No. 17-2

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICROSOFT CORPORATION,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE POLICING PROJECT AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Policing Project at New York University School of Law is dedicated to strengthening policing through democratic governance. The Project facilitates public input and engagement on policing policies and practices, with the twin aims of giving communities a voice in how they are policed and developing greater mutual trust between the police and the communities they serve. It writes rules, policies, and best practices for policing agencies, and is presently drafting model policies for the use of surveillance technologies. Its Director is the Reporter for the American Law Institute's *Principles of the Law: Policing*. The Project promotes transparency around policing by, among other things, helping departments get their policy manuals online. It also works with experts and policing agencies on groundbreaking cost-benefit studies of policing practices, from de-escalation training to vehicle pursuit policies. Across these domains, the Project's staff and externs work in close collaboration with police departments to effect policy change.

This is the first brief the Policing Project has submitted in any litigation. We do so here because this case implicates the Project's core principle: that, to the greatest extent possible, policing and surveillance practices ought to be governed by *ex ante* public

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[1] No counsel for a party has authored this brief in whole or in part, and no person or entity other than the amicus curiae or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Blanket consent letters on behalf of all the parties are on file with this Court.

deliberation about what law enforcement agencies can (and cannot) do in their efforts to ensure public safety. Citizens are more "secure in their persons, houses, papers, and effects," U.S. Const. amend. IV, when policing agencies—be they federal, state, or local—act with the authorization of their elected legislative representatives. At the same time, policing agencies and the people who work for them are able to discharge their duties more safely and more successfully with the trust that comes from democratic approval of their methods. This position has been recently and forcefully advanced by members of this Court. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 429–30 (2012) (Alito, J., concurring) ("A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."). In fact, it is a bedrock principle of American jurisprudence that legislative authorization for executive action is not just superior, but generally required. For that reason, the Policing Project believes courts ought not read into statutes new authorizations for executive action not contemplated by legislative bodies.

This is a case that calls clearly for this Court to insist upon the fundamental requirement of legislative authorization of law enforcement practices. The parties essentially agree that Congress did not consider (and could not have considered) the specific authorization here at issue—obtaining email off of foreign servers—when it enacted the Stored Communications Act in 1986. As this Court's recent decisions have stressed, it is not the role of the courts to correct congressional oversights or channel how the legislature might have addressed problems that it did not.

Doing so tends to short-circuit the democratic deliberation that precedes legislative action. Conversely, when courts refuse to read into statutes law enforcement authorizations that the legislature did not textually enact, they only return the question to the democratic process, and in fact compel the legislature to fulfill its role more actively and more precisely in this area of critical import to the liberties of the people. This case exemplifies how courts best serve democracy by declining to do Congress's job for it.

The Policing Project's perspective on this case is unique: Although we believe that Congress did not authorize the power the government seeks to exercise here, we care less about the specific practice at issue than the principle this Court should use to evaluate it. Whoever wins, this Court should make clear that the question is whether the legislature has expressly authorized the practice at issue; courts cannot begin from the premise that everything is permitted to law enforcement agencies that has not been expressly prohibited by the legislature. Accordingly, the Court should cast a skeptical eye on arguments that stretch narrow, decades-old statutory authorizations to reach new technologies or unforeseen contexts that Congress failed to cover expressly in the text it enacted.

SUMMARY OF ARGUMENT

The argument in this brief proceeds in three parts.

Part I begins with the bedrock principle of American government that executive officials—from the constable to the Commander-in-Chief—can act only pursuant to an authorization from the people's elected legislative representatives. This fundamental principle of legislative authorization means that the

starting point in a case like this one should be that executive officials lack power unless and until this Court is satisfied that Congress affirmatively provided it. Not only is this principle inherent in our system of government, but enforcing it also strengthens our democracy by bringing the judgment of accountable representatives to bear on how law enforcement officials do their jobs. Indeed, because the people's security from their government is most at stake in the context of surveillance and law enforcement, it is particularly important in this area to decline the executive's invitation to read statutes beyond what was legislatively authorized by the people's representatives. The bottom line is this: When evaluating a case like this one, this Court must proceed from the premise that executive law enforcement officials have only those powers that Congress expressly provided.

