SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,   )

       Petitioner,   )

         v.   ) No. 17-2

MICROSOFT CORPORATION,   )

       Respondent.   )

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Pages: 1 through 64

Place: Washington, D.C.

Date: February 27, 2018

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10                  Washington, D.C.

11              Tuesday, February 27, 2018

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13         The above-entitled matter came on for oral

14    argument before the Supreme Court of the United States

15    at 10:21 a.m.

16

17    APPEARANCES:

18    MICHAEL R. DREEBEN, 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 United States crime and here by a

16    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
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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 GINSBURG: But something has

20   to happen abroad. I mean, there are computers

21   in Ireland and something has to happen to those

22   computers in order to get these e-mails back to

23   the United States.

24   MR. DREEBEN: Yes. And this Court has

25   a test for determining whether an application

1   of a statute that has some domestic conduct and

2   some foreign conduct is domestic or

3   extraterritorial.

4   And as Justice Alito put it for the

5   Court in the RJR opinion, one has to look at

6   the focus of the statute. If the focus of the

7   statute has domestic conduct in view, then it

8   is a domestic application of the statute,

9   either if -- even if other conduct must occur

10   abroad.

11   JUSTICE GORSUCH: Mr. Dreeben, why

12   would that be the case using the focus test

13   that we wouldn't take cognizance of the fact

14   that the information must be collected abroad

15   and transmitted from abroad to the United

16   States before it could then be disclosed? I

17   mean, there's a chain of activity that's

18   required here.

19   MR. DREEBEN: There --

20   JUSTICE GORSUCH: Why should we

21   divorce the first half from the second?

22   MR. DREEBEN: Because I think the way

23   that the Court has approached this, Justice

24   Gorsuch, is to look at the language of the

25   statute and the actual text and try to identify

1   from that text what is the focus of the

2   statute.

3   JUSTICE GORSUCH: I understand that,

4   and disclosure -- I understand your argument.

5   MR. DREEBEN: Yes.

6   JUSTICE GORSUCH: But in order to

7   disclose, it anticipates necessarily certain

8   antecedent conduct.

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

10   JUSTICE GORSUCH: And you'd ask us to

11   ignore that, I think. Is that -- is that your

12   position?

13   MR. DREEBEN: Well, I think this

14   Court's case law provides a test that says that

15   if the activity that's within the focus of the

16   statute occurs in the United States, the fact

17   that there may be antecedent or other conduct

18   abroad doesn't detract from a domestic

19   application.

20   And I have an example that I think

21   will help illustrate that point. Suppose that

22   a defendant in federal court were convicted and

23   ordered to pay a fine and the defendant said, I

24   can't do that with my domestic assets. They're

25   all located abroad.

1   I am fairly confident that the courts

2   would say the obligation falls on you. How you

3   raise the money is your concern. It's not an

4   extraterritorial application of the statute to

5   say bring the money home and pay the fine.

6   And that's the same that we're asking

7   to happen with the warrant. In fact, the text

8   of the statute says nothing about

9   extraterritorial conduct.

10   JUSTICE SOTOMAYOR: Mr. Dreeben, I

11   don't know that you fairly answered Justice

12   Ginsburg's question.

13   This is a 1986 statute. The reality

14   in 1986, if you look at the statute and its

15   reference to stored records, to stored

16   communications, was -- it's a past technology,

17   old concept. But I think it's fair to say that

18   back then they were thinking that where these

19   materials were stored had a geographic

20   existence in the United States, not abroad or

21   nowhere else, and that they were protecting the

22   communications that were stored in particular

23   locations.

24   Things have changed. But what you're

25   asking us to do is to imagine what Congress

1   would have done or intended in a totally

2   different situation today. And the problem

3   that Justice Ginsburg alludes to is the fact

4   that, by doing so, we are trenching on the very

5   thing that our extraterritoriality doesn't want

6   to do, what our jurisprudence doesn't want to

7   do, which is to create international problems.

8   Now I understand there's a bill that's

9   being proposed by bipartisan senators that

10   would give you most of what you want but with

11   great protections against foreign conflicts.

12   There are limitations involving records that

13   are stored abroad.

14   Why shouldn't we leave the status quo

15   as it is and let Congress pass a bill in this

16   new age --

17   MR. DREEBEN: So the --

18   JUSTICE SOTOMAYOR: -- that addresses

19   the potential problems that your reading would

20   create?

21   MR. DREEBEN: So I've got to start

22   with the last part of your question and then

23   come back to the first because otherwise I'll

24   probably forget what the last part is.

25   There is not an international problem

1   here. This is largely a mirage that Microsoft

2   is seeking to create. For the 20 or so --

3   JUSTICE SOTOMAYOR: You mean all those

4   amici who have written complaining about how

5   this would conflict with so much foreign law.

6   We've got a bunch of amici briefs telling us

7   how much this conflicts.

8   MR. DREEBEN: No foreign government

9   has come to this Court saying that the order

10   that we seek would conflict with its law. The

11   State Department and the Office of

12   International Affairs in the Justice Department

13   have heard no complaints from foreign

14   governments about the way that we have

15   typically operated under 2703 for decades.

16   In fact, the complaints all run the

17   other way. The complaints are that when

18   foreign governments need information from U.S.

19   providers, they come here under a Mutual Legal

20   Assistance Treaty, an MLAT, and they depend on

21   the United States pursuant to a statute to go

22   into court, invoke 35 -- 2703 and seek the

23   information from the provider wherever it may

24   be located.

25   And the Microsoft decision has caused

1   grave interference with our ability to help our

2   foreign law enforcement partners enforce their

3   own laws. It is -- the Microsoft decision also

4   puts us out of compliance with our

5   international obligations.

6   The Budapest Cybercrime Treaty, which

7   is joined by over 50 nations, including most of

8   the European nations, requires courts in -- in

9   particular jurisdictions to have the authority

10   to require providers to furnish information in

11   response to court requests regardless of where

12   the information is stored.

13   That's Section 18.1a of the Budapest

14   Convention. So the international baseline here

15   is exactly what the government is arguing for,

16   and we are the ones who are really urging the

17   status quo.

18   JUSTICE SOTOMAYOR: Let's assume

19   because there's been a lot of back and forth,

20   and I -- I tend to disagree, there's an open

21   question on the Budapest Treaty, but putting

22   that disagreement aside, assuming the point

23   I've made, there is a bill. Can you tell me

24   where it is in the legislative process? It's

25   bipartisan. It's supported by the Department

1   of State and the Department of Justice.

2   It does deal with certain rights and

3   limitations to the access to this information

4   when it's stored in foreign locations. Why

5   shouldn't we wait for that bill?

6   MR. DREEBEN: Well, first of all, this

7   Court's duty is to interpret the statute under

8   its own statutory interpretation canons. I

9   don't think that any --

10   JUSTICE SOTOMAYOR: There's no circuit

11   split. We granted cert before a circuit split,

12   which is an unusual act to start with.

