No 17-02

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NEW ZEALAND PRIVACY COMMISSIONER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST[1]

Amicus is the Privacy Commissioner for New Zealand, appointed as an independent statutory entity by the Governor-General on recommendation of the responsible Minister. Privacy Act 1993 (N.Z.), s 12 and Crown Entities Act 2004 (N.Z.), Part 1.

Amicus' responsibilities include promoting the information-privacy principles set out in the Privacy Act and inquiring into matters affecting the privacy of individuals—including international obligations—while having due regard for protecting important human rights and social interests that must be balanced with privacy. As part of that international engagement, the present Commissioner has served as Chair of the International Conference of Data Protection and Privacy Commissioners.

Amicus therefore has an interest in the legal standards that govern access to information held in New Zealand or otherwise by or on behalf of New Zealanders and New Zealand enterprises. As a small, developed, and highly internationally engaged society and economy, New Zealand is particularly affected by and engaged in these important issues: as of 2015, New Zealand ranked 20th in the world concerning business and personal use of information and communications technology (ICT), which comprises a significant proportion of New Zealand's gross domestic product and its international trade in services. New Zealand is also deeply engaged in refining regulatory standards to promote ICT innovation, with privacy and security key government objectives in those efforts. See, e.g., *Building a Digital Nation* 4-5 (2017).

The increasing extent and importance of cross-border ICT makes New Zealand's international engagement with privacy, other human rights issues, and the rule of law—including the pursuit of transnational crime—particularly important. To that end, New Zealand law provides both broad and specific protections for information when held both in New Zealand and abroad by or on behalf of New Zealanders and New Zealand enterprises. New Zealand law also provides for regulated access to information, including through a range of agreements and arrangements for law enforcement and cooperation with foreign governments, subject to protections for privacy and other civil rights.

Amicus does not take a position on the outcome of the present case. *Amicus* is instead concerned that the legal standards at issue are—so far as possible—interpreted and developed in accordance with the principle of comity, and in light of each jurisdiction's interest in avoiding conflicts in legal obligations. *Amicus* therefore respectfully submits this brief to emphasize the important social interests at stake in providing proper and orderly access to information between jurisdictions for criminal investigative purposes while at the same time upholding each jurisdiction's obligations regarding privacy and other human rights.

SUMMARY OF ARGUMENT

The Court is asked to decide whether 18 U.S.C. § 2703 applies to information held in Ireland but accessible from the United States. That question turns upon whether the conduct relevant to the focus of 18 U.S.C. § 2703 is that in Ireland or in the United States.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters consenting to the filing of amicus briefs are on file with the Clerk.

The potential application of this statute to information held in other countries has significant implications for those countries, including New Zealand (and of course for the United States itself). Many of these countries institute and apply various (often stringent) protections for information held within their respective jurisdictions. Many—again including New Zealand and the United States—also provide mechanisms for access to information for purposes of foreign law enforcement, including but by no means limited to mutual assistance agreements.

These mechanisms and arrangements enable cross-border law enforcement while respecting each country's authority to assert and apply its own laws, including on matters of fundamental legal principles. These principles extend well beyond questions of law enforcement search or seizure. For example, both the United States and New Zealand protect information on grounds of religious liberty, but not all countries do.

The potential application of 18 U.S.C. § 2703 to information stored in Ireland thus has implications beyond the law-enforcement context and raises the spectre of conflict between different countries' laws. Absent express statutory language, the question should be determined by reference to three longstanding and inter-related principles of jurisdiction, which have been recognized by this Court, by other final appellate courts in cognate jurisdictions (including the New Zealand Supreme Court), and at international law: (1) the importance of comity, (2) the presumption of territoriality (as supplemented by international agreements and cooperation), and (3) the responsibility of each country to assert and respect the rights of those within its jurisdiction.