Part II explains that authorization is absent in this case. The parties principally dispute whether the practice at issue constitutes a domestic or foreign application of the Stored Communications Act, and we believe Microsoft has the better of that argument. But more important is the fact that *no one* argues that Congress clearly authorized the executive to take this kind of action—that much is evident from the fact that the government simultaneously is asking Congress to provide the power it also seeks from this Court. Congress wrote the SCA before the widespread use of personal email (let alone cloud storage), and it thus is unsurprising that the authorizations the executive seeks, in order to obtain information from email servers abroad, requires some indelicate manipulation of the statute's text. Even as Congress has amended the SCA in recent years, it has said

nothing about its application outside of the United States. This Court thus should decline to extend the requested authority to the executive, confident that Congress readily can provide authorization if the people's representatives deem it appropriate.

Part III explains why applying the legislative authorization principle to decline the government's invitation to plug up a statutory hole in a case like this one is both necessary and proper. It is necessary because, no matter how badly law enforcement wants or needs the power it seeks, it is not for courts to provide. It is not the courts' "job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). And it is proper because the only effect of applying the authorization principle is to return the issue to Congress for the democratic deliberation the question requires. Notably, this Court has taken this precise approach in the past in the context of authorizing government surveillance. *See infra* pp. 19–22. And when it has done so, Congress has responded exactly as one would hope—with bespoke legislative authorizations that reflect sensitive understandings of modern technologies and balance security from crime and terrorism with the people's security in their "persons, houses, papers, and effects." U.S. Const. amend. IV. Because of the executive's strong agenda-setting voice in the legislature—particularly in the law enforcement context—this Court can be confident that when these issues return to the legislative branch, they will there receive the attention they require, and Congress will

provide whatever authorization it deems appropriate. Better outcomes are guaranteed from Congress than the courts, because questions such as the one presented in this case involve an inevitable balancing act between privacy and law enforcement interests, and because Congress has the ability to draw finely-tailored legislative lines unavailable to the courts.

ARGUMENT

I. The Executive Cannot Act in a Law Enforcement Capacity, or Engage in Surveillance, Without Congressional Authorization.

This case represents the second time this Term, *see Carpenter v. United States*, No. 16-402, and at least the sixth time in the last seven Terms, that this Court has had to resolve a conflict between new technology and older doctrines or statutes governing law enforcement and privacy.[2] That is no coincidence. New technology not only breeds new crimes and creates new ways for criminals to evade law enforcement; it also creates new private spaces and demands by law enforcement to have access to them, *see, e.g*, *Riley v. California*, 134 S. Ct. 2473, 2493 (2014) (requiring warrant for search of smartphone), along with new techniques the agencies can use in policing

[2] *Carpenter v. United States*, U.S. S. Ct. No. 16-402 (historical cell phone location records); *Grady v. North Carolina*, 135 S. Ct. 1368 (2015) (satellite-based monitoring of recidivist sex offender); *Riley v. California*, 134 S. Ct. 2473 (2014) (cell phone search incident to arrest); *Maryland v. King*, 569 U.S. 435 (2013) (DNA testing of arrestee); *United States v. Jones*, 565 U.S. 400 (2012) (GPS tracking).

and surveillance. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 404 (2012) (holding prolonged GPS surveillance constitutes a search).

Updating statutes to authorize new law enforcement powers—the precise question in this case—is a job for legislatures, not this Court. It is a bedrock principle of American government that the executive must have authorization from Congress before it acts. The Constitution requires legislative authorization for essentially all exercises of executive power, apart from certain inherent powers of the executive that predominantly concern foreign affairs. *E.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015) (holding that power "to recognize … a foreign state and its territorial bounds resides in the President alone"). It is the job of the executive to "take Care that the Laws be faithfully executed," U.S. Const. art. II, §3, not to simply assume that the law has granted power when the executive wants or needs it. This Court has held fast to the bedrock principle of legislative authorization for well over 200 years. *See, e.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804) (Marshall, C.J.) (holding that a naval commander could not use the president's instructions as a defense to liability because those instructions were "not strictly warranted" by Congress's authorization); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952) (invalidating the president's seizure of a steel mill because neither the Constitution nor Congress had authorized the action); *Medellin v. Texas*, 552 U.S. 491, 525 (2008) (holding that absent legislative authorization, the executive may not unilaterally give a non-self-executing treaty domestic effect).