13   MR. DREEBEN: Well, there are a couple

14   of reasons for that. No other court that has

15   issued a written opinion since Microsoft has

16   agreed with the Second Circuit. And the Second

17   Circuit's decision has caused grave and

18   immediate harm to the government's ability to

19   enforce federal criminal law.

20   But as to the question about the CLOUD

21   Act, as it's called, it has been introduced.

22   It's not been marked up by any committee. It

23   has not been voted on by any committee. And it

24   certainly has not yet been enacted into law.

25   And I think this Court's normal

1   practice is to decide cases before it based on

2   the law as it exists, rather than waiting for

3   an uncertain legislative process.

4   And as to the --

5   JUSTICE KAGAN: Mr. Dreeben --

6   MR. DREEBEN: If I can just make one

7   final point on this.

8   JUSTICE KAGAN: Please.

9   MR. DREEBEN: As to the bill itself,

10   it does not retrench on the authority that the

11   government says is part of the legal fabric

12   here today. It actually endorses in an

13   unqualified manner the government's ability to

14   get information from a provider over whom it

15   has jurisdiction, regardless of the location of

16   the data.

17   It goes on to provide very useful

18   mechanisms for bilateral cooperation that will

19   facilitate other nations' ability to get

20   information from our providers and our ability

21   to get information from their providers with

22   safeguards.

23   But those are supplementary

24   protections that do not exist apart from the

25   fundamental 2703 obligation, which, I would

1   add, does have built-in protections to address

2   Justice Ginsburg's concerns.

3   Lower courts have confronted this

4   problem in a variety of other contexts. This

5   is not a new problem. In the banking area, the

6   government has been very active in putting

7   subpoenas on branch offices of foreign banks

8   that have access to --

9   JUSTICE GORSUCH: Mr. Dreeben, you

10   used the word subpoena, and -- and we've talked

11   about that a lot. And could you help me out

12   with the fact that when we're focusing on the

13   text, here the statute uses the word warrant,

14   which typically has a very limited and narrow

15   understanding territorially.

16   MR. DREEBEN: Yes.

17   JUSTICE GORSUCH: Unlike subpoenas.

18   MR. DREEBEN: Yes.

19   JUSTICE GORSUCH: And elsewhere in the

20   statute Congress used the word subpoenas.

21   MR. DREEBEN: Yes.

22   JUSTICE GORSUCH: So we know it knew

23   the difference.

24   MR. DREEBEN: Yes.

25   JUSTICE GORSUCH: Help me out with

1 that.

2   MR. DREEBEN: Okay. So I'm glad that

3 you brought up the text, because I think the

4 text is actually the government's friend here.

5   What the statute does is create

6 obligations of disclosure. It puts an

7 obligation on a provider to make disclosure.

8   What a warrant does, if it's in its

9 ordinary form, under Rule 41 of the Federal

10 Rules of Criminal Procedure, apart from this

11 statute, a warrant is a authorization to a law

12 enforcement officer to go in and search.

13 Doesn't need the cooperation of anybody.

14 Doesn't put the obligations to do anything on

15 anybody else. It puts the government in the

16 driver's seat.

17   This statute says --

18   JUSTICE GORSUCH: It doesn't do that.

19 I got you. But it uses the word warrant. So

20 what are we supposed to make of that?

21   MR. DREEBEN: I think what you make of

22 it is that the structure of the statute

23 provides three mechanisms for the government to

24 obtain disclosure: A subpoena; a 2703(d)

25 order, which is the intermediate form of

1   process that's at issue in the Carpenter case;

2   and a warrant.

3   And those three different instruments

4   correlate with the different levels of

5   sensitivity of information that Congress

6   perceived and, therefore, it ratcheted up the

7   showing that the government had to make in

8   order to get the disclosure order.

9   And so instead of saying just go get a

10   warrant, it says get a warrant using the

11   procedures of Rule 41, not all of Rule 41. The

12   territorial limitations of Rule 41 are not

13   incorporated into the statute. In fact, the

14   statute has its own territorial provision which

15   provides for nationwide service of disclosure

16   orders.

17   And it goes on to specify that this

18   disclosure obligation applies regardless of the

19   instrument, be it subpoena, 2703, or a warrant.

20   It all falls on the provider to make

21   disclosure.

22   And I think that that's an important

23   fact because when you have an order to a

24   provider, it allows the provider to do what my

25   friend here did: Come into court and make an

 1   ex-ante objection before the instrument is

 2   executed.

 3   With a warrant, parties don't get that

 4   opportunity. Under United States versus

 5   Grubbs, the government shows up with a warrant.

 6   The citizen's obligation is to comply.

 7   It also ensures that -- that the --

 8   that the recipient has the obligation to raise

 9   various objections about burdensomeness, which

10   are also features associated with subpoenas,

11   not warrants.

12   And, finally, it avoids the

13   intrusiveness of a warrant. A warrant allows

14   the government to just come right in. If we

15   had a warrant, and we could get a Rule 41

16   ordinary warrant if we wanted to, we would go

17   to Microsoft headquarters and ask the gentleman

18   sitting at the keyboard to step aside and sit

19   down and do the work ourselves.

20   But we don't do that under 2703. And

21   Congress didn't intend that we do that. What

22   Congress intended was that we have the ability

23   to compel providers to provide information.

24   And the warrant then addresses the

25   customer's privacy interests. So the court

1   below thought that two things were going on:

2   One was we were actually executing a warrant

3   overseas. That's not true. We're putting an

4   obligation on a domestic provider to comply

5   with a domestic court order with information

6   from wherever it's drawn.

7   And, second, the court below thought

8   that we were invading privacy overseas.

9   There are two fallacies I think in the

10   view that this is a case about privacy. It's

11   not a case about privacy.

12   The government has the gold standard

13   of an instrument to address privacy interests

14   here: a probable-cause-based warrant issued by

15   a judge that describes with particularity what

16   we want. That is the hallmark in our domestic

17   system of how privacy interests are addressed.

18   JUSTICE BREYER: Well, I don't -- I

19   don't know if you want to --

20   JUSTICE ALITO: Mr. Dreeben, do you

21   think that -- do you think there's anything --

22   that the Stored Communications Act prevents you

23   from obtaining this information in either of

24   the two conventional ways that you mentioned?

25   One, by getting a grand jury subpoena. If the

         1   Stored Communications Act simply doesn't apply

         2   here, could you go to a grand jury and get a

         3   grand jury subpoena or, two, conduct the kind

         4   of search that you just referred to? And if

         5   you did that, would Microsoft have any

         6   opportunity to contest that search?

         7   MR. DREEBEN: So, if we got a ordinary

         8   conventional warrant under Rule 41, Microsoft

         9   does not have an ex-ante opportunity to contest

        10   the search. The government goes in and it

        11   takes control of what property it needs to in

        12   order to conduct the search.