First is the importance of comity among countries. As consistently held by this Court and others, the principled allocation of jurisdiction ensures clarity while respecting the right of each country to apply its own substantive law. Comity thus affords critical safeguards not only to each country—which carries responsibility for the administration of law within its jurisdiction—but also to those subject to the law, who are spared differing and even contradictory legal obligations. While governments can and do legislate the extraterritorial application of their laws, the longstanding principle of comity should not be lightly disregarded or circumvented.

Second is the presumption of territoriality, as supplemented by international agreements and other forms of cooperation, in determining the particular law that should apply to the exercise of law enforcement measures (including law enforcement access to information for the purpose of criminal proceedings). Leaving aside crimes of recognized universal or extraterritorial jurisdiction, such as piracy or terrorism, this Court has recognized that jurisdiction is presumptively territorial but has been usefully and cooperatively supplemented by agreements and arrangements between governments, including through a range of bilateral commitments between New Zealand the United States. Those mechanisms, and the advancement of cooperation between governments, are increasingly important.

Third is the responsibility of each country to assert and protect the rights of those within its territory, including the right to privacy. That right has been recognized by this Court and affirmed across other jurisdictions, including New Zealand, and in international human rights agreements widely ratified by governments, including New Zealand and the United States. The responsibility of each country regarding the right to privacy has two implications on the global stage: first, that each country is principally responsible for protecting and regulating privacy within its territorial

jurisdiction and, second, that where individuals' information is to be accessed, the basis for that access is clear and straightforward.

The necessity and practical importance of each of these three principles is evident in the present case. Each country can, and does, apply differing standards and restrictions to questions of access to information. These three principles allow for cooperation not only for purposes of law-enforcement access to information but also for cross-border exchanges of information and ICT more broadly—all the while ensuring that those subject to the law are not saddled with conflicting legal obligations. And these three principles are critical to advancing the increasingly important objectives of cooperative advancement of criminal-law enforcement and continuing respect for each jurisdiction's respective laws—especially as the United States, New Zealand, and other countries work together to respond effectively to the growing challenges of transnational crime and related threats. The Court should therefore continue to be guided by these longstanding principles in addressing the question presented in this case.

ARGUMENT

I. COMITY IS A FOUNDATIONAL PRINCIPLE THAT SHOULD NOT BE LIGHTLY OR INDIRECTLY CIRCUMVENTED.

This Court has consistently recognized the importance of the presumption against extraterritoriality and, underpinning that presumption, the importance of principled allocation of jurisdiction. "It is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (quoting *Microsoft Corp.* v. *AT&T Corp.,* 550 U.S. 437, 454 (2007)).

The same presumption, based on the same rationale, is applied by the highest courts in other jurisdictions, including the New Zealand Supreme Court, and undergirds a recognized and elementary principle of international law. "Other than quite exceptionally, sovereigns do not meddle with the subjects of foreign sovereigns within the jurisdiction of those foreign sovereigns – a consideration inherently potent in matters where international standards vary greatly." *Poynter* v. *Commerce Commission* [2010] 3 NZLR 300 (SC) at [37] (citing the decision of the Judicial Committee of the House of Lords in *Gold Star Publications Ltd.* v. *Director of Public Prosecutions* [1981] 1 WLR 732 (HL) at 737).

This principle serves both jurisdictional and substantive legal purposes. Both can be seen at work here.

First, the principle ensures clarity as to the responsible jurisdiction, thereby avoiding conflicts between legal systems and the prospect of differing and even contradictory obligations. "Most notably, it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco*, 136 S. Ct. at 2100.

Second, it acknowledges and upholds the right of each jurisdiction to determine the content of its own law, which often differs between jurisdictions. In the present case, it is evident that the standards and procedures for law-enforcement access to individuals' information, including information held by service providers, vary considerably among New Zealand, the United States, and other countries. Although friction between differing legal standards is not a requirement for applying the presumption, this Court has held "where such a risk is evident, the need to enforce the presumption is at its apex." *Id.* at 2107.