When courts evaluate a claim of executive authority—particularly for surveillance or other law enforcement activities—they must find that the legislature has authorized the practice before they can approve it. That is because "[a]ll power should be derived from the people," and "those intrusted with it should be kept in dependence on the people." The Federalist No. 37, at 223 (James Madison) (Clinton Rossiter ed., 1961). Our system of government is built on accountability; representative democracy cannot function unless individuals can "readily identify the source of legislation or regulation that affects their lives." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring). Without accountability, "[g]overnment officials can wield power without owning up to the consequences." *Id.* The requirement of legislative authorization ensures that the power to grant license to police or surveil the public rests with "those responsive to the political process." *United States v. Giordano*, 416 U.S. 505, 520 & n.9 (1974). In doing so, it builds "[t]rust between law enforcement agencies and the people they protect and serve [that] is essential in a democracy." President's Task Force on 21st Century Policing, Final Report of the President's Task Force on 21st Century Policing 1 (2015).

What courts cannot do, conversely, is begin from the opposite premise: namely, that all actions not expressly forbidden by the legislature are therefore available to law enforcement. That turns our system on its head, and erodes the democratic processes through which the people govern their agents in law enforcement and establish trust in their work.

Although the Framers eventually incorporated a set of protections for personal liberty in the Bill of Rights, they expected the principle of legislative authorization to be the principal safeguard on the people's liberty. In James Madison's words, the legislature would serve as "the confidential guardians of the rights and liberties of the people." The Federalist No. 49, at 313 (James Madison) (Clinton Rossiter ed., 1961). Therefore, "[i]f civil rights are to be curtailed ..., it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court." *Hamdi v. Rumsfeld*, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting). As this Court explained in *Kent v. Dulles*, 357 U.S. 116 (1958), absent authorization from Congress "in explicit terms," the executive cannot restrict citizens' liberty to travel freely on account of their political beliefs. *Id.* at 130. That is because if "liberty is to be regulated, it must be pursuant to the lawmaking functions of the Congress." *Id.* (internal quotation marks omitted); *accord id.* ("[W]e will construe narrowly all delegated powers that curtail or dilute [individual liberties].").

What is true of executive action generally is paramount with regard to executive action that effects a search or seizure. This is made clear by *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), "the true and ultimate expression of constitutional law with regard to search and seizure," *United States v. Jones*, 565 U.S. 400, 405 (2012) (internal quotation marks omitted). In holding that the laws of England did not authorize general warrants, the *Entick* court proceeded from the premise that the powers of search and seizure are so serious that "one would naturally

expect the law to warrant it should be clear." *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quoting *Entick*). In this area of fundamental liberty, "[i]f it is law, it will be found in our books" and "[i]f it is not to be found there[,] it is not law." *Id.* Put otherwise, because the search or seizure power is of such great consequence, "silence o[n] the books is an authority against [the executive]." *Id.* at 531.

This Court and other federal courts therefore have repeatedly demanded legislative authorization for the executive's conduct in the law enforcement and surveillance arenas. In *United States v. U.S. District Court (Keith)*, 407 U.S. 297 (1972), this Court required express legislative authorization before allowing the government to conduct domestic national-security surveillance without obtaining a warrant. *Id.* at 322–24. The relevant statutory language was "essentially neutral"—neither authorizing nor clearly prohibiting the practice. *Id.* at 303. In accordance with the principles above, this Court thus reasoned that silence in granting such serious powers "would not comport with the sensitivity of the problem involved," *id.* at 306. It held that unwarranted surveillance was impermissible absent explicit congressional authorization. *Id.*; *see also United States v. Giordano*, 416 U.S. 505 (1974) (holding that Attorney General's executive assistants could not submit wiretap applications under Title III because statute referred only to Attorney General and Assistant Attorneys General); *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 812 (2d Cir. 2015) (holding that FISA's authorization to collect "relevant" information on individuals was not sufficient to authorize indiscriminate collection of data on all domestic tele-

phone communications, some of which *might* later become "relevant" respecting an individual).