        13   The grand jury subpoena, I think, is a

        14   little bit of a more difficult question because

        15   the question would be whether 2703 meant to

        16   occupy the field in getting information from

        17   providers or instead left us free to use grand

        18   jury subpoenas in areas that aren't covered by

        19   2703.

        20   What is clear, I think, though, is

        21   that 2703 was meant to build on categories of

        22   existing instruments, plus adding a new one of

        23   Congress's own device. The subpoena instrument

        24   is useful for us in certain circumstances for

        25   the content of information under the way that

1   Congress wrote the statute if we give notice to

2   the person whose privacy interests are

3   implicated.

4   It also allows us to get very basic

5   subscriber information. We don't have to go to

6   a court first. We just issue the instrument.

7   The provider has to make disclosures.

8   JUSTICE ALITO: Could I ask you one

9   other question? What is happening when these

10   orders are sought now outside of the Second

11   Circuit? I mean, there's been talk about

12   leaving things alone, but is the rest of the

13   country going -- are the judges everywhere in

14   the country going to follow what the Second

15   Circuit decided? Are they doing that, or are

16   they continuing to issue the kinds of orders

17   that were issued in the past?

18   MR. DREEBEN: Every district court

19   that has written an opinion outside of the

20   Second Circuit has rejected the Second

21   Circuit's approach, and the United States is

22   continuing to compel information from service

23   providers, regardless of where they store it.

24   And in the case of providers like

25   Google, algorithms enable them to move

    1   information around the globe in order to

    2   maximize the efficiency of their system. And

    3   much of the information that we're getting is

    4   coming from overseas. And we have heard no

    5   protests from foreign governments.

    6   JUSTICE ALITO: What is happening when

    7   these district courts outside of the Second

    8   Circuit are issuing these orders? The Internet

    9   service providers are not appealing?

   10   MR. DREEBEN: I think that in some

   11   cases, there are appeals that are on hold

   12   pending this Court's disposition of this issue,

   13   so it's not going to go away. And if Congress

   14   doesn't enact legislation, we will be here in

   15   the exact position we are today, stymied in the

   16   Second Circuit, but getting the exact same

   17   information from providers all over the country

   18   in the rest of the country. And it's

   19   information that's extremely vital to criminal

   20   law enforcement because so much criminal law

   21   enforcement today is international.

   22   JUSTICE BREYER: I see the problem, I

   23   think, but what I don't see yet -- maybe I just

   24   have to go back and study it -- is -- is your

   25   answer to Justice Gorsuch's question, which has

1   been bothering me on both sides. They're with

2   you on this, you know, but I look at the

3   language of the statute and the statute says:

4   A government entity may require the disclosure

5   by a provider of electronic communication only

6   pursuant to a warrant issued using the

7   procedures described in the Federal Rules of

8   Criminal Procedure. Right?

9   MR. DREEBEN: Yes.

10   JUSTICE BREYER: That's what it says.

11   MR. DREEBEN: Yes.

12   JUSTICE BREYER: So then I go to the

13   Federal Rules of Criminal Procedure, and there

14   the first thing I discover is you ask a

15   magistrate, and it says: A magistrate judge

16   with authority in the district has authority to

17   issue a warrant to search for and seize a

18   person or property located within the district.

19   All right? Now, so that's what you

20   did. You went to this person, a magistrate, I

21   think.

22   MR. DREEBEN: No, that's not what we

23   did.

24   JUSTICE BREYER: Oh, you went to the

25   district judge?

1   MR. DREEBEN: We went to the district

2   court --

3   JUSTICE BREYER: So it's the same

4   problem. It's the same -- isn't it?

5   MR. DREEBEN: Well, it's a slightly

6   different problem, Justice Breyer, and I think

7   that I can help clear up a little bit of this.

8   JUSTICE BREYER: Yeah. Okay.

9   MR. DREEBEN: There are two angles of

10   it. The most basic one is that the Stored

11   Communications Act itself has a jurisdictional

12   provision that allows the government to go to a

13   variety of places to get warrants. It can go

14   to the district where the crime is being

15   investigated --

16   JUSTICE BREYER: Yeah.

17   MR. DREEBEN: -- and that court has

18   nationwide authority. It's not trammeled by

19   Rule 45.

20   JUSTICE BREYER: But is that what you

21   did? What did you do here?

22   MR. DREEBEN: We did that here. We

23   did that here. This is an investigation being

24   conducted out of one district --

25   JUSTICE BREYER: Okay. Okay. Second

1   question is -- maybe it's not this case, but

2   what happens if you go to Microsoft and you

3   ask, say, some for -- for some bank records

4   that are in Italy and, in fact, Italy does have

5   a law, we imagine, which says absolutely no

6   bank record can be taken by any other person

7   without some special thing under the MLAT or

8   something.

9   MR. DREEBEN: Yes.

10   JUSTICE BREYER: And what happens

11   then?

12   MR. DREEBEN: So this is a very common

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

14   JUSTICE BREYER: All right. So what

15   is the answer?

16   MR. DREEBEN: The answer is that

17   courts conduct a comity analysis. They look to

18   the Restatement of Foreign Relations --

19   JUSTICE BREYER: Okay. So the answer

20   is that, which many amici suggest to us, that

21   what should be done in such a case is you go to

22   the magistrate or the judge and you say, judge,

23   I want you to look at the factors of comity.

24   And one of them will be, if there is --

25   MR. DREEBEN: Yes.

1   JUSTICE BREYER: -- which you say is

2   not here --

3   MR. DREEBEN: Yes.

4   JUSTICE BREYER: -- this Italian law,

5   if there is --

6   MR. DREEBEN: Yes.

7   JUSTICE BREYER: -- which says you

8   can't bring it.

9   MR. DREEBEN: Yes.

10   JUSTICE BREYER: So you -- so perhaps

11   there's agreement, we'll see, about what should

12   be done, and this new law proposes that.

13   MR. DREEBEN: Well, I think what's

14   more --

15   JUSTICE BREYER: Right.

16   MR. DREEBEN: -- radical is that

17   Microsoft's position is that no court ever gets

18   to ask the question. If the data is stored

19   overseas, we're just out of luck. We can't

20   even ask a court for an order that would

21   require its production.

22   They haven't asserted that it would

23   violate foreign law in order for them to comply

24   with the order that we obtained in this case.

25   Nobody has actually pointed concretely to a --

1   JUSTICE KAGAN: But you are agreeing,

2   Mr. Dreeben, that a court in that circumstance

3   should conduct a comity analysis?

4   MR. DREEBEN: Yes.

5   JUSTICE KAGAN: And if you are, what

6   would that look like and when would it occur?

7   MR. DREEBEN: Well, in our view, it

8   would occur at the contempt stage, after the

9   government procures an order, if it seeks to

10   impose sanctions on a party for noncompliance.

