says:
9 A government entity "may require the disclosure
10 by a provider of electronic communication ...
11 only pursuant to a warrant issued using the
12 procedures described in the Federal Rules of
13 Criminal Procedure."

14 MR. DREEBEN: Yes.

15 JUSTICE BREYER: Right?

16 MR. DREEBEN: Yes.

17 JUSTICE BREYER: That's what it says.

18 MR. DREEBEN: Yes.

19 JUSTICE BREYER: So then I go to the
20 Federal Rules of Criminal Procedure, and there
21 the first thing I discover is you ask a
22 magistrate, and it says: "A magistrate judge
23 with authority in the district ... has
24 authority to issue a warrant to search for and
25 seize a person or property located within the

1 district."

2 All right? Now, so that's what you
3 did. You went to this person, a magistrate, I
4 think.

5 MR. DREEBEN: No, that's not what we
6 did.

7 JUSTICE BREYER: Oh, you went to the
8 district judge?

9 MR. DREEBEN: We went to the district
10 court --

11 JUSTICE BREYER: All right. So -- but
12 --

13 MR. DREEBEN: Under a --

14 JUSTICE BREYER: -- but -- it's the
15 same problem. It's the same -- isn't it.

16 MR. DREEBEN: Well, it's a slightly
17 different problem, Justice Breyer, and I think
18 that I can help clear up a little bit of this.

19 JUSTICE BREYER: Yeah. Okay.

20 MR. DREEBEN: There are two angles of
21 it. The most basic one is that the Stored
22 Communications Act itself has a jurisdictional
23 provision that allows the government to go to a
24 variety of places to get warrants. It can go
25 to the district where the crime is being

1 investigated --

2 JUSTICE BREYER: Yeah.

3 MR. DREEBEN: -- and that court has
4 nationwide authority. It's not trammled by
5 Rule 45.

6 JUSTICE BREYER: But is that what you
7 did? What did you do here?

8 MR. DREEBEN: We did that here. We
9 did that here.

10 JUSTICE BREYER: Okay.

11 MR. DREEBEN: This is an investigation
12 being conducted out of one district --

13 JUSTICE BREYER: Okay. Okay. Second
14 question is -- maybe it's not this case, but
15 what happens if you go to Microsoft and you
16 ask, say, some for -- for some bank records
17 that are in Italy, and, in fact, Italy does
18 have a law, we imagine, which says absolutely
19 no bank record can be taken by any other person
20 without some special thing under the MLAT or
21 something.

22 MR. DREEBEN: Yes.

23 JUSTICE BREYER: And what happens
24 then?

25 MR. DREEBEN: So this is a very common

1 problem, and it's why I -- I --

2 JUSTICE BREYER: All right. So what
3 is the answer?

4 MR. DREEBEN: The answer is that
5 courts conduct a comity analysis. They look to
6 the Restatement of Foreign Relations --

7 JUSTICE BREYER: Okay. So the answer
8 is that, which many amici suggest to us, that
9 what should be done in such a case is you go to
10 the magistrate or the judge and you say, judge,
11 I want you to look at the factors of comity.
12 And one of them will be, if there is --

13 MR. DREEBEN: Yes.

14 JUSTICE BREYER: -- which you say is
15 not here --

16 MR. DREEBEN: Yes.

17 JUSTICE BREYER: -- this Italian law,
18 if there is --

19 MR. DREEBEN: Yes.

20 JUSTICE BREYER: -- which says you
21 can't bring it.

22 MR. DREEBEN: Yes.

23 JUSTICE BREYER: So you -- so you --
24 perhaps there's agreement, we'll see, about
25 what should be done, and this new law proposes

1 that.

2 MR. DREEBEN: Well, I think what's
3 more --

4 JUSTICE BREYER: Right.

5 MR. DREEBEN: -- radical is that
6 Microsoft's position is that no court ever gets
7 to ask the question. If the data is stored
8 overseas, we're just out of luck. We can't
9 even ask a court for an order that would
10 require its production.

11 They haven't asserted that it would
12 violate foreign law in order for them to comply
13 with the order that we obtained in this case.
14 Nobody has --

15 JUSTICE BREYER: Yeah, yeah.

16 MR. DREEBEN: -- actually pointed
17 concretely to a --

18 JUSTICE KAGAN: But you are agreeing,
19 Mr. Dreeben, that a court in that circumstance
20 should conduct a comity analysis?

21 MR. DREEBEN: Yes.

22 JUSTICE KAGAN: And if you are, what
23 would that look like and when would it occur?

24 MR. DREEBEN: Well, in our view, it
25 would occur at the contempt stage, after the

1 government procures an order, if it seeks to
2 impose sanctions on a party for noncompliance.
3 That's roughly the model that this Court used
4 in *Societe Internationale versus Rogers*, a 1958
5 decision that squarely posed the question of
6 whether a party over whom a U.S. court had
7 jurisdiction could be ordered to produce
8 documents that were located in Switzerland when
9 Swiss law had a blocking statute.

10 And the Court had no problem with the
11 issuance of the order, but it had a great deal
12 of problem with failure to conduct any comity
13 analysis that took into account possible
14 conflicts with foreign law.

15 And that same framework was applied by
16 lower courts when they encountered grand jury
17 subpoenas seeking financial information located
18 in foreign countries -- states, and there was
19 an assertion of a conflict with foreign law.

20 So there's nothing new about this
21 problem. It's a problem that courts have been
22 grappling with for decades, quite successfully.
23 And what's more remarkable is it's never come
24 up under the Stored Communications Act. We
25 have had no protests, either before or after

1 Microsoft, and no litigation by a party, either
2 before or after Microsoft, that said this order
3 would violate foreign law.

4 JUSTICE KAGAN: May I take you back to
5 the language of the statute? Most of your
6 argument in your brief focuses on 2703. And
7 you say --

8 MR. DREEBEN: Yes.

9 JUSTICE KAGAN: -- we should just
10 focus on 2703. And I'm -- I'm -- I'm not going
11 to argue with you one way or the other on that,
12 but I want to get your view, actually, of what
13 the focus of 2701 and 2702 is.