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

II. The Legislature Did Not Authorize the Executive Action Here.

Given the foregoing, the question in this case becomes a simple one: Does the Stored Communications Act (SCA) authorize a warrant to seize data held abroad? The answer is no. Particularly in light of the well-settled background rule that a warrant is a "dead letter outside the United States," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990), one would expect any statute authorizing the use of warrants to collect information held abroad to be especially clear in doing so. Without disputing this rule, the government purports to find implied authorization by arguing that the SCA creates a kind of eldritch hybrid of warrant and subpoena. Gov't Br. 34–39. But that argument misses the point: Congress has not authorized (or even considered) what the government is trying to do here, and until it does, the government may not attempt it.

The SCA was adopted in 1986; at the time it was written, few imagined that citizens' private data would be stored across the world as a matter of course. There thus was no reason for Congress to weigh the costs and benefits of conferring on the executive the power to access communications stored abroad. Instead, Congress began with a blanket pro-

hibition on obtaining electronic communications without authorization. 18 U.S.C. §2701(a). It then carved out (as relevant here) an exception. If the government wants access to the contents of communications stored for 180 days or less, "*only* … a warrant issued using the procedures described in the Federal Rules of Criminal Procedure" will do. §2703(a). By contrast, when the government wants access to records "pertaining to a subscriber," it may proceed by subpoena or a court order founded on a showing that there are "reasonable grounds" to believe that the records are relevant to a criminal investigation. §2703(c)–(d).

The government's argument is thus, essentially, that Congress mis-described the processes Congress itself created in the SCA, and would have wanted its "warrant" to function like a "subpoena" in forcing domestically-served parties to search for and produce whatever information they had wherever it was held. But that is decidedly not what *Congress* authorized: Congress authorized the government to seek "a warrant," using the procedures applicable to *any* warrant, and *said nothing* that could be read as authorizing a subpoena-like use of that "warrant" to compel companies like Microsoft to produce data stored abroad. Congress referred specifically to "subpoenas" elsewhere in the statute, demonstrating that it well knows the difference between the two, and could have authorized a subpoena-like power if it had wished. *See* 18 U.S.C. §2703(b)(1)(B)(i). Moreover, Congress amended the Act "to address the investigative delays caused by the cross-jurisdictional nature of the Internet," H.R. Rep. No. 107–236, at 57 (2001), and when it did so, it provided for "*Nationwide* [not worldwide]

Service of Search Warrants for Electronic Evidence." *Id.* (emphasis added). From the standpoint of the legislative authorization principle, therefore, the statute is devoid of any indication that Congress contemplated, meant to authorize, or did authorize the government's practices here. The government is straining to fit a round Blu-ray disc into a square floppy drive.

Recognizing the statutory problem it faces, the executive branch has called upon Congress to resolve the issue in this case—a curious step were the surveillance at issue here already clearly authorized by the SCA. After the Second Circuit's decision, the Department of Justice urged Congress to amend the SCA to expressly permit warrants requiring the disclosure of emails stored outside of the United States. *See* Letter from Samuel R. Ramer, Acting Assistant Att'y General, U.S. Dep't of Justice, to Hon. Paul Ryan, Speaker, U.S. House of Representatives, at A-1 (May 24, 2017), https://perma.cc/MUT6-A8GC. In fact, Congress is currently considering its own proposal. A bipartisan group of Senators introduced the International Communications Privacy Act in July 2017, which among other things would permit warrants to reach the emails of U.S. persons stored overseas. *See* International Communications Privacy Act (ICPA), S. 1671, 115th Cong. (2017). Senator Hatch, a sponsor, said quite rightly that "whether, when, and under what circumstances the United States should authorize law enforcement access to data stored abroad is a question *for Congress*," acknowledging that Congress had not answered these questions by enacting the SCA in its current form. Press Release, Hatch Urges Senators to Support International Communications Privacy Act (Aug. 1, 2017),

https://perma.cc/96FP-PXDY (emphasis added). And he would know—Orrin Hatch was in the Senate when they passed the SCA in 1986 and for each set of amendments since.