11   That's roughly the model that this Court used

12   in Societe Internationale versus Rogers, a 1958

13   decision that squarely posed the question of

14   whether a party over whom a U.S. court had

15   jurisdiction could be ordered to produce

16   documents that were located in Switzerland when

17   Swiss law had a blocking statute.

18   And the Court had no problem with the

19   issuance of the order, but it had a great deal

20   of problem with failure to conduct any comity

21   analysis that took into account possible

22   conflicts with foreign law.

23   And that same framework was applied by

24   lower courts when they encountered grand jury

25   subpoenas seeking financial information located

1   in foreign countries -- states, and there was

2   an assertion of a conflict with foreign law.

3   So there's nothing new about this

4   problem. It's a problem that courts have been

5   grappling with for decades, quite successfully.

6   And what's more remarkable is it's never come

7   up under the Stored Communications Act. We

8   have had no protests, either before or after

9   Microsoft, and no litigation by a party, either

10   before or after Microsoft, that said this order

11   would violate foreign law.

12   JUSTICE KAGAN: May I take you back to

13   the language of the statute? Most of your

14   argument in your brief focuses on 2703. And

15   you say --

16   MR. DREEBEN: Yes.

17   JUSTICE KAGAN: -- we should just

18   focus on 2703. And I'm -- I'm -- I'm not going

19   to argue with you one way or the other on that,

20   but I want to get your view, actually, of what

21   the focus of 2701 and 2702 is.

22   MR. DREEBEN: So --

23   JUSTICE KAGAN: If you do expand your

24   field of vision and -- you know, what would you

25   say there Congress was --

1   MR. DREEBEN: So 2701 is a statute

2   that blocks access. It's a protection against

3   hackers. And we think that is a domestically

4   focused statute, but it would reach foreign

5   conduct that hacked into a computer located in

6   the United States.

7   JUSTICE KAGAN: The computer is

8   here --

9   MR. DREEBEN: Yes.

10   JUSTICE KAGAN: -- but the hacker is

11   overseas?

12   MR. DREEBEN: Yes. Yes. Because the

13   conduct that's the focus of 2701 would be here.

14   2702 is a much more difficult statute. We have

15   not taken a position in this Court on its

16   focus. It prohibits certain divulgences of

17   information by providers.

18   We've been willing to assume for

19   purposes of this case that its focus mirrors

20   2703 and addresses only domestic disclosures,

21   but that only puts us in the same position as

22   Microsoft, with one difference. Microsoft's

23   theory is that if it moves information abroad,

24   since storage is the only thing that counts,

25   it's then free to disclose that information to

1   the world, to sell it, to do anything it wants

2   free from U.S. law.

3   The only thing that Microsoft adds to

4   that picture is that the only person who can't

5   get it is the United States under lawful

6   process. And we think that that's wrong and

7   that the Court should reverse that judgment.

8   If I could save the rest of my time

9   for rebuttal.

10   CHIEF JUSTICE ROBERTS: Thank you,

11   counsel.

12   Mr. Rosenkranz.

13   ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

14   ON BEHALF OF THE RESPONDENT

15   MR. ROSENKRANZ: Mr. Chief Justice,

16   and may it please the Court:

17   I'll start where Justice Kennedy

18   started, which is where we all agree that the

19   Stored Communications Act is limited to the

20   United States. Yet the government wants to use

21   the act to unilaterally reach into a foreign

22   land to search for, copy, and import private

23   customer correspondence physically stored in a

24   digital lockbox, any foreign computer where

25   it's protected by foreign law.

1   Now that is a foreign scenario, not a

2   --

3   JUSTICE GINSBURG: Mr. Rosenkranz,

4   we're told, and -- and correct me if it's

5   incorrect, that until this very case Microsoft

6   was complying with these disclosure orders.

7   This case is the first time it

8   objected, but there were past efforts of the

9   same kind and Microsoft disclosed the contents

10   of the communications. Is that so?

11   MR. ROSENKRANZ: Yes, Your Honor, but

12   what -- I just -- I want to make sure that you

13   -- that the Court understands, Justice

14   Ginsburg, that this is a very new phenomenon,

15   this whole notion of cloud storage in another

16   country.

17   We didn't start doing it until 2010.

18   So the fact that we analyzed what our legal

19   obligations were and realized, wait a minute,

20   this is actually an extraterritorial act that

21   is unauthorized by the U.S. Government, the

22   fact that we were sober-minded about it

23   shouldn't be held against us.

24   CHIEF JUSTICE ROBERTS: Well, but it

25   -- it seems to me you're assuming the answer to

 1   the question. The government's position, of

 2   course, is it's not an extraterritorial act.

 3   They're going to Redmond, Washington, and

 4   saying you have to turn this over to us.

 5   It's not the government's fault that

 6   it's located overseas. I suspect the

 7   government doesn't care. Just like any other

 8   subpoena where you go, and Mr. Dreeben used the

 9   example of funds, but it could be any other

10   evidence.

11   And if there is a particular objection

12   by the government where the information is

13   located, they're free to raise that and the

14   government will have to deal with that, but I

15   gather that's not the situation here.

16   MR. ROSENKRANZ: Well, Your Honor,

17   first, it is the situation here, but let me

18   answer the question directly.

19   The reason that this is an

20   extraterritorial act goes right to the heart of

21   why we have a presumption against

22   extraterritoriality. No one disputes that

23   countries across the world believe that they

24   have the sovereignty and the sovereign right to

25   pass their own laws governing the access to

1   e-mails stored on their soil.

2   And here we are reaching into their

3   lands and imposing our U.S. position on who

4   gets access to e-mails on their soil.

5   JUSTICE KENNEDY: What -- why should

6   we have a binary choice between a focus on the

7   location of the data and the location of the

8   disclosure? Aren't there some other factors,

9   where the owner of the e-mail lives or where

10   the service provider has its headquarters?

11   MR. ROSENKRANZ: No, Justice --

12   JUSTICE KENNEDY: Or do we have --

13   we're forced to this binary choice?

14   MR. ROSENKRANZ: Your Honor, that is a

15   consequence of this Court's analysis in

16   Morrison, which no one is challenging. But,

17   so, yes, you've got to figure out what the

18   focus is at step 2.

19   No one's arguing for any focus other

20   than the government's argument that it focuses

21   on disclosure and our argument that it focuses

22   on storage. And I want to be sure to get to

23   that argument.

24   If you -- if you look at this statute,

25   the focus is on the storage. This is the

 1   Stored Communications Act. At the most basic

 2   level, that's what the focus is. And it's more

 3   specifically on securing communications sitting

 4   in storage.

 5   Congress confronted this brave new

 6   world of people entrusting their communications

 7   to third-party storage providers. It wanted to

 8   make sure that Americans felt comfortable

 9   putting their communications there.

10   JUSTICE ALITO: Mr. Rosenkranz, let me

11   -- this is what troubles me. It would be good

12   if Congress enacted legislation that modernized

13   this, but in the interim, something has to be

14   done.

