14-2985-cv

United States Court of Appeals

for the

Second Circuit

In the Matter of a Warrant to Search a certain E-mail account controlled and maintained by Microsoft Corporation,

MICROSOFT CORPORATION,

Appellant,

– v. –

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* ANTHONY J. COLANGELO, INTERNATIONAL LAW SCHOLAR, IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*

In view of longstanding canons of statutory interpretation, this appeal obliges the Court to consider the content of customary international law. When determining the state of such principles, the courts are often assisted by "the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *see also* Restatement (Third) of Foreign Relations Law of the United States ("Restatement of Foreign Relations") § 103(2)(c) (1987).

Amicus curiae is Anthony J. Colangelo, the Gerald J. Ford Research Fellow and Associate Professor of Law at the SMU Dedman School of Law.[1] *Amicus curiae* is a scholar who has devoted his career to teaching and writing about international law, and is familiar with and has a demonstrated academic interest in the specific international legal principles that bear on this appeal. In the decision below, the District Court gave short shrift to these established principles by holding that U.S. law enforcement may search and seize electronic customer communications that are stored abroad without obtaining the consent of the foreign

[1] Pursuant to Fed. R. App. P. 29(c)(5), no party's counsel authored or contributed money to fund this brief in whole or in part, and no person other than *amicus curiae* and his counsel contributed money that was intended to fund preparing or submitting the brief. All parties consent to the filing of this brief.

state and without providing any means for considering whether the request complies with the privacy and other laws and regulations of that state.

SUMMARY OF ARGUMENT

The District Court has interpreted the Electronic Communications Privacy Act ("ECPA") to authorize the government to search and seize emails stored in computers outside the United States. Under established principles of statutory interpretation, the District Court should have read ECPA's silence on the question of extraterritoriality against the government. The District Court's contrary reading violates two bedrock canons of statutory interpretation designed to respect the sovereign interests of other nations and thus to promote international comity. *Amicus* seeks in this brief to explain how the District Court overlooked the fundamental international law principles that animate those presumptions.

First, the District Court's interpretation violates the *Charming Betsy* canon because the court failed to interpret ECPA in a manner that would avoid a conflict with international law. Under customary international law, fundamental principles of state sovereignty and non-intervention preclude one nation from exercising law enforcement authority in the jurisdiction of another, without that nation's consent. One state's sovereignty over its territory necessarily acts as a limit upon the actions of all other nations within its territory. *See, e.g.*, Restatement of Foreign Relations § 432(2). This principle of non-intervention is broadly accepted by U.S. courts,

foreign courts, and international tribunals, and the United States has endorsed this principle in numerous international agreements.

The principle of non-intervention precludes the United States from exercising its law enforcement authority abroad without the consent of a foreign state. *See*, *e.g.*, *United States v. Odeh*, 552 F.3d 157, 171 (2d Cir. 2008); Restatement of Foreign Relations § 432 (2) ("a state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."). Accordingly, the government plainly would violate the sovereignty of a foreign state by physically executing this search warrant abroad.

Despite ECPA's silence as to extraterritorial application, the District Court read ECPA to authorize the government to conscript U.S.-based internet service providers to engage in the routine collection of such foreign documents without providing for any means by which the U.S. government would respect the authority of the foreign sovereign. In the face of statutory silence and in light of the teaching of *Charming Betsy*, ECPA should not be read to authorize the search and seizure of records stored in servers located abroad.

Second, the District Court's interpretation contravenes the presumption against extraterritoriality under United States law. Out of respect for other sovereigns and to avoid potential international disputes, federal courts will not

assume that federal statutes regulate matters in foreign jurisdictions, unless the statute permits of no other interpretation. The District Court's decision contravenes this presumption by authorizing law enforcement searches in a foreign country, absent express statutory authorization. Because ECPA contains no clear indication that Congress intended the statute to apply extraterritorially, the District Court was bound to presume that it did not.

Finally, the District Court's issuance of the search warrant itself threatens to place the United States in violation of international law. The United States is party to mutual legal assistance treaties ("MLAT's") with both the Republic of Ireland and the European Union that provide appropriate procedures pursuant to which the United States should collect evidence stored in Ireland. These treaties were carefully negotiated and approved by the political branches. Their detailed scheme for cooperation establishes a norm that the United States and Ireland will seek to act through bilateral cooperation when engaging in law enforcement activity on the other's sovereign territory. And the United States has an international law obligation to carry out its obligations under those treaties in good faith. Here, the United States has made no attempt to follow these procedures, and the federal courts should not abet an effort to circumvent them by unilaterally searching for and seizing evidence located in Ireland.