In the end, the government's argument is that it would be "incongruous[]" for it not to have access to overseas records when using a warrant—and therefore Congress must have meant to authorize it to obtain such records using a warrant, too. Gov't Br. 15. That is not how statutory interpretation works: Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). And more important, it is an attempt to supply an answer to the wrong question. The question is not what Congress *ought* to have authorized, or even what it would have been *incongruous* for Congress to omit from its authorization. The question, instead, is what the legislature *did* authorize. And the answer here is: Not this.

III. It Is Not the Role of Courts to Supply Authority in the Absence of Legislative Authorization.

The government nonetheless urges this Court to find authorization here, warning that without it, the government will have no way of getting the information it needs. The government thus argues that the "real-world consequences" of denying it the power it seeks—which, it says, include "serious administrability concerns" and "hamper[ing] domestic law enforcement and counterterrorism efforts"—"further suggest that Congress did not adopt the scheme that Microsoft proposes." Gov't Br. 41. One dissenter below would have found the government's actions au-

thorized because the (supposed) "baleful consequences" of rejecting the government's position were "compelled neither by the text of the statute nor by our precedent." Pet. App. 129a (Cabranes, J., dissenting from denial of rehearing); *see also id.* at 125a–129a (highlighting alleged negative consequences). Yet another dissenter acknowledged that, notwithstanding the poor fit between the SCA's scheme and the government's request, "the prudent course of action is to allow the warrants to proceed" because "if Congress wishes to change the statute, it may do so while important criminal investigations continue." Pet. App. 151a (Droney, J., dissenting from denial of rehearing); *see also id.* at 154a (same).

While all of this may sound reasonable, it is decidedly backwards. Law enforcement necessity is not, and cannot be, a substitute for legislative authorization, and the "prudent course of action" is certainly not to allow unauthorized policing techniques until Congress updates a statute to expressly provide otherwise. *Cf. Ex parte Milligan*, 71 U.S. 2, 124 (1866) (stating that if necessity can substitute for legislative authorization, "republican government is a failure, and there is an end of liberty regulated by law"). As explained above, the rule is and must be the opposite: Because the executive cannot act without legislative authorization, a court cannot approve a practice until it determines that Congress in fact authorized it. If, as here, the statute does not map onto the surveillance power requested, the right conclusion is that Congress simply failed to address this situation and so *did not authorize* what the government wants. *See* Pet. App. 67a. (Lynch, J., concurring).

At the same time, there is little cause for the concern that animates the government's argument and these opinions from the *en banc* dissenters below. If history shows anything, it is that when necessity exists—and particularly when public safety is at issue—the executive branch is fully capable of getting from Congress the power it requires. *See infra* pp. 19–22 (describing genesis of Title III, the FISA, and the USA PATRIOT Act); Ian Samuel, *The New Writs of Assistance*, 86 Fordham L. Rev. (forthcoming 2018) (manuscript at 20), https://perma.cc/9BJ4-EN9T ("Legislatures, moreover, have displayed an enormous willingness to modify the law to ensure that the government can get the assistance it needs for authorized investigations."). At the same time, history also shows that, when it grants this power, Congress often attaches greater protections for the people's liberty than a simple warrant requirement. Congress, and Congress alone, can wield the scalpel necessary to balance the competing interests at issue in this case. Accordingly, the best result comes not from this Court doing the work of Congress when that work becomes outdated, but rather from deciding this case in a way that encourages Congress to do its own work.

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

Contrary to the government's suggestion, a lacuna in a thirty-year-old statute that has allegedly negative consequences under contemporary conditions does not remotely suggest that Congress (somehow) legislated to avoid those unforeseeable consequences many years ago. Nor is it this Court's function to fix that statute based on the judicial conception of what Congress would have wanted had it had contempo-

rary conditions in mind. This Court frequently and properly expresses aversion to doing just that: As Justice Scalia famously framed it, "[t]he question ... is not what Congress 'would have wanted' but what Congress enacted." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 349–50 (2012) (denouncing the "false notion that when a situation is not quite covered by a statute, the court should reconstruct what the legislature would have done had it confronted the issue"). "It is for Congress, not the courts, to revise longstanding legislation in order to accommodate the effects of changing social conditions." *United States v. Lorenzetti*, 467 U.S. 167, 179 (1984). Just last Term, this Court reaffirmed that "while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