14 MR. DREEBEN: So --

15 JUSTICE KAGAN: If you do expand your
16 field of vision and -- you know, what would you
17 say there Congress was --

18 MR. DREEBEN: So 2701 is a statute
19 that blocks access. It's a protection against
20 hackers. And we think that is a domestically
21 focused statute, but it would reach foreign
22 conduct that hacked into a computer located in
23 the United States.

24 JUSTICE KAGAN: The computer is
25 here --

1 MR. DREEBEN: Yes.

2 JUSTICE KAGAN: -- but the hacker is
3 overseas?

4 MR. DREEBEN: Yes. Yes. Because the
5 conduct that's the focus of 2701 would be here.

6 2702 is a much more difficult statute.
7 We have not taken a position in this Court on
8 its focus. It prohibits certain divulgences of
9 information by providers. We've been willing
10 to assume for purposes of this case that its
11 focus mirrors 2703 and addresses only domestic
12 disclosures, but that only puts us in the same
13 position as Microsoft, with one difference.
14 Microsoft's theory is that if it moves its
15 information abroad, since storage is the only
16 thing that counts, it's then free to disclose
17 that information to the world, to sell it, to
18 do anything it wants free from U.S. law.

19 The only thing that Microsoft adds to
20 that picture is that the only person who can't
21 get it is the United States under lawful
22 process. And we think that that's wrong and
23 that the Court should reverse that judgment.

24 If I could save the rest of my time
25 for rebuttal.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Rosenkranz.

4 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ
5 ON BEHALF OF THE RESPONDENT

6 MR. ROSENKRANZ: Mr. Chief Justice,
7 and may it please the Court:

8 I'll start where Justice Kennedy
9 started, which is where we all agree that the
10 Stored Communications Act is limited to the
11 United States. Yet the government wants to use
12 the act to unilaterally reach into a foreign
13 land to search for, copy, and import private
14 customer correspondence physically stored in a
15 digital lockbox in a foreign computer where
16 it's protected by foreign law.

17 Now that is a foreign scenario, not a
18 --

19 JUSTICE GINSBURG: Mr. Rosenkranz,
20 we're told, and -- and correct me if it's
21 incorrect, that until this very case Microsoft
22 was complying with these disclosure orders.

23 This case is the first time it
24 objected, but there were past efforts of the
25 same kind and Microsoft disclosed the contents

1 of the communications. Is that so?

2 MR. ROSENKRANZ: Yes, Your Honor, but
3 what -- I just -- I want to make sure that you
4 -- you -- that the Court understands, Justice
5 Ginsburg, that this is a very new phenomenon,
6 this whole notion of cloud storage in another
7 country.

8 We didn't start doing it until 2010.
9 So the fact that we analyzed what our legal
10 obligations were and realized, wait a minute,
11 this is actually an extraterritorial act that
12 is unauthorized by the U.S. Government, the
13 fact that we were sober-minded about it
14 shouldn't be held against us.

15 CHIEF JUSTICE ROBERTS: Well, but it's
16 -- it seems to me you're assuming the answer to
17 the question. The government's position, of
18 course, is it's not an extraterritorial act.
19 They're going to Redmond, Washington, and
20 saying you have to turn this over to us.

21 It's not the government's fault that
22 it's located overseas. I suspect the
23 government doesn't care. Just like any other
24 subpoena where you go, and -- and Mr. Dreeben
25 used the example of funds, but it could be any

1 other evidence.

2 And if there is a particular objection
3 by the government where the information is
4 located, they're free to raise that and the
5 government will have to deal with that. But I
6 gather that's not the situation here.

7 MR. ROSENKRANZ: Well, Your Honor,
8 first, it is the situation here, but let me
9 answer the question directly.

10 The reason that this is an
11 extraterritorial act goes right to the heart of
12 why we have a presumption against
13 extraterritoriality. No one disputes that
14 countries across the world believe that they
15 have the sovereignty and the sovereign right to
16 pass their own laws governing the access to
17 e-mails stored on their soil.

18 And here we are reaching into their
19 lands and imposing our U.S. position on who
20 gets access to e-mails on their soil.

21 JUSTICE KENNEDY: What -- why should
22 we have a binary choice between a focus on the
23 location of the data and the location of the
24 disclosure? Aren't there some other factors,
25 where the owner of the e-mail lives or where

1 the service provider has its headquarters?

2 MR. ROSENKRANZ: No, Justice --

3 JUSTICE KENNEDY: Or do we have --
4 we're forced to this binary choice?

5 MR. ROSENKRANZ: Your Honor, that is a
6 consequence of this Court's analysis in
7 Morrison, which no one is challenging. But,
8 so, yes, you've got to figure out what the
9 focus is at step 2.

10 No one's arguing for any focus other
11 than the government's argument that it focuses
12 on disclosure and our argument that it focuses
13 on storage. And I want to be sure to get to
14 that argument.

15 If you -- if you look at this statute,
16 the focus is on the storage. This is the
17 Stored Communications Act. At the most basic
18 level, that's what the focus is. And it's more
19 specifically on securing communications sitting
20 in storage.

21 Congress confronted this brave new
22 world of people entrusting their communications
23 to third-party storage providers. It wanted to
24 make sure that Americans felt comfortable
25 putting their communications there.

1 JUSTICE ALITO: Mr. Rosenkranz, let me
2 -- this is what troubles me. It would be good
3 if Congress enacted legislation that modernized
4 this, but in the interim, something has to be
5 done.

6 So what happens in this situation? I
7 mean, there's an American citizen who's being
8 investigated for crimes committed in the United
9 States. The government shows probable cause
10 that there is evidence of this crime in e-mails
11 that are in the possession of an American
12 Internet service provider. And there they have
13 an urgent need for the information.

14 But the provider has chosen to store
15 the data overseas and, in fact, in some
16 instances, has actually broken it up into
17 shards so that it's stored not just in one
18 foreign country but in a number of foreign
19 countries.

20 Now what -- what happens in that
21 situation? There is no way in which the
22 information can be obtained except by pursuing
23 MLATs against multiple countries, a process
24 that could -- that will take many months, maybe
25 years? What happens?

1 MR. ROSENKRANZ: Well, Justice Alito,
2 first, that is not so far as certainly -- so
3 far as this record is concerned and not so far
4 as any record before any court is concerned
5 what actually happens.