Although some of these differences in the law may be subtle or immaterial, others are not. For example, New Zealand and the United States each afford protections for religious liberty, but many other countries do not. See A. Keith Thompson, *Religious Confession Privilege and the Common Law* (2011). The United States and New Zealand also diverge in some respects: New Zealand has abolished capital punishment, for example, and that prohibition is reflected in its extradition and mutual assistance laws. See Mutual Assistance in Criminal Matters Act 1992, s 27(2)(ca) (N.Z.). Such mechanisms provide necessary safeguards for varying national laws, many of considerable and even constitutional importance.

The result is that the interests of each country are best served by the principled allocation of jurisdiction through comity. As this Court and others have recognized, that principle should not lightly or indirectly be set aside by reference to what this Court thinks "Congress would have wanted if it had thought of the situation before the Court." *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 261 (2010). If Congress is silent and absent other patent basis for extraterritoriality, the presumption against extraterritorial application should apply. *Ibid.* "It is very important in the potentially sensitive area of extraterritoriality that [the legislature] make the necessary policy determinations and evidence them clearly in the resulting legislation." *Poynter*, 3 NZLR at [65].

II. JURISDICTION RESPECTING LAW-ENFORCEMENT MEASURES IS PRESUMPTIVELY TERRITORIAL BUT SUPPLEMENTED BY COOPERATION AMONG COUNTRIES.

This Court has held that jurisdiction over measures relating to law enforcement is presumptively territorial—thereby avoiding intrusive and conflicting enforcement measures. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013); see also Restatement (Third) of Foreign Relations § 432(2) (Am. Law Inst. 1987) (criminal enforcement functions may be exercised in another country's territory only with that country's consent).

That position is also reflected in the law of other jurisdictions and at international law. According to the Permanent Court of International Justice, a state "may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or a convention." *The Case of the S.S. "Lotus" (France v. Turkey)*, P.C.I.J. (ser. A) No. 10, 18 (1927).

The principle of territoriality is subject to variation in practice in at least two respects. The first and most familiar (although not relevant here) is the recognition of certain crimes as properly subject to universal or otherwise extraterritorial jurisdiction, such as piracy and terrorism.

The second exception, which is relevant here, is bilateral or multilateral agreements between countries to cooperate in criminal-law matters. Just as the United States has agreements with Ireland, New Zealand also cooperates with the United States, both in a number of specific agreements and arrangements and also in general terms. See Mutual Assistance in Criminal Matters, pt. 3 (N.Z.) (discussing the general mechanisms for law enforcement cooperation, including through search warrants), regs. 1998 (including United States of America).

Such cooperation can be far reaching and, while there is some criticism of various mutual assistance mechanisms as cumbersome, there is also room to

innovation. For example, the Convention on Cybercrime arts. 16-19, Nov, 23, 2001, T.I.A.S. No. 13174, provides procedures not only for search and production but also for expedition to ensure the rapid location, preservation, and access to information required for criminal investigations. The Convention also upholds the right and obligation of state parties—including the United States—to apply their own respective constitutional and related protections: "Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties[.]" Convention, *supra*, art. 15.

The usefulness and effectiveness of such cooperation—along with advancing and encouraging the use of existing mechanisms and, where necessary, reforming and developing them—is clear. Such cooperation is preferable to each country unilaterally seeking to extend its jurisdiction into data held in the territory of others. "It is difficult to see how an interpretation that encourages unilateral action could foster cooperation and mutual assistance …". *United States v. Alvarez-Machain*, 504 U.S. 655, 672 fn 4 (1992), Stevens, J., dissenting. This Court has previously indicated that it will not accept a "double standard" of non-reciprocity with respect to extraterritorial jurisdiction. *RJR Nabisco*, 136 S. Ct. at 2108. It should decline to create such a double standard in this case, as well.

Nor is it necessary to depart from longstanding jurisdictional safeguards to enable the effective enforcement of criminal-law matters. To the contrary, under the Convention on Cybercrime and other multi-national agreements, cooperative mechanisms may provide not only the particular information sought, but also more substantial assistance, especially where relevant information is held but is not known to the requesting government.