By refusing to do the work of legislators, this Court not only restrains itself against an inappropriate exercise of legislative authority; it also encourages legislators to do their own work more precisely and actively in areas in which the judgment of the people's representatives is essential. "By pointing out the obscurities, the ambiguities, the Court is trying to encourage Congress to write clearer laws." Interview by Jonathan Faust with Justice Ruth Bader Ginsburg, in Palo Alto, Cal. (Feb. 8, 2017); *see also* Scalia & Garner, *Reading Law* xxviii (explaining that

this Court's doctrines of statutory interpretation "discourage legislative free-riding, whereby legal drafters idly assume that judges will save them from their blunders"). Congress can weigh whether and how to respond, in a deliberative process that is essential to our democracy and particularly vital in the context of law enforcement and surveillance. The agencies responsible for the nation's public safety require the trust of the public to sustain them in their vital roles. And that trust comes, in large part, from democratic accountability. *See supra* p. 8.

Of course, there can be no guarantee that the executive will get what it wants from Congress, but *that is the point*: "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978). The only way to ensure that democratic institutions weigh in on this issue is for this Court to require Congress to act as clearly as possible—and it should do so here not by "allowing the warrants to proceed" until Congress intervenes, but by doing precisely the opposite. *Contra* Pet. App. 151a (Droney, J., dissenting from denial of rehearing).

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

That is particularly so because, in the face of a compelling claim of necessity, Congress almost invariably gives the executive what it needs. "[T]he legislature is generally a willing partner in government

collection of private information." Samuel, *The New Writs of Assistance,* manuscript at 35. Indeed, it is quite clear that when the Department of Justice speaks, Congress listens. Empirical studies show that no institution is as successful as the federal government at getting Congress to pass legislation in the wake of a statutory decision by this Court. *See*, *e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 348 (1991). As the authors of a recent leading study conclude: "If the Department of Justice believes the Court's stingy interpretation of a criminal prohibition, penalty, or procedural rule stands in the way of effective implementation of a criminal law regime, it can typically gain the attention of Congress and can often secure an override." Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex. L. Rev. 1317, 1383 (2014).

Examples of this phenomenon abound. After this Court decided in *Katz* and *Berger* that existing authorizations were insufficient for wiretapping, for instance, Congress stepped in with Title III. This Court encouraged legislative action in the field of wiretapping as technology advanced, and Congress responded. In *Berger v. New York*, 388 U.S. 41 (1967), this Court invalidated a "blanket grant of permission to eavesdrop ... without adequate judicial supervision or protective procedures." *Id.* at 60. And in *Katz v. United States*, 389 U.S. 347 (1967), this Court rejected the government's argument that phone booth surveillance should be exempted from the requirement of advance judicial authorization. *Id.* at 358. Congress responded with the Federal

Wiretap Act in 1968, which codified a detailed set of authorization requirements for the government. Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 18 U.S.C. §§2510–2522). The Act has governed wiretap practices since. *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827, 1901 (2015) ("Title III, the federal law governing wiretapping, is, as many recognize, the product of an extended dialogue between Congress and the Supreme Court.").

Another example is Congress's enactment of the Foreign Intelligence Surveillance Act (FISA). Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §1801 *et seq.*). Before Congress passed FISA, the federal government argued to this Court that it needed the power to conduct surveillance for national security purposes, without prior judicial approval. *Keith*, 407 U.S. at 303. This Court declined to find existing authorization and instead suggested that Congress ought to provide a framework for the surveillance at issue. *Id.* at 322–23. Congress did just that; in FISA, it "set out various rules governing domestic security investigations and created a special court to hear warrant applications." Friedman & Ponomarenko, 90 N.Y.U. L. Rev. at 1903.