6 No one actually breaks up the e-mail
7 into shards, certainly not in this case.
8 That's not what Microsoft does. And that is
9 not, it turns out, what Google does either --
10 excuse me, that is not what the other service
11 provider does either in the context of these
12 other cases that are being litigated --

13 JUSTICE ALITO: Well, we were told
14 that that's what Gmail does. That's not
15 correct?

16 MR. ROSENKRANZ: No, Your Honor,
17 that's not correct.

18 JUSTICE ALITO: All right. Well, all
19 right. The service provider has chosen to
20 store it overseas. There's no way to get the
21 information, other than through these -- these
22 very time-consuming MLAT procedures?

23 MR. ROSENKRANZ: Well, Your Honor, the
24 -- the way to get the information is through
25 MLATs, and the only evidence in this record

1 about MLATs is that MLATs do work. If it's
2 urgent for the government, the other
3 governments respond urgently.

4 JUSTICE BREYER: Just -- there are two
5 parts to this in my mind. One is the language,
6 which I'll have to work my way through. You
7 heard the answer to that.

8 The -- the other is a practical way of
9 dealing with the foreign law. Now the
10 government suggested what's impractical about
11 this, in any situation where, say, Microsoft
12 thinks that there really is a problem here
13 because of a foreign law, which might forbid it
14 or a variety of reasons, what you do is you --
15 Microsoft goes to the magistrate and says,
16 look, there's a problem here because of the law
17 of other countries, because of this, because of
18 that, and the magistrate takes that into
19 account.

20 That sounds to me like a -- and then
21 maybe Congress will pass this and we'll have
22 standards in it and it'll be much more helpful.
23 But -- but even without that, what's wrong with
24 that?

25 MR. ROSENKRANZ: The problem with

1 that, Justice Breyer, is that that's not the
2 statute Congress passed.

3 The statute Congress passed is a
4 statute that does not call for this sort of
5 weighing --

6 JUSTICE BREYER: All right. You're
7 giving a conceptual answer, which I think is
8 fine, but -- but I want to know, if the
9 language permits it, can we read this statute
10 to adapt to the modern condition and, if we
11 can, then shouldn't we do it that way, because
12 it would be practical. Everybody would get a
13 fair shot. You'd take foreign interests into
14 account. Maybe you'd use Aerospatiale
15 standards. One brief tells us they're not good
16 enough, but it didn't say what we should use,
17 but -- but the -- the -- the -- you see my
18 question practically?

19 MR. ROSENKRANZ: I do understand your
20 question, Justice Breyer, and the answer is
21 that is simply not the statute that Congress --
22 Congress wrote. And the job of this Court is
23 to interpret the statute Congress wrote, rather
24 than innovating and -- and adopting its own new
25 standard.

1 Now, by the way, the CLOUD Act that --
2 that has gotten some conversation this morning,
3 does have various factors that might be
4 weighed. That's Congress's decision if
5 Congress wants to do that and it's a decision
6 that applies in certain --

7 JUSTICE SOTOMAYOR: Mr. Rosenkranz --

8 JUSTICE KENNEDY: Under this Act,
9 could you voluntarily disclose this to the
10 government, or would that be a violation of
11 2702?

12 MR. ROSENKRANZ: It would not be a
13 violation of 2702 if we voluntarily did
14 something, but it would be a violation of our
15 obligations to our customers.

16 JUSTICE KENNEDY: Well, if that's so,
17 then why can't the government just obtain this
18 by a subpoena?

19 MR. ROSENKRANZ: Well, so that is
20 another big question. This is a statute in
21 which the -- or a scenario in which the
22 government has used a warrant.

23 A subpoena could not reach a lot of
24 these e-mails because a subpoena would not
25 reach e-mails that are in storage for less than

1 180 days under this statute and, under a Sixth
2 Circuit decision, couldn't reach them at all,
3 that is, individual's private --

4 JUSTICE KENNEDY: You could
5 voluntarily disclose, but they couldn't have a
6 subpoena?

7 MR. ROSENKRANZ: I'm sorry?

8 JUSTICE KENNEDY: It seems odd to me
9 that if -- you could voluntarily disclose, but
10 they couldn't ask for a subpoena. That doesn't
11 quite mesh, does it?

12 MR. ROSENKRANZ: Well, Your Honor, my
13 point is --

14 JUSTICE KENNEDY: I recognize we have
15 a difficult statute here.

16 MR. ROSENKRANZ: Your -- Your Honor,
17 if we voluntarily disclosed, it would be a
18 violation of our obligations to our customer.
19 It would also, by the way, in this context, be
20 a violation of European law.

21 Now I just -- I want to back up,
22 though. There are a lot of --

23 JUSTICE GORSUCH: Mr. Rosenkranz, do
24 you agree that after 180 days the government
25 could get this material with a subpoena?

1 MR. ROSENKRANZ: Absolutely not, Your
2 Honor. That is -- I -- I agree with you that
3 that is what the statute says, but it raises
4 the same exact problems of extraterritoriality
5 because -- I mean, the only thing that we
6 wouldn't be able to do is rely on the word
7 "warrant" and all of the territorial
8 implications of that word, but all of our other
9 answers would be the same.

10 The truth is other countries --

11 JUSTICE GINSBURG: So what actions --
12 what actions would Microsoft have to take
13 extraterritoriality -- extraterritorially to
14 comply with the -- in this case, the warrant?
15 What would Microsoft have to do outside the
16 United States?

17 MR. ROSENKRANZ: Well, so let's start
18 with the fact that these e-mails are stored
19 outside the United States. They are stored in
20 Ireland. And the government is asking us to go
21 and fetch them from Ireland.

22 They are subject to protections in
23 Ireland. So what happens in Ireland? What
24 happens in Ireland is really a remote control
25 is actually working a mechanism where these

1 e-mails are stored on a hard drive in a
2 facility under protection of foreign law, and a
3 -- a reader, which is a physical piece of
4 hardware, reads the digital ones and zeros off
5 of it, which are also physical manifestations.
6 It's then packaged up and it runs through
7 Ireland on hard wires and over the Atlantic.
8 This is a quintessentially extraterritorial
9 act.

10 Now I was just saying -- there are a
11 lot of complicated questions in this case, but
12 the decisive point and the point that Justice
13 Gorsuch was making earlier is that the e-mails
14 are stored in Ireland and the DEA is forcing us
15 to fetch them.