III. RESPONSIBILITY FOR PROTECTING PRIVACY IS A MATTER OF TERRITORIAL JURISDICTION.

The right to privacy finds protection not only in the U.S. Constitution and the decisions of this Court, but also in New Zealand law and in significant international human rights instruments to which both the United States and New Zealand are parties. The primary responsibility for protecting privacy, though, remains principally a matter of territorial jurisdiction.

Such protection can be found in this case in the prohibition against disclosure in 18 U.S.C. § 2701. Similarly under New Zealand law, any person or entity that holds personal information in New Zealand is subject to the broad requirements of the Privacy Act 1993 (N.Z.) and related civil rights protections, and may also be subject to more specific obligations in relation to information subject to legal or religious privilege or other protections. Further, the Privacy Act 1993 (N.Z.) provides for access to information for law-enforcement purposes and is directed to the actions of New Zealand official agencies. Through that provision, New Zealand agencies are, in turn, able to provide other countries with mutual assistance.

In addition to the protections afforded by individual countries, the right to privacy is affirmed by the International Covenant on Civil and Political Rights art. 17, Dec. 19, 1966, 999 U.N.T.S. 171, to which both New Zealand and the United States are parties. Under Article 2 of the Covenant, state parties are required to ensure the right to privacy to all individuals within their territories.

The result is reinforcement of the principle of territoriality—that is, the principle that responsibility for decisions about providing access to information (here, for purposes of law enforcement) rests with the country in which that information is held. This allocation of responsibility is not merely formal or procedural. As noted above, the law governing law-enforcement access to information differs materially across jurisdictions.

The instant case highlights the importance of maintaining that allocation. As other *amici* explained in the Court of Appeals, applying 18 U.S.C. § 2703 to data held in Ireland could create a conflict between respondent and its Irish and European Union legal obligations. Pet. App. 46a-47a. A survey conducted by the United Nations Office on Drugs and Crime indicated that such problems occur frequently: "As regards the permissibility of foreign law enforcement access to computer systems or data, around two-thirds of countries in all regions of the world stated that this was not permissible." UNODC, *Comprehensive Study on Cybercrime*, 220 (2013).[2]

Similarly, applying 18 U.S.C. § 2703 to data held in New Zealand could entail civil and, for certain data protected under New Zealand law, criminal liability. See, e.g., *Brannigan* v. *Davison* [1997] 1 NZLR 140 (PC) at [18] (obligation to disclose information not qualified by potential breach of a foreign law).

The potential for conflict underscores the importance of clarity concerning the preconditions and procedures for accessing private information, so that privacy is protected and predictability is afforded. See *United States* v. *Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J. concurring); *id.* at 431 (Alito, J., concurring). Thus "relevant legislation must specify in detail the precise circumstances in which such interferences [into privacy] may be permitted." United Nations Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, ¶ 8.[3] Both the means and the criteria for accessing information should be clear. Conflicting or otherwise uncertain legal requirements for access between national jurisdictions risk a lack of clarity and so risk uncertainty and conflict.

* * *

This case implicates foundational principles of jurisdiction and international comity long recognized by this Court, by courts in other jurisdictions (including New Zealand), and at international law. These well-established principles protect the prerogative of each country—large or small—to apply its own law, including fundamental protections for the rights of its own citizens, to information within its own jurisdiction. These principles also promote a cooperative approach—not only to the regulation of access to information, but also (and more broadly) to the exchange of information across borders.

These principles are increasingly important, because of both the need for information technology to operate effectively across borders, and the critical importance of international cooperation and mutual respect in addressing transnational crime and other grave threats. *Amicus* therefore respectfully submits that this Court should continue to be guided by those principles in deciding this case.

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[2] Available at https://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf (last visited Dec. 7, 2017).
[3] Available at http://hrlibrary.umn.edu/gencomm/hrcom16.htm (last visited Dec. 7, 2017).

CONCLUSION

For the foregoing reasons, in deciding this case, this Court should continue to be guided by the longstanding principles of comity, territoriality, and the responsibility of each country to protect the rights of individuals within its own borders.

December 13, 2017 Respectfully submitted,

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