Adoption of the USA PATRIOT Act similarly illustrates Congress's proactivity in matters of security and public safety. Congress originally passed the PATRIOT Act in 2001, in the wake of the September 11th attacks. Pub. L. No. 107-56, 115 Stat. 272 (2001). In response, the executive branch sought broad authorities, and Congress in turn provided them. Indeed, although Congress included sunset provisions so that it could periodically reconsider

whether these powers remained necessary, it has sprung into action and either reauthorized the PATRIOT Act or passed a new authorization scheme every time these powers were at risk of expiring.[3] Congress has, in fact, provided reauthorizations (or replacements) at least three separate times over the last two decades. Each time it carefully considered which police powers to authorize and which to let expire—and each time it showed considerable solicitude for the powers the executive requested.[4]

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[3] In 2005, Congress reauthorized the PATRIOT Act, making permanent fourteen provisions originally set to expire and extending three other provisions until December 31, 2009. USA PATRIOT Act Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006). Then, in 2010 and 2011, Congress authorized temporary extensions before passing the PATRIOT Sunsets Extension Act of 2011, extending the authorizations for four more years. Pub. L. No. 112-14, 125 Stat. 216 (2011). Congress returned to the subject in 2015, passing the USA Freedom Act, which restored some of the provisions of the PATRIOT Act that had expired the day before in modified forms while allowing other sections to expire. Pub. L. No. 114–23, 129 Stat. 268 (2015).

[4] Congress is often responsive to concerns raised by this Court, including that a statute is insufficiently clear to cover a particular case. For instance, in *Finley v. United States*, 490 U.S. 545 (1989), this Court remarked: "Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Id.* at 556. The next year, "Congress accepted the invitation" and "passed the Judicial Improvements Act" to clarify its previous grant of jurisdiction to the courts. *Exxon Mobile Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 557 (2005). Similarly, in *McNally v. United States*, 483 U.S. 350

While every one of these examples teaches that the Congress stands ready to provide the executive with necessary law enforcement authority when circumstances so require, each also provides another important lesson: namely, that when Congress is called upon to grant these new authorizations, it frequently imposes limitations on the executive beyond a simple warrant requirement. Title III comprehensively regulates wiretapping practices in the United States, providing an exclusive list of the dozens of specific crimes for which the government can obtain a wiretap to investigate. 18 U.S.C. §2516. In FISA,

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(1987), the majority noted that Congress "must speak more clearly" if it wished to extend the mail fraud statute to cover honest services fraud by government officials, *id.* at 360, and the dissent urged Congress to remedy the "grave … ramifications" of the decision by amending the statute, *id.* at 377 (Stevens, J., dissenting). Congress promptly responded with 18 U.S.C. §1346. *See Skilling v. United States*, 561 U.S. 358, 401 (2010). Likewise, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), this Court held that the Detainee Treatment Act did not strip it of jurisdiction to hear pending habeas appeals of detainees held at Guantanamo Bay and encouraged Congress to speak clearly if it meant to do so. *Id.* at 575–76. Congress then responded with section 7 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, clarifying that it did in fact wish to strip courts of jurisdiction. *See also Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), *overruled by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978), *abrogated in part by statute*, Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified as amended at 16 U.S.C. § 1532).

Congress articulated intricate rules governing domestic surveillance and created two new judicial oversight bodies: the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review. *E.g.*, 50 U.S.C. §§1802–1803. And in the PATRIOT Act, Congress included sunset provisions to require the legislature to re-examine the authorizations and decide whether to extend or amend them. Pub. L. No. 107-56, 115 Stat. 272 (2001).

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

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

The limits of judicial power further support insistence on the authorization requirement. Only the legislature can balance the competing policy interests and craft appropriately tailored solutions to promote successful law enforcement with adequate regard for personal security and privacy. "The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them." *United States v. Gilman*, 347 U.S. 507, 511–13 (1954); *see also Hall v. United States*, 566 U.S. 506, 523 (2012) ("Given the statute's plain language, context, and structure, it is not for us

to rewrite the statute, particularly in this complex terrain of interconnected provisions and exceptions enacted over nearly three decades."); *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 513 (1982) (noting Congress's "superior institutional competence" on matters of policy). This is precisely the point Judge Lynch made in his opinion below: "Courts interpreting statutes that manifestly do not address these issues cannot easily create nuanced rules." Pet. App. 69a.