16 JUSTICE SOTOMAYOR: I'm sorry, I don't
17 -- perhaps it's my technological ignorance.
18 How is it in a locked box? If I'm trying to
19 mentally imagine this, what has to happen? You
20 know, I press a button in the U.S. and it
21 accesses directly the information in Ireland,
22 or does something have to happen in Ireland?

23 MR. ROSENKRANZ: Something has to
24 happen in Ireland. These e-mails, Justice
25 Sotomayor, exist only in Ireland. And what

1 happens in -- and it exists in a four --

2 JUSTICE KENNEDY: Something has to
3 happen electronically or with human
4 intervention?

5 MR. ROSENKRANZ: No -- no human
6 intervention -- there's a human --

7 JUSTICE KENNEDY: So -- so when you
8 push the button in Washington --

9 MR. ROSENKRANZ: Yes.

10 JUSTICE KENNEDY: -- then, obviously,
11 something happens in Ireland on the computer.
12 But does some person have to be there?

13 MR. ROSENKRANZ: A human being doesn't
14 have to do it. It is a robot. And if you --
15 if you sent a robot into a foreign land to
16 seize evidence, it would certainly implicate
17 foreign interests.

18 And so if the DEA -- just let me just
19 draw out this example.

20 JUSTICE SOTOMAYOR: I -- I'm sorry,
21 I'm -- I'm now -- I guess my imagination is
22 running wild.

23 (Laughter.)

24 JUSTICE SOTOMAYOR: How -- how does --
25 who tells the robot what to do and what does

1 the robot do?

2 MR. ROSENKRANZ: A human being in,
3 let's say, Redmond tells the robot -- it sends
4 the robot instructions. And, by the way, the
5 computer scientists' amicus brief spells this
6 out in great detail.

7 JUSTICE SOTOMAYOR: Okay.

8 MR. ROSENKRANZ: What happens then?
9 It interfaces with a hardware computer in a
10 hardware facility. It spins a disk. It looks
11 for the e-mail on that disk after verifying
12 certain protocols. It reads physical
13 manifestations on magnets of the ones and
14 zeros, which are like letters in the alphabet.
15 And then it copies them onto another disk. It
16 then safeguards them and sends them back here.

17 Now, if the DEA sat at a computer in
18 D.C. and hacked into our servers in Ireland,
19 everyone agrees that that would be a search and
20 seizure in Ireland. If the government did what
21 Mr. Dreeben described, executed a search
22 warrant itself, pushed us aside from our --
23 from the operator in Redmond, pushed him aside
24 and said I'll take it from here, that search
25 would be in Ireland.

1 All that's happening now is that the
2 government is requiring us to do something that
3 it would want to do --

4 JUSTICE GORSUCH: Do you dispute that
5 the government could issue a warrant to go
6 ahead and do exactly that in Redmond?

7 MR. ROSENKRANZ: The government could
8 issue a warrant -- I believe that's --

9 JUSTICE GORSUCH: Push you aside and
10 do the search in Redmond?

11 MR. ROSENKRANZ: This warrant
12 authorizes it. There's nothing --

13 JUSTICE GORSUCH: No, could -- could
14 the government do that outside of the Stored
15 Communications Act? Could the government issue
16 a classic search warrant, go in to Redmond, and
17 conduct a search on the computers in Redmond?

18 MR. ROSENKRANZ: It would be an
19 extraterritorial search; it would, therefore,
20 be illegal. But if the government did that,
21 there is no question that that search is going
22 on in Ireland and the government --

23 JUSTICE ALITO: And what could -- and
24 what could you do about it?

25 MR. ROSENKRANZ: Well, we could -- we

1 could sue the government and say that you can't
2 come onto our property and -- and engage in
3 these unconstitutional -- in these
4 extraterritorial acts. But my -- my point here
5 is --

6 JUSTICE ALITO: What kind of --

7 CHIEF JUSTICE ROBERTS: Counsel --

8 JUSTICE ALITO: -- what kind of suit
9 would that be? But anyway, never mind.

10 CHIEF JUSTICE ROBERTS: -- there --
11 there is nothing under your position that
12 prevents Microsoft from storing United States
13 communications, every one of them, either in
14 Canada or Mexico or anywhere else, and then
15 telling their customers: Don't worry if the
16 government wants to get access to your
17 communications; they won't be able to, unless
18 they go through this MLAT procedure, which --
19 which is costly and time-consuming. Could you
20 provide that service to your customers?

21 MR. ROSENKRANZ: Is it theoretically
22 possible, yes, but it would never happen. And
23 the reason it would never happen is that we
24 have 200 million active customers here in the
25 United States. They -- this is really a

1 tail --

2 CHIEF JUSTICE ROBERTS: Well -- I'm
3 sorry. In -- in what way is their service
4 seriously compromised if the server is
5 overseas?

6 MR. ROSENKRANZ: Well, there's a basic
7 physical property at issue here that
8 underscores that this is not just some random
9 act of putting e-mails in one place or another.
10 There's this physical phenomenon called
11 latency. It actually slows down the e-mail
12 service for those 200 --

13 CHIEF JUSTICE ROBERTS: Okay. So you
14 -- so they have to wait a little longer, I
15 assume quite -- quite a short while longer, but
16 they're protected from any government intrusion
17 into their e-mail communications.

18 MR. ROSENKRANZ: Your Honor, these
19 facilities are half a billion dollar
20 facilities. We build them in order to make
21 sure that our customers get the best possible
22 service. Even a microsecond -- even a -- a
23 fraction of a second's delay actually costs us
24 customers. And so we would --

25 CHIEF JUSTICE ROBERTS: Well, but you

1 might gain customers if you can assure them, no
2 matter what happens, the government won't be
3 able to get access to their e-mails.

4 MR. ROSENKRANZ: Your Honor, so this
5 is the -- the tail-wagging-the-dog problem. We
6 have 200 million customers who are relying on
7 the best service here in the United States that
8 can possibly be brought.