15   So what happens in this situation? I

16   mean, there's an American citizen who's being

17   investigated for crimes committed in the United

18   States. The government shows probable cause

19   that there is evidence of this crime in e-mails

20   that are in the possession of an American

21   Internet service provider. And there they have

22   an urgent need for the information.

23   But the provider has chosen to store

24   the data overseas and, in fact, in some

25   instances, has actually broken it up into

1   shards so that it's stored not just in one

2   foreign country but in a number of foreign

3   countries.

4   Now what -- what happens in that

5   situation? There is no way in which the

6   information can be obtained except by pursuing

7   MLATs against multiple countries, a process

8   that could -- that will take many months, maybe

9   years? What happens?

10   MR. ROSENKRANZ: Well, Justice Alito,

11   first, that is not so far as certainly -- so

12   far as this record is concerned and not so far

13   as any record before any court is concerned

14   what actually happens.

15   No one actually breaks up the e-mail

16   into shards, certainly not in this case.

17   That's not what Microsoft does. And that is

18   not, it turns out, what Google does either --

19   excuse me, that is not what the other service

20   provider does either in the context of these

21   other cases that are being heard here.

22   JUSTICE ALITO: Well, we were told

23   that that's what Gmail does. That's not

24   correct?

25   MR. ROSENKRANZ: No, Your Honor,

1   that's not correct.

2   JUSTICE ALITO: All right. Well, all

3   right. The service provider has chosen to

4   store it overseas. There's no way to get the

5   information, other than through these -- these

6   very time-consuming MLAT procedures?

7   MR. ROSENKRANZ: Well, Your Honor, the

8   way to get the information is through MLATs,

9   and the only evidence in this record about

10   MLATs is that MLATs do work. If it's urgent

11   for the government, the other governments

12   respond urgently.

13   JUSTICE BREYER: Just -- there are two

14   parts to this in my mind. One is the language,

15   which I'll have to work my way through. You

16   heard the answer to that.

17   The other is a practical way of

18   dealing with the foreign law. Now the

19   government suggested what's impractical about

20   this, in any situation where, say, Microsoft

21   thinks that there really is a problem here

22   because of a foreign law, which might forbid it

23   or a variety of reasons, what you do is you --

24   Microsoft goes to the magistrate and says,

25   look, there's a problem here because of the law

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1    of other countries, because of this, because of

2    that, and the magistrate takes that into

3    account.

4             That sounds to me like a -- and then

5    maybe Congress will pass this and we'll have

6    standards in it and it'll be much more helpful.

7    But -- but even without that, what's wrong with

8    that?

9             MR. ROSENKRANZ:  The problem with

10   that, Justice Breyer, is that that's not the

11   statute Congress passed.

12            The statute Congress passed is a

13   statute that does not call for this sort of

14   weighing --

15            JUSTICE BREYER:  All right.  You're

16   giving a conceptual answer, which I think is

17   fine, but -- but I want to know, if the

18   language permits it, can we read this statute

19   to adapt to the modern condition and, if we

20   can, then shouldn't we do it that way, because

21   it would be practical.  Everybody would get a

22   fair shot.  You'd take foreign interests into

23   account.  Maybe you'd use Aerospatiale

24   standards.

25            One brief tells us they're not good
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        1   enough, but it didn't say what we should use,

        2   but -- but the -- the -- the -- you see my

        3   question?

        4   MR. ROSENKRANZ: I do understand your

        5   question, Justice Breyer, and the answer is

        6   that is simply not the statute that Congress

        7   wrote. And the job of this Court is to

        8   interpret the statute Congress wrote, rather

        9   than innovating and adopting its own new

       10   standard.

       11   Now, by the way, the CLOUD Act that --

       12   that has gotten some conversation this morning,

       13   does have various factors that might be

       14   weighed. That's Congress's decision if

       15   Congress wants to do that and it's a decision

       16   that applies in certain --

       17   JUSTICE SOTOMAYOR: Mr. Rosenkranz --

       18   JUSTICE KENNEDY: Under this act,

       19   could you voluntarily disclose this to the

       20   government, or would that be a violation of

       21   2702?

       22   MR. ROSENKRANZ: It would not be a

       23   violation of 2702 if we voluntarily did

       24   something, but it would be a violation of our

       25   obligations to our customers.

1   JUSTICE KENNEDY: Well, if that's so,

2   then why can't the government just obtain this

3   by a subpoena?

4   MR. ROSENKRANZ: Well, so that is

5   another big question. This is a statute in

6   which the -- or a scenario in which the

7   government has used a warrant.

8   A subpoena could not reach a lot of

9   these e-mails because a subpoena would not

10   reach e-mails that are in storage for less than

11   180 days under this statute and, under a Sixth

12   Circuit decision, couldn't reach them at all,

13   that is, individual's private --

14   JUSTICE KENNEDY: You could

15   voluntarily disclose, but they couldn't have a

16   subpoena?

17   MR. ROSENKRANZ: I'm sorry?

18   JUSTICE KENNEDY: It seems odd to me

19   that if -- you could voluntarily disclose, but

20   they couldn't ask for a subpoena. That doesn't

21   quite mesh, does it?

22   MR. ROSENKRANZ: Well, Your Honor, my

23   point is --

24   JUSTICE KENNEDY: I recognize we have

25   a difficult statute here.

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 1              MR. ROSENKRANZ:  Your Honor, if we

 2   voluntarily disclosed, it would be a violation

 3   of our obligations to our customer.  It would

 4   also, by the way, in this context, be a

 5   violation of European law.

 6              Now I just -- I want to back up,

 7   though.  There are a lot of --

 8              JUSTICE GORSUCH:  Mr. Rosenkranz, do

 9   you agree that after 180 days the government

10   could get this material with a subpoena?

11              MR. ROSENKRANZ:  Absolutely not, Your

12   Honor.  That is -- I -- I agree with you that

13   that is what the statute says, but it raises

14   the same exact problems of extraterritoriality

15   because -- I mean, the only thing that we

16   wouldn't be able to do is rely on the word

17   "warrant" and all of the territorial

18   implications of that word, but all of our other

19   answers would be the same.

20              The truth is other countries --

21              JUSTICE GINSBURG:  So what actions --

22   what actions would Microsoft have to take

23   extraterritorial -- extraterritorially to

24   comply with the -- in this case, the warrant?

25   What would Microsoft have to do outside the
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1   United States?

2   MR. ROSENKRANZ: Well, so let's start

3   with the fact that these e-mails are stored

4   outside the United States. They are stored in

5   Ireland. And the government is asking us to go

6   and fetch them from Ireland.

7   They are subject to protections in

8   Ireland. So what happens in Ireland? What

9   happens in Ireland is really a remote control

10   is actually working a mechanism where these

11   e-mails are stored on a hard drive in a

12   facility under protection of foreign law, and a

13   -- a reader, which is a physical piece of

14   hardware, reads the digital ones and zeros off

15   of it, which are also physical manifestations.