The intersection of new technology and law enforcement practices presents uniquely difficult line-drawing problems, in which congressional engagement is essential. As Justice Alito noted in his concurrence in *United States v. Jones*, 565 U.S. 400, 429–30 (2012) (Alito, J., concurring)—an opinion joined by three other Justices and endorsed as "incisive[]" by another, *see id.* at 415 (Sotomayor, J., concurring)—"[a] legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *See also Riley v. California*, 134 S. Ct. 2473, 2497–98 (2014) (Alito, J., concurring) ("Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future."). Courts can resolve only the controversy in front of them, whereas Congress may consider a wider set of issues and solutions, crafting structural protections rather than simply announcing standards and deciding fact patterns *ex post*, one at a time.

The present case makes these concerns abundantly clear. The executive claims authority to com-

pel information from foreign servers. At issue are long-standing principles against the extraterritorial application of U.S. law, relations with foreign countries, law enforcement needs, and the security and privacy of the people in their personal communications. Balancing these concerns is a job for Congress in the first instance. Yet, "there is no evidence that Congress has *ever* weighed the costs and benefits of authorizing court orders of the sort at issue in this case," Pet. App. 68a (Lynch, J., concurring), as even the dissenters below agreed. *See* Pet. App. 150a (Droney, J., dissenting from denial of rehearing). And unlike this Court, "Congress need not make an all-or-nothing choice. It is free to decide, for example, to set different rules for access to communications stored abroad depending on the nationality of the subscriber or of the corporate service provider." *See* Pet. App. 69a (Lynch, J., concurring). It is just this kind of nuanced solution that is lost when courts ignore the need for legislative authorization and provide a power the legislature has not considered or approved. *See* Friedman & Ponomarenko, 90 N.Y.U. L. Rev. at 1875 ("[D]emocratic review is what is necessary to strike the policy balance that rests at the bottom of policing decisions.").

The issue in this case presents the perfect illustration of how legislative authorization can lead to more nuanced solutions than courts ever could provide through case-by-case adjudication. The government's demands for emails from a server abroad require sensitive consideration of law enforcement interests, individual privacy, and international relations. Congress might take account of citizenship, residency, the severity of the alleged crime, and al-

ternative methods of acquiring the information in determining what authority the government should have to access information on foreign servers. But only the legislature could enact those considerations into law.

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The government argues that, from a privacy perspective, there is a trivial distinction between emails stored domestically and those stored abroad. Gov't Br. 39–40. Others disagree. *See, e.g.*, Microsoft Br. 57–59; New Zealand Privacy Comm'r Br. 12.; U.N. Special Rapporteur on the Right to Privacy Joseph Cannataci Br. 9–17. But that is *exactly* the sort of debate Congress, not this Court, ought to referee, fraught as it is with the sort of non-legal policy judgments the people expect their elected representatives to make on their behalf. Perhaps Congress will be convinced by the government's other policy arguments (at Gov't Br. 41–45) as well. Perhaps not. But even if it were truly *necessary* for the police to have the power of international warrants, and even were its absence from the SCA only an oversight stemming from technological change, the government's view of its own necessities is not a substitute for legislative authorization.

When Congress adopted the SCA, it recognized that "the law must advance with the technology." S. Rep. No. 99-541, at 5 (1986). That is even more true today than it was in 1986, when the SCA was adopted. There are widespread calls for reform of the Electronic Communications Privacy Act (ECPA) on this issue in particular. *See* Caroline Lynch, *ECPA Reform 2.0: Previewing the Debate in the 115th Congress*, Lawfare, https://perma.cc/K4AL-CB8Y (Jan. 30, 2017)

("Also on deck for ECPA reform is the question of whether the government should be allowed to use the ECPA process to obtain electronic data stored outside the United States."). But that debate involves hard policy choices. One proposal, for example, would "define the legitimacy of ECPA warrants on the basis of the nationality and location of the customer"; another simply "amends ECPA to offer partial extraterritoriality for warrants seeking data belonging to U.S. persons regardless of where it is stored." *Id.* Which is the right course? That is not for this Court to say. But one thing is certain: Only by abstaining from giving the executive what it wants in this case—but which Congress has not authorized—can this Court compel Congress to do its job.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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