9 The government serves on us, say -- I
10 mean, these record -- these statistics are
11 public, 60,000 requests for information in the
12 United States. The percentage of those that
13 relate to e-mails abroad, it's 54 of them out
14 of 60,000. It's 99.9 --

15 CHIEF JUSTICE ROBERTS: I know, but my
16 basic point, and I'm not sure that you've
17 answered it, is that there is nothing that
18 prevents Microsoft -- in other words, an e-mail
19 from me to somebody on the other side of the
20 building that is going to be stored somewhere
21 else would be protected from disclosure, if
22 people, the government, wanted access in the
23 normal course of a criminal investigation where
24 they have a warrant establishing probable
25 cause. From here to the next block, that is

1 going to be protected from disclosure to the
2 government.

3 MR. ROSENKRANZ: And, Your Honor, my
4 answer is an equally practical one, and that
5 is, if customers do not want their e-mails to
6 be seized by the government, they don't use
7 Microsoft's services. They don't use
8 Microsoft's services whether they are in Canada
9 or Mexico because those are available by MLATs.

10 What do they do? They use services
11 that are sold specifically with the -- with the
12 promise that we have no U.S. presence, and,
13 therefore, you can trust us to keep it under
14 lock and key from the U.S. Government.

15 By the way, you probably all have cell
16 phones with this feature. It is a feature that
17 scrambles your instant messaging and that --
18 that scrambles it in a way that no government
19 can get their hands on it.

20 So it's not like this is a device that
21 is available only through Microsoft's services.
22 If people want to break the law and put their
23 e-mails outside the reach of the U.S.
24 Government, they simply wouldn't use Microsoft.

25 JUSTICE ALITO: Is it correct that we

1 don't know the nationality of the individual
2 who has this e-mail account?

3 MR. ROSENKRANZ: Yes, that is correct,
4 Justice Alito.

5 JUSTICE ALITO: Well, if this person
6 is not Irish and Ireland played no part in your
7 decision to store the information there and
8 there's nothing that Ireland could do about it
9 if you chose tomorrow to move it someplace
10 else, it is a little difficult for me to see
11 what Ireland's interest is in this.

12 MR. ROSENKRANZ: Your Honor, Ireland's
13 interests are the same interests of any
14 sovereign who protects information stored where
15 -- within their domain.

16 We protect information stored within
17 the United States and we don't actually care
18 whose information it is because we have laws
19 that guard the information for everyone.

20 JUSTICE ALITO: And I guess the point
21 is when we're talking about this information,
22 which, all right, yes, it -- it physically
23 exists on one or more computers somewhere, but
24 it doesn't have a presence anyplace in the
25 sense that a physical object has a presence

1 someplace.

2 And the Internet service providers can
3 put it anywhere they want and move it around at
4 will. The whole idea of territoriality is
5 strained. Wouldn't you agree with that?

6 MR. ROSENKRANZ: I -- I would not
7 agree with that, Justice Alito, and here's why:
8 First, I disagree with the premise.

9 This -- these e-mails have a physical
10 presence. They are actually on a hard drive.
11 Are they movable? Yes. But letters are
12 movable as well.

13 And they are under protection of
14 foreign laws, which, by the way, are really
15 quite robust. So moving -- moving just back to
16 the -- to the basic question of focus, the
17 common thread that ties together all of these
18 cross-referenced provisions of the SCA, the
19 common thread is stored communications that are
20 in electronic storage. That is what ties these
21 provisions together and that is the focus of --

22 CHIEF JUSTICE ROBERTS: And what about
23 --

24 JUSTICE KAGAN: But why do we need to
25 look for a common thread? Why shouldn't we

1 just look at 2703 and ask what Congress was
2 trying to do in that section?

3 MR. ROSENKRANZ: Well, Your Honor,
4 even if you focus on 2703 and -- and isolate it
5 from everything else, the first thing I'd say
6 is even the government agrees that that's not
7 what you're supposed to do. You are at a
8 minimum allowed to look at how it relates to
9 other provisions.

10 The focus is still on protecting
11 e-mails in electronic storage from government
12 intrusion. It is not about --

13 JUSTICE KAGAN: Well, how do we know
14 really? I mean, it seems as though we have a
15 choice between two things: One is what
16 Congress is doing is it's regulating the
17 disclosure in the United States of electronic
18 communications that are stored everywhere in
19 the world. And that's what the government is
20 saying.

21 And you're essentially saying the
22 opposite. What Congress was doing was to
23 regulate the disclosure anywhere in the world
24 of electronic communications that are stored in
25 the United States.

1 I'm not sure how I pick between those
2 two from the face of the statute, whether it's
3 2703 or whether it's the broader statute. So
4 give me your best shot.

5 (Laughter.)

6 MR. ROSENKRANZ: Okay. So I -- I'll
7 give you, if I may, I'll give you a couple
8 shots.

9 If we're only focusing on 2703,
10 Congress passed the -- the 2703 because it
11 wanted to limit law enforcement access to a
12 specific category of e-mails. And that is
13 what? E-mails that are in electronic storage.

14 Congress was concerned that e-mails
15 shared with a service provider would lose all
16 Fourth Amendment protection under the
17 third-party doctrine.

18 Congress did not need to pass 2703 to
19 author disclosure by a warrant. Law
20 enforcement already had access by a warrant.
21 The focus was on enhancing the security of
22 e-mails that were in electronic storage.

23 Now back up and relate the various
24 provisions, 2701, 2702, 2703. I was saying
25 earlier, at the most basic level, this is the

1 Stored Communications Act. It's about securing
2 communications that are sitting in storage.

3 I was describing earlier this brave
4 new world that Congress was facing where it
5 wanted people to -- to understand that their
6 e-mails in electronic storage were safe.

7 CHIEF JUSTICE ROBERTS: If I -- but
8 you focus on the storage. 2703 is headed,
9 "Required disclosure of customer communications
10 or records." And Congress put that heading in
11 the Act when it amended it.

12 And it seems to me that the government
13 might have a strong position there that the
14 statute focuses on disclosure. And disclosure
15 takes place in Washington, not in Ireland.

16 MR. ROSENKRANZ: Well, Your Honor,
17 2703 -- this goes back to Justice Kagan's
18 question -- it cannot be read in isolation from
19 2702. 27 -- 2701 and 2702 are with 2703 --

20 CHIEF JUSTICE ROBERTS: Well, 2702
21 says, "Voluntary disclosure of customer
22 communications or records." And that too takes
23 place in Washington, not Ireland.