16   It's then packaged up and it runs through

17   Ireland on hard wires and over the Atlantic.

18   This is a quintessentially extraterritorial

19   act.

20   Now I was just saying there are a lot

21   of complicated questions in this case, but the

22   decisive point and the point that Justice

23   Gorsuch was making earlier is that the e-mails

24   are stored in Ireland and the DEA is forcing us

25   to fetch them.

1   JUSTICE SOTOMAYOR: I'm sorry, I don't

2   -- perhaps it's my technological ignorance.

3   How is it in a locked box? If I'm trying to

4   mentally imagine this, what has to happen? You

5   know, I press a button in the U.S. and it

6   accesses directly the information in Ireland,

7   or does something have to happen in Ireland?

8   MR. ROSENKRANZ: Something has to

9   happen in Ireland. These e-mails, Justice

10   Sotomayor, exist only in Ireland. And what

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

12   JUSTICE KENNEDY: Something has to

13   happen electronically or with human

14   intervention?

15   MR. ROSENKRANZ: No -- no human

16   intervention -- there's a human --

17   JUSTICE KENNEDY: So someway you push

18   the button in Washington?

19   MR. ROSENKRANZ: Yes.

20   JUSTICE KENNEDY: Then, obviously,

21   something happens in Ireland on the computer.

22   But does some person have to be there?

23   MR. ROSENKRANZ: A human being doesn't

24   have to do it. It is a robot. And if you --

25   if you sent a robot into a foreign land to

1   seize evidence, it would certainly implicate

2   foreign interests.

3   And so if the DEA -- just let me just

4   draw out this example.

5   JUSTICE SOTOMAYOR: I -- I'm sorry,

6   I'm -- I'm now -- I guess my imagination is

7   running wild.

8   (Laughter.)

9   JUSTICE SOTOMAYOR: How -- how does --

10   who tells the robot what to do and what does

11   the robot do?

12   MR. ROSENKRANZ: A human being in,

13   let's say, Redmond tells the robot -- it sends

14   the robot instructions. And, by the way, the

15   computer scientists' amicus brief spells this

16   out in great detail.

17   JUSTICE SOTOMAYOR: Okay.

18   MR. ROSENKRANZ: What happens then?

19   It interfaces with a hardware computer in a

20   hardware facility. It spins a disk. It looks

21   for the e-mail on that disk after verifying

22   certain protocols. It reads physical

23   manifestations on magnets of the ones and

24   zeros, which are like letters in the alphabet.

25   And then it copies them onto another disk. It

1   then safeguards them and sends them back here.

2   Now, if the DEA sat at a computer in

3   D.C. and hacked into our servers in Ireland,

4   everyone agrees that that would be a search and

5   seizure in Ireland. If the government did what

6   Mr. Dreeben described, executed a search

7   warrant itself, pushed us aside from our --

8   from the operator in Redmond, pushed them aside

9   and said I'll take it from here, that search

10   would be in Ireland.

11   All that's happening now is that the

12   government is requiring us to do something that

13   it would want to do --

14   JUSTICE GORSUCH: Do you dispute that

15   the government could issue a warrant to go

16   ahead and do exactly that in Redmond?

17   MR. ROSENKRANZ: The government could

18   issue a warrant -- I believe that's --

19   JUSTICE GORSUCH: Push you aside and

20   do the search in Redmond?

21   MR. ROSENKRANZ: This warrant

22   authorizes it. There's nothing --

23   JUSTICE GORSUCH: No, could -- could

24   the government do that outside of the Stored

25   Communications Act? Could the government issue

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  1      a classic search warrant, go into Redmond, and

  2      conduct a search on the computers in Redmond?

  3                MR. ROSENKRANZ:  It would be an

  4      extraterritorial search; it would, therefore,

  5      be illegal.  But if the government did that,

  6      there is no question that that search is going

  7      on in Ireland and the government --

  8                JUSTICE ALITO:  And what could -- and

  9      what could you do about it?

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

 11      could sue the government and say that you can't

 12      come onto our property and -- and engage in

 13      these unconstitutional -- in these

 14      extraterritorial acts.  But my -- my point here

 15      is --

 16                JUSTICE ALITO:  What kind of --

 17                CHIEF JUSTICE ROBERTS:  Counsel --

 18                JUSTICE ALITO:  -- what kind of suit

 19      would that be?  But anyway, never mind.

 20                CHIEF JUSTICE ROBERTS:  -- there --

 21      there is nothing under your position that

 22      prevents Microsoft from storing United States

 23      communications, every one of them, either in

 24      Canada or Mexico or anywhere else, and then

 25      telling their customers:  Don't worry if the
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1   government wants to get access to your

2   communications; they won't be able to, unless

3   they go through this MLAT procedure, which --

4   which is costly and time-consuming. Could you

5   provide that service to your customers?

6   MR. ROSENKRANZ: Is it theoretically

7   possible, yes, but it would never happen. And

8   the reason it would never happen is that we

9   have 200 million active customers here in the

10   United States. They -- this is really a

11   tail --

12   CHIEF JUSTICE ROBERTS: Well -- I'm

13   sorry. In -- in what way is their service

14   seriously compromised if the server is

15   overseas?

16   MR. ROSENKRANZ: Well, there's a basic

17   physical property at issue here that

18   underscores that this is not just some random

19   act of putting e-mails in one place or another.

20   There's this physical phenomenon called

21   latency. It actually slows down the e-mail

22   service for those 200 --

23   CHIEF JUSTICE ROBERTS: Okay. So you

24   -- so they have to wait a little longer, I

25   assume quite -- quite a short while longer, but

1   they're protected from any government intrusion

2   into their e-mail communications.

3   MR. ROSENKRANZ: Your Honor, these

4   facilities are half a billion dollar

5   facilities. We build them in order to make

6   sure that our customers get the best possible

7   service. Even a microsecond -- even a fraction

8   of a second's delay actually costs us

9   customers. And so we would --

10   CHIEF JUSTICE ROBERTS: Well, but you

11   might gain customers if you can assure them, no

12   matter what happens, the government won't be

13   able to get access to their e-mails.

14   MR. ROSENKRANZ: Your Honor, so this

15   is the -- the tail-wagging-the-dog problem. We

16   have 200 million customers who are relying on

17   the best service here in the United States that

18   can possibly be brought.

19   The government serves on us, say -- I

20   mean, these -- these statistics are public,

21   60,000 requests for information in the United

22   States. The percentage of those that relate to

23   e-mails abroad, it's 54 of them out of 60,000.

24   It's 99.9 --

25   CHIEF JUSTICE ROBERTS: I know, but my

          1   basic point, and I'm not sure that you've

          2   answered it, is that there is nothing that

          3   prevents Microsoft -- in other words, an e-mail

          4   from me to somebody on the other side of the

          5   building that is going to be stored somewhere

          6   else would be protected from disclosure, if

          7   people, the government, wanted access in the

          8   normal course of a criminal investigation where

          9   they have a warrant establishing probable

         10   cause. From here to the next block, that is

         11   going to be protected from disclosure to the

         12   government?