24 MR. ROSENKRANZ: And so the answer,
25 Your Honor, is that -- that the Act was first

1 and fundamentally about protecting the
2 communications that were in electronic storage,
3 and so 2703 pairs with 2702.

4 Now, 2702 is about making sure -- so
5 2702, as -- as the government has suggested, is
6 about making sure that the electronic -- that
7 the electronic communications in electronic
8 storage are protected. And 2703 is simply an
9 exception to 2702.

10 JUSTICE BREYER: If you're -- I'm
11 going to ask a technical thing to help me with
12 that, and do it -- no more than 15 seconds.

13 MR. ROSENKRANZ: Yes, Justice Breyer.

14 JUSTICE BREYER: What I did is I -- I
15 looked at the warrant which is in the record,
16 and it's signed by James Francis, Magistrate
17 Judge, Southern District, New York. Is that
18 right?

19 MR. ROSENKRANZ: Yes, Your Honor.

20 JUSTICE BREYER: Okay. So then I went
21 over to Rule 41, and I assumed it fell within
22 (b), (a), or, what is it, it's -- it's (b)(1).
23 Am I right or is it -- do you know that well
24 enough in your head?

25 MR. ROSENKRANZ: Yes, Your Honor.

1 JUSTICE BREYER: Okay.

2 MR. ROSENKRANZ: But let me hear the
3 question again.

4 JUSTICE BREYER: Well, if it fell
5 within (b) (1), it says that Mr. Francis, Judge
6 Francis, has authority to issue a warrant to
7 search for and seize a property located within
8 the district.

9 So that's how I got in by -- into my
10 linguistic problem of -- what's the answer?

11 MR. ROSENKRANZ: Well, Your Honor, 27
12 -- the government has invoked 2703(a), which is
13 --

14 JUSTICE BREYER: Yeah --

15 MR. ROSENKRANZ: -- the provision that
16 requires a warrant.

17 JUSTICE BREYER: -- and it says, "only
18 pursuant to a warrant issued using the
19 procedures described in the Federal Rules of
20 Criminal Procedure."

21 MR. ROSENKRANZ: Yes, Your Honor.

22 JUSTICE BREYER: So I said what's the
23 warrant? It's Judge Francis's warrant. He's
24 in the Southern District of New York. I went
25 to Rule 41, and there 41(b) (1) --

1 MR. ROSENKRANZ: Oh, 41, yes.

2 JUSTICE BREYER: -- which -- you see?
3 Yeah. So -- so what's the answer to that? The
4 answer says that Judge Francis -- this says
5 that Judge Francis has authority to issue a
6 warrant to search for property in New York.

7 MR. ROSENKRANZ: Yeah, I -- I agree
8 with you, Justice Breyer. And -- and warrants
9 are distinctly territorial devices. They're
10 not extraterritorial devices.

11 So if we're looking at federal rule --

12 JUSTICE ALITO: I -- I think the
13 question --

14 JUSTICE BREYER: But you didn't make
15 much of a point of this in your brief.

16 (Laughter.)

17 JUSTICE BREYER: And so I suspect that
18 -- that -- that it just can't be that easy,
19 this case.

20 MR. ROSENKRANZ: No, Justice Breyer, I
21 think we -- we certainly tried to make a point
22 in our brief --

23 JUSTICE ALITO: No, but, Mr.
24 Rosenkranz --

25 MR. ROSENKRANZ: -- that this

1 incorporates --

2 JUSTICE ALITO: -- I think the
3 question is this: If this information were in
4 Redmond, Washington, would the magistrate judge
5 be unable to issue the order because Redmond,
6 Washington, is not in New York? That's the
7 question.

8 JUSTICE BREYER: That's right.

9 MR. ROSENKRANZ: Oh, he would not be
10 able to issue the warrant. And it's not
11 because Redmond, Washington, is not in New
12 York. It's because warrants, although there is
13 nationwide ability to reach evidence within the
14 United States, warrants are not
15 extraterritorial.

16 Now just by way of -- of wrapping up,
17 the government asks this Court to grant it an
18 extraordinary power, and it's a power that
19 Congress did not think it was granting law
20 enforcement in 1986, and certainly did not
21 intend to grant to every police officer and
22 every sheriff's deputy anywhere in the country.

23 Back then, if the police needed to
24 gather evidence from all over the world, they
25 would have to engage with law enforcement

1 everywhere else in those countries.

2 The Internet makes it possible now to
3 reach a lifetime of correspondence for billions
4 of people all across the world, but only
5 Congress can grant that power.

6 And this goes to Justice Ginsburg's
7 point. Think about the questions that the
8 Court has been wrestling with today. It's
9 about the architecture of other providers.
10 It's -- there were conversations about where
11 the Internet is headed. There is conversations
12 about whether this will kill the tech sector,
13 how much of an international consensus there is
14 about the sovereignty of data.

15 These are all questions that only
16 Congress can answer. Meanwhile, this Court's
17 job is to defer -- to defer to Congress to take
18 the path that is least likely to create
19 international tensions.

20 And if you try to tinker with this,
21 without the tools that -- that only Congress
22 has, you are as likely to break the cloud as
23 you are to fix it.

24 If there are no further questions, I
25 -- I thank the Court for its attention. And we

1 respectfully request that the Court affirm the
2 Second Circuit.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Two minutes, Mr. Dreeben.

6 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

7 ON BEHALF OF THE PETITIONER

8 MR. DREEBEN: I have four quick
9 points, two technical and two substantive.

10 The technical point first is, Justice
11 Breyer, you asked what the authority of the
12 district court is. The authority of the
13 district court, in this case for a magistrate
14 judge, comes from, first, 2703, which entitles
15 a court of competent jurisdiction to issue the
16 relevant warrant in this case.

17 This is on page 6A of the government's
18 appendix to its brief. There is then a
19 definition of a court of competent jurisdiction
20 on page 12A of the appendix to the government's
21 brief, which defines it to include any
22 magistrate judge that has jurisdiction over the
23 offense being investigated, as well as several
24 other bases.

25 This was a Patriot Act amendment

1 designed to expand the authority of courts to
2 issue orders.

3 The second technical question is the
4 one asked by Justice Kennedy on whether
5 Microsoft could voluntarily disclose this
6 information to the government. It couldn't.
7 It's barred by 2702 from making disclosures,
8 except as authorized by that statute.

9 And one of the exceptions is that the
10 government can proceed under 2703 to compel the
11 same information. So Microsoft is basically
12 claiming the authority, once it moves the
13 information overseas, to unilaterally disclose
14 it to anyone. But if it's in, you know,
15 responding to an order that's issued by the
16 United States, it says it has no obligation to
17 produce the information.

18 And then the substantive points here
19 are that this statute does, indeed, focus on
20 disclosure, not storage. 2703 begins by
21 requiring disclosure as to the variety of
22 categories of information that providers may
23 have, and it backs it up with at least three
24 more provisions that address disclosure.

25 Section (e) says there's no cause of

1 action for disclosing in accordance with the
2 statute. Section (f) allows the government to
3 issue preservation orders of the information to
4 be disclosed. And Section (g) discusses -- may
5 I complete the sentence?

6 CHIEF JUSTICE ROBERTS: Sure.

7 MR. DREEBEN: -- discusses the
8 execution of the warrant and it provides that
9 the government need not be there, which makes
10 this an instrument, not like a warrant that
11 allows us to conduct a search, but like a
12 subpoena or discovery order that places
13 obligations on parties over whom the court has
14 jurisdiction. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 11:22 a.m., the case
18 was submitted.)

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<p style="text-align: center;">1</p> <p>10:21 [2] 1:15 3:2 11:22 [1] 64:17 12A [1] 62:20 15 [1] 57:12 17-2 [1] 3:4 18.1(a) [1] 14:15 180 [2] 42:1,24 1958 [2] 7:9 30:4 1986 [6] 6:3,11,20 11:15,16 60:20 1987 [1] 7:10</p>	<p>account [7] 5:6,9 6:12 30:13 39:19 40:14 52:2 achieves [1] 5:19 across [2] 35:14 61:4 Act [27] 3:12,20 4:21,22 7:6,20 15:14,23 22:2,6 26:22 30:24 33:10,12 34:11,18 35:11 36:17 41:1,8 44:9 47:15 49:9 56:1,11,25 62:25 action [1] 64:1 actions [2] 43:11,12 active [2] 17:8 48:24 activity [2] 9:19 10:17 acts [1] 48:4 actual [1] 10:2 actually [17] 3:17 4:12,19 16:14 18:6 21:5 29:16 31:12 34:11 37:16 38:5,6 43:25 49:11,23 52:17 53:10 adapt [1] 40:10 add [1] 17:3 adding [1] 23:2 address [3] 17:3 21:16 63:24 addressed [1] 21:20 addresses [3] 12:20 21:2 32:11 adds [1] 32:19 adopting [1] 40:24 Aerospatiale [2] 7:9 40:14 Affairs [1] 13:14 affirm [1] 62:1 age [1] 12:18 agree [9] 6:2,19 7:19 33:9 42:24 43:2 53:5,7 59:7 agreed [1] 15:18 agreeing [1] 29:18 agreement [1] 28:24 agrees [2] 46:19 54:6 ahead [1] 47:6 algorithms [1] 24:5 Alito [21] 9:5,12 21:21,25 23:13 24:11 37:1 38:1,13,18 47:23 48:6,8 51:25 52:4,5,20 53:7 59:12,23 60:2</p>	<p>35:9 39:7 40:7,20 51:4 56:24 58:10 59:3,4 61:16 answered [2] 11:13 50:17 answers [1] 43:9 antecedent [2] 10:10,19 anticipates [1] 10:9 anybody [2] 18:15,17 anyplace [1] 52:24 anyway [1] 48:9 apart [2] 17:1 18:12 appealing [1] 24:14 appeals [1] 24:16 APPEARANCES [1] 1:17 appendix [2] 62:18,20 application [7] 7:21 8:4,7 9:1,9 10:21 11:6 applied [1] 30:15 applies [2] 19:21 41:6 apply [1] 22:6 approach [1] 24:1 approached [1] 9:25 architecture [1] 61:9 area [1] 17:7 areas [1] 22:23 aren't [2] 22:23 35:24 argue [1] 31:11 arguing [3] 8:6 14:17 36:10 argument [13] 1:14 2:2,5,8 3:4,7 10:6 31:6 33:4 36:11,12,14 62:6 arguments [1] 6:5 around [2] 24:6 53:3 aside [5] 14:24 20:21 46:22,23 47:9 asks [1] 60:17 aspect [1] 5:7 asserted [1] 29:11 assertion [1] 30:19 assets [1] 11:1 Assistance [1] 13:22 associated [1] 20:13 assume [3] 14:20 32:10 49:15 assumed [1] 57:21 assuming [2] 14:24 34:16 assure [1] 50:1 Atlantic [1] 44:7 attention [1] 61:25 author [1] 55:19 authority [11] 14:12 16:12 25:23,24 27:4 58:6 59:5 62:11,12 63:1,12 authorization [1] 18:13 authorize [1] 4:9 authorized [2] 6:23 63:8 authorizes [2] 5:22 47:12 available [2] 51:9,21 avoids [1] 20:15 away [1] 24:18</p>	<p>backs [1] 63:23 bank [2] 27:16,19 banking [1] 17:7 banks [1] 17:9 barred [1] 63:7 based [1] 16:3 baseline [1] 14:16 bases [1] 62:24 basic [8] 7:10 23:9 26:21 36:17 49:6 50:16 53:16 55:25 basically [2] 8:11 63:11 begins [1] 63:20 behalf [8] 1:20,22 2:4,7,10 3:8 33:5 62:7 believe [2] 35:14 47:8 below [2] 21:4,10 best [3] 49:21 50:7 55:4 between [4] 4:23 35:22 54:15 55:1 big [1] 41:20 bilateral [1] 16:20 bill [5] 12:10,17 14:25 15:7 16:11 billion [1] 49:19 billions [1] 61:3 binary [2] 35:22 36:4 bipartisan [2] 12:11 15:2 bit [2] 22:19 26:18 block [1] 50:25 blocking [1] 30:9 blocks [1] 31:19 both [3] 5:19 7:11 25:6 bothering [1] 25:6 box [1] 44:18 branch [1] 17:9 brave [3] 6:16 36:21 56:3 break [2] 51:22 61:22 breaks [1] 38:6 BREYER [43] 21:23 25:2,15,17,19 26:7,11,14,17,19 27:2,6,10,13,23 28:2,7,14,17,20,23 29:4,15 39:4 40:1,6,20 57:10,13,14,20 58:1,4,14,17,22 59:2,8,14,17,20 60:8 62:11 brief [7] 31:6 40:15 46:5 59:15,22 62:18,21 briefs [1] 13:8 bring [2] 11:7 28:21 broader [2] 6:1 55:3 broken [1] 37:16 brought [2] 18:5 50:8 Budapest [3] 14:8,15,23 build [2] 23:1 49:20 building [1] 50:20 built-in [1] 17:3 bunch [1] 13:8 burdensomeness [1] 20:12 button [2] 44:20 45:8</p>
<p style="text-align: center;">2</p> <p>2 [1] 36:9 20 [1] 13:4 200 [3] 48:24 49:12 50:6 2010 [1] 34:8 2018 [1] 1:11 27 [3] 1:11 56:19 58:11 2701 [5] 31:13,18 32:5 55:24 56:19 2702 [13] 31:13 32:6 41:11,13 55:24 56:19,19,20 57:3,4,5,9 63:7 2703 [27] 3:11 13:17,24 17:2 19:22 20:23 22:20,24 23:1 31:6,10 32:11 54:1,4 55:3,9,10,18,24 56:8,17,19 57:3,8 62:14 63:10,20 2703(a) [1] 58:12 2703(d) [1] 19:2</p>	<p>actually [17] 3:17 4:12,19 16:14 18:6 21:5 29:16 31:12 34:11 37:16 38:5,6 43:25 49:11,23 52:17 53:10 adapt [1] 40:10 add [1] 17:3 adding [1] 23:2 address [3] 17:3 21:16 63:24 addressed [1] 21:20 addresses [3] 12:20 21:2 32:11 adds [1] 32:19 adopting [1] 40:24 Aerospatiale [2] 7:9 40:14 Affairs [1] 13:14 affirm [1] 62:1 age [1] 12:18 agree [9] 6:2,19 7:19 33:9 42:24 43:2 53:5,7 59:7 agreed [1] 15:18 agreeing [1] 29:18 agreement [1] 28:24 agrees [2] 46:19 54:6 ahead [1] 47:6 algorithms [1] 24:5 Alito [21] 9:5,12 21:21,25 23:13 24:11 37:1 38:1,13,18 47:23 48:6,8 51:25 52:4,5,20 53:7 59:12,23 60:2</p>	<p>35:9 39:7 40:7,20 51:4 56:24 58:10 59:3,4 61:16 answered [2] 11:13 50:17 answers [1] 43:9 antecedent [2] 10:10,19 anticipates [1] 10:9 anybody [2] 18:15,17 anyplace [1] 52:24 anyway [1] 48:9 apart [2] 17:1 18:12 appealing [1] 24:14 appeals [1] 24:16 APPEARANCES [1] 1:17 appendix [2] 62:18,20 application [7] 7:21 8:4,7 9:1,9 10:21 11:6 applied [1] 30:15 applies [2] 19:21 41:6 apply [1] 22:6 approach [1] 24:1 approached [1] 9:25 architecture [1] 61:9 area [1] 17:7 areas [1] 22:23 aren't [2] 22:23 35:24 argue [1] 31:11 arguing [3] 8:6 14:17 36:10 argument [13] 1:14 2:2,5,8 3:4,7 10:6 31:6 33:4 36:11,12,14 62:6 arguments [1] 6:5 around [2] 24:6 53:3 aside [5] 14:24 20:21 46:22,23 47:9 asks [1] 60:17 aspect [1] 5:7 asserted [1] 29:11 assertion [1] 30:19 assets [1] 11:1 Assistance [1] 13:22 associated [1] 20:13 assume [3] 14:20 32:10 49:15 assumed [1] 57:21 assuming [2] 14:24 34:16 assure [1] 50:1 Atlantic [1] 44:7 attention [1] 61:25 author [1] 55:19 authority [11] 14:12 16:12 25:23,24 27:4 58:6 59:5 62:11,12 63:1,12 authorization [1] 18:13 authorize [1] 4:9 authorized [2] 6:23 63:8 authorizes [2] 5:22 47:12 available [2] 51:9,21 avoids [1] 20:15 away [1] 24:18</p>	<p>backs [1] 63:23 bank [2] 27:16,19 banking [1] 17:7 banks [1] 17:9 barred [1] 63:7 based [1] 16:3 baseline [1] 14:16 bases [1] 62:24 basic [8] 7:10 23:9 26:21 36:17 49:6 50:16 53:16 55:25 basically [2] 8:11 63:11 begins [1] 63:20 behalf [8] 1:20,22 2:4,7,10 3:8 33:5 62:7 believe [2] 35:14 47:8 below [2] 21:4,10 best [3] 49:21 50:7 55:4 between [4] 4:23 35:22 54:15 55:1 big [1] 41:20 bilateral [1] 16:20 bill [5] 12:10,17 14:25 15:7 16:11 billion [1] 49:19 billions [1] 61:3 binary [2] 35:22 36:4 bipartisan [2] 12:11 15:2 bit [2] 22:19 26:18 block [1] 50:25 blocking [1] 30:9 blocks [1] 31:19 both [3] 5:19 7:11 25:6 bothering [1] 25:6 box [1] 44:18 branch [1] 17:9 brave [3] 6:16 36:21 56:3 break [2] 51:22 61:22 breaks [1] 38:6 BREYER [43] 21:23 25:2,15,17,19 26:7,11,14,17,19 27:2,6,10,13,23 28:2,7,14,17,20,23 29:4,15 39:4 40:1,6,20 57:10,13,14,20 58:1,4,14,17,22 59:2,8,14,17,20 60:8 62:11 brief [7] 31:6 40:15 46:5 59:15,22 62:18,21 briefs [1] 13:8 bring [2] 11:7 28:21 broader [2] 6:1 55:3 broken [1] 37:16 brought [2] 18:5 50:8 Budapest [3] 14:8,15,23 build [2] 23:1 49:20 building [1] 50:20 built-in [1] 17:3 bunch [1] 13:8 burdensomeness [1] 20:12 button [2] 44:20 45:8</p>
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