         13   MR. ROSENKRANZ: And, Your Honor, my

         14   answer is an equally practical one, and that

         15   is, if customers do not want their e-mails to

         16   be seized by the government, they don't use

         17   Microsoft's services. They don't use

         18   Microsoft's services whether they are in Canada

         19   or Mexico because those are available by MLATs.

         20   What do they do? They use services

         21   that are sold specifically with the -- with the

         22   promise that we have no U.S. presence, and,

         23   therefore, you can trust us to keep it under

         24   lock and key from the U.S. Government.

         25   By the way, you probably all have cell

 1   phones with this feature. It is a feature that

 2   scrambles your instant messaging and that

 3   scrambles it in a way that no government can

 4   get their hands on it.

 5   So it's not like this is a device that

 6   is available only through Microsoft's services.

 7   If people want to break the law and put their

 8   e-mails outside the reach of the U.S.

 9   Government, they simply wouldn't use Microsoft.

10   JUSTICE ALITO: Is it correct that we

11   don't know the nationality of the individual

12   who has this e-mail account?

13   MR. ROSENKRANZ: Yes, that is correct,

14   Justice Alito.

15   JUSTICE ALITO: Well, if this person

16   is not Irish and Ireland played no part in your

17   decision to store the information there and

18   there's nothing that Ireland could do about it

19   if you chose tomorrow to move it someplace

20   else, it is a little difficult for me to see

21   what Ireland's interest is in this.

22   MR. ROSENKRANZ: Your Honor, Ireland's

23   interests are the same interest of any

24   sovereign who protects information stored where

25   -- within their domain.

1   We protect information stored within

2   the United States and we don't actually care

3   whose information it is because we have laws

4   that guard the information for everyone.

5   JUSTICE ALITO: And I guess the point

6   is when we're talking about this information,

7   which, all right, yes, it -- it physically

8   exists on one or more computers somewhere, but

9   it doesn't have a presence anyplace in the

10   sense that a physical object has a presence

11   someplace.

12   And the Internet service providers can

13   put it anywhere they want and move it around at

14   will. The whole idea of territoriality is

15   strained. Wouldn't you agree with that?

16   MR. ROSENKRANZ: I would not agree

17   with that, Justice Alito, and here is why:

18   First I disagree with the premise.

19   This -- these e-mails have a physical

20   presence. They are actually on a hard drive.

21   Are they movable? Yes. But letters are

22   movable as well.

23   And they are under protection of

24   foreign laws, which, by the way, are really

25   quite robust. So moving -- moving just back to

1   the -- to the basic question of focus, the

2   common thread that ties together all of these

3   cross-reference provisions of the SCA, the

4   common thread is stored communications that are

5   in electronic storage.

6   That is what ties these provisions

7   together and that is the focus of --

8   JUSTICE KAGAN: Well, why do we need

9   to look for a common thread? Why shouldn't we

10   just look at 2703 and ask what Congress was

11   trying to do in that section?

12   MR. ROSENKRANZ: Well, Your Honor,

13   even if you focus on 2703, and isolate it from

14   everything else, the first thing I would say is

15   even the government agrees that that's not what

16   you're supposed to do. You are at a minimum

17   allowed to look at how it relates to other

18   provisions.

19   The focus is still on protecting

20   e-mails in electronic storage from government

21   intrusion. It is not about --

22   JUSTICE KAGAN: Well, how do we know,

23   really? I mean, it seems as though we have a

24   choice between two things: one is what

25   Congress is doing is it's regulating the

 1   disclosure in the United States of electronic

 2   communications that are stored everywhere in

 3   the world. And that's what the government is

 4   saying.

 5   And you're essentially saying the

 6   opposite. What Congress was doing was to

 7   regulate the disclosure anywhere in the world

 8   of electronic communications that are stored in

 9   the United States.

10   I'm not sure how I pick between those

11   two from the face of the statute, whether it's

12   2703 or whether it's the broader statute. So

13   give me your best shot.

14   (Laughter.)

15   MR. ROSENKRANZ: Okay. So I -- I will

16   give you, if I may, I'll give you a couple

17   shots.

18   If we're only focusing on 2703,

19   Congress passed the 2703 because it wanted to

20   limit law enforcement access to a specific

21   category of e-mails. And that is what?

22   E-mails that are in electronic storage.

23   Congress was concerned that e-mails

24   shared with a service provider would lose all

25   Fourth Amendment protection under the

1   third-party doctrine. Congress did not need to

2   pass 2703 to author disclosure by a warrant.

3   Law enforcement already had access by a

4   warrant.

5   The focus was on enhancing the

6   security of e-mails that were in electronic

7   storage.

8   Now, back up and relate the various

9   provisions, 2701, 2702, 2703. I was saying

10   earlier at the most basic level this is the

11   Stored Communications Act. It's about securing

12   communications that are sitting in storage.

13   I was describing earlier this brave

14   new world that Congress was facing where it

15   wanted people to -- to understand that their

16   e-mails in electronic storage were safe.

17   CHIEF JUSTICE ROBERTS: If I -- but

18   you focus on the storage. 2703 is headed

19   Required Disclosure of Customer Communications

20   Or Records. And Congress put that heading in

21   the Act when it amended it.

22   And it seems to me that the government

23   might have a strong position there that the

24   statute focuses on disclosure. And disclosure

25   takes place in Washington, not in Ireland.

1   MR. ROSENKRANZ: Well, Your Honor,

2   2703 -- this goes back to Justice Kagan's

3   question -- it cannot be read in isolation from

4   2702. 2701 and 2702 are with 2703.

5   CHIEF JUSTICE ROBERTS: Well, 2702

6   says "voluntary disclosure of customer

7   communications or records." And that, too,

8   takes place in Washington, not Ireland.

9   MR. ROSENKRANZ: And so the answer,

10   Your Honor, is that -- that the Act was first

11   and fundamentally about protecting the

12   communications that were in electronic storage,

13   and so 2703 pairs with 2702.

14   Now, 2702 is about making sure -- so

15   2702, as the government has suggested, is about

16   making sure that the electronic -- the

17   electronic communications in electronic storage

18   are protected.

19   And 2703 is simply an exception to

20   2702.

21   JUSTICE BREYER: If your -- I'm going

22   to ask a technical thing to help me with that,

23   and do it no more than 15 seconds.

24   MR. ROSENKRANZ: Yes, Justice Breyer.

25   JUSTICE BREYER: What I did is I -- I

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 1    looked at the warrant which is in the record.

 2    And it's signed by James Francis, Magistrate

 3    Judge, Southern District, New York.  Is that

 4    right?

 5              MR. ROSENKRANZ:  Yes, Your Honor.

 6              JUSTICE BREYER:  Okay.  So then I went

 7    over to Rule 41, and I assumed it fell within

 8    B, A, or, what is it, it's -- it's B-1.  Am I

 9    right or do you know that well enough in your

10    head?

11              MR. ROSENKRANZ:  Yes, Your Honor.

12              JUSTICE BREYER:  Okay.

13              MR. ROSENKRANZ:  Let me hear you say

14    the question again.

15              JUSTICE BREYER:  If it fell within

16    B-1, it says that Mr. Francis, Judge Francis,

17    has authority to issue a warrant to search for

18    and seize a property located within the

19    district.

20              So that's how I got in by -- into my

21    linguistic problem of -- what's the answer?

22              MR. ROSENKRANZ:  Well, Your Honor, 27

23    -- the government has invoked 2703(a), which is

24    --

25              JUSTICE BREYER:  Yeah --
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        1   MR. ROSENKRANZ: -- the provision that

        2   requires a warrant.

        3   JUSTICE BREYER: -- and it says you're

        4   "only pursuant to a warrant issued using the

        5   procedures described in the Federal Rules of

        6   Criminal Procedure."

        7   MR. ROSENKRANZ: Yes, Your Honor.

        8   JUSTICE BREYER: So I said what is a

        9   warrant? It is judge Francis's warrant. He is

       10   in the Southern District of New York. I went

       11   to Rule 41, and there 41-B-1, which --

       12   MR. ROSENKRANZ: 41, yes.

       13   JUSTICE BREYER: Yeah, so-- so what's

       14   the answer to that? The answer says that Judge

       15   Francis -- this says that Judge Francis has

       16   authority to issue a warrant to search for

       17   property in New York.

       18   MR. ROSENKRANZ: Yeah, I -- I agree

       19   with you, Justice Breyer. And -- and warrants

       20   are distinctly territorial devices. They are

       21   not extraterritorial devices.

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

       23   JUSTICE KAGAN: I think the question

       24   --

       25   JUSTICE BREYER: But you didn't make

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 1    much of a point of this in your brief.

 2              (Laughter.)

 3              JUSTICE BREYER:  And so I suspect that

 4    -- that -- that it just can't be that easy,

 5    this case.

 6              MR. ROSENKRANZ:  No, Justice Breyer, I

 7    think we -- we certainly tried to make a point

 8    in our brief.

 9              JUSTICE ALITO:  No, but Mr. Rosenkranz

10    --

11              MR. ROSENKRANZ:  But this incorporates

12    --

13              JUSTICE ALITO:  -- I think the

14    question is this:  If this information were in

15    Redmond, Washington, would the magistrate judge

16    be unable to issue the order because Redmond,

17    Washington is not in New York?  That's the

18    question.

19              JUSTICE BREYER:  That's right.

20              MR. ROSENKRANZ:  Oh, he would not be

21    able to issue the warrant.  And it is not

22    because Redmond, Washington is not in New York.

23    It'S because warrants, although there is

24    nationwide ability to reach evidence within the

25    United States, warrants are not
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     1   extraterritorial.
     2   Now, just by way of -- of wrapping up,
     3   the government asks this Court to grant it an
     4   extraordinary power, and it's a power that
     5   Congress did not think it was granting law
     6   enforcement in 1986, and certainly did not
     7   intend to grant to every police officer and
     8   every sheriff's deputy anywhere in the country.
     9   Back then, if the police needed to
    10   gather evidence from all over the world, they
    11   would have to engage with law enforcement
    12   everywhere else in those countries.
    13   The Internet makes it possible now to
    14   reach a lifetime of correspondence for billions
    15   of people all across the world, but only
    16   Congress can grant that power.
    17   And this goes to Justice Ginsburg's
    18   point. Think about the questions that the
    19   Court has been wrestling with today. It's
    20   about the architecture of other providers.
    21   It's -- there were conversations about where
    22   the Internet is headed. There is conversations
    23   about whether this will kill the tech sector,
    24   how much of an international consensus there is
    25   about the sovereignty of data.

1   These are all questions that only

2   Congress can answer. Meanwhile, this Court's

3   job is to defer, to defer to Congress to take

4   the path that is least likely to create

5   international tensions.

6   And if you try to tinker with this,

7   without the tools that -- that only Congress

8   has, you are as likely to break the cloud as

9   you are to fix it.

10   If there are no further questions, I

11   -- I thank the Court for its attention. And we

12   respectfully request that the Court affirm the

13   Second Circuit.

14   CHIEF JUSTICE ROBERTS: Thank you,

15   counsel.

16   Two minutes, Mr. Dreeben.

17   REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

18   ON BEHALF OF THE PETITIONER

19   MR. DREEBEN: I have four quick

20   points, two technical and two substantive.

21   The technical point first is, Justice

22   Breyer, you asked what the authority of the

23   district court is. The authority of the

24   district court, in this case for a magistrate

25   judge, comes from, first, 2703, which entitles

 1   a court of competent jurisdiction to issue the

 2   relevant warrant in this case.

 3   This is on page 6A of the government's

 4   appendix to its brief. There is then a

 5   definition of a court of competent jurisdiction

 6   on page 12A of the appendix to the government's

 7   brief, which defines it to include any

 8   magistrate judge that has jurisdiction over the

 9   offense being investigated, as well as several

10   other bases.

11   This was a Patriot Act amendment

12   designed to expand the authority of courts to

13   issue orders.

14   The second technical question is the

15   one asked by Justice Kennedy on whether

16   Microsoft could voluntarily disclose this

17   information to the government. It couldn't.

18   It's barred by 2702 from making disclosures,

19   except as authorized by that statute.

20   And one of the exceptions is that the

21   government can proceed under 2703 to compel the

22   same information. So Microsoft is basically

23   claiming the authority, once it moves the

24   information overseas, to unilaterally disclose

25   it to anyone. But if it's in, you know,

1   responding to an order that's issued by the

2   United States, it says it has no obligation to

3   produce the information.

4   And then the substantive points here

5   are that this statute does, indeed, focus on

6   disclosure and not storage. 2703 begins by

7   requiring disclosure as to the variety of

8   categories of information that providers may

9   have, and it backs it up with at least three

10   more provisions that address disclosure.

11   Section E says there is no cause of

12   action for disclosing in accordance with the

13   statute. Section F allows the government to

14   issue preservation orders of the information to

15   be disclosed. And Section G discusses -- may I

16   complete the sentence?

17   CHIEF JUSTICE ROBERTS: Sure.

18   MR. DREEBEN: -- discusses the

19   execution of the warrant and it provides that

20   the government need not be there, which makes

21   this an instrument, not like a warrant that

22   allows us to conduct a search, but like a

23   subpoena or discovery order that places

24   obligations on parties over whom the Court has

25   jurisdiction. Thank you.

1   CHIEF JUSTICE ROBERTS: Thank you,

2   counsel. The case is submitted.

3   (Whereupon, at 11:22 a.m., the case

4   was submitted.)

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