ARGUMENT

This appeal presents the important question of whether Congress implicitly granted federal and state law enforcement the authority to execute search warrants to collect foreign electronic communications stored abroad. The United States here seeks to seize electronic communications stored on servers located in the Republic of Ireland. Plainly, the Republic of Ireland has the sovereign right to regulate electronic communications within its borders, including the authority to collect evidence for law enforcement purposes. The question is whether ECPA authorizes law enforcement to compel Microsoft, as a U.S. corporate citizen, to seize and deliver without the Government of Ireland's consent customer emails that are stored in Ireland.

As the Magistrate Judge recognized, ECPA is "ambiguous" with respect to this very issue. *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.* (*"In re Microsoft Corp."*), No. 13-mj-2814, Memorandum and Order (S.D.N.Y. Apr. 25, 2014), Dkt. No. 5 at 10-11. The relevant language was enacted in 1986 at a time when Congress could hardly have foreseen the Internet's global reach and the prominent position that United States companies might play in providing internet communications services.

ECPA requires the communications at issue to be collected by the government only pursuant to a "warrant," the quintessential exercise of law

enforcement power. 18 U.S.C. § 2703(a). It would appear to be common grounds among the parties that (i) the statute applies to routine law enforcement activities by both the state and federal governments, that (ii) it generally contemplates the use of ordinary judicial procedures for the issuances of warrants, and that (iii) the statute itself does not address where Congress expects the authorized search and seizure to take place, much less expressly state that it was intended to authorize the seizure of records held abroad.

The question before the Court is not whether Congress could pass a law requiring an internet service provider to engage in the collection of electronic communications stored in foreign servers under its control. The question is whether, in the face of ECPA's silence on the geographic scope of the warrant at issue, the Court should give this 1986 statute the broad reach claimed by the government below. *Amicus* submits that powerful concerns for international law and comity weigh against that overbroad interpretation.

I. THE DISTRICT COURT'S ORDER VIOLATES THE PRESUMPTION THAT CONGRESS DOES NOT INTEND TO VIOLATE INTERNATIONAL LAW UNLESS IT DOES SO EXPLICITLY

The District Court's interpretation of ECPA violates the *Charming Betsy* canon. Confronted with two possible readings of the ECPA, the District Court has adopted the interpretation of ECPA that would violate the law of nations by

authorizing the U.S. government to search and seize information in violation of the sovereignty of Ireland.

A. *Charming Betsy* Requires Courts To Interpret Ambiguous Statutes To Avoid Conflicts With International Law

More than 200 years ago the Supreme Court recognized that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations." *Talbot v. Seeman*, 5 U.S. 1, 43 (1801). In *Talbot*, a U.S. captain recaptured a neutral ship previously seized by the French, and the issue before the court was whether the neutral owner of the ship owed compensation to the captain for the recapture. *Id.* at 28. After determining that the captain was entitled to some compensation, Chief Justice Marshall's opinion refused to adopt the captain's position that he was entitled to one half the gross value of the ship and cargo under a U.S. statute providing for such remuneration if "re-taken from the enemy." *Id.* at 43. Given the "settled doctrine of the law of nations, that a neutral vessel captured by a belligerent is to be discharged without paying salvage" (*id.* at 36), the Court instead interpreted the word "enemy" in the statute to mean the enemy of both the United States and the country of the owner of the vessel. *Id.* at 44. The Court held that "[b]y this construction the act of congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred." *Id.*

Three years later, in *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), the Supreme Court considered whether the owner of the Charming Betsy had violated an act prohibiting "any person or persons, resident within the United States or under their protection" from commercial intercourse with France. In construing the act, Chief Justice Marshall again pronounced that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains" (*id.*), and ultimately held the act inapplicable because the owner was not resident within nor under the protection of the United States. *Id.* at 119-21.

The rule pronounced by Chief Justice Marshall, which came to be known as the "Charming Betsy" canon, has since occupied an important and central role in interpreting Congressional legislation. *See*, *e.g.*, *Weinberger v Rossi,* 456 U.S. 25, 32 (1982); *see also* Restatement of Foreign Relations § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); *The Apollon*, 22 U.S. 362, 370 (1824) ("however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction.").

While Congress has the domestic power to pass laws that may violate

international law, the *Charming Betsy* canon obliges courts to presume that Congress did not intend to do so absent explicit and express intent:

> The *Charming Betsy* principle is designed to prevent inadvertent violations of international law, and before accepting apparent violations as congressional policy, the court should assure itself that apparent violations were intended. If the violations were inadvertent, the court should interpret the statute sufficiently narrowly to avoid the violation. Thus, a court fully respecting both congressional supremacy and the *Charming Betsy* principle may insist that an attempted legislative override be explicit, comprehensive, and conscious. This approach is not purely textual: a court may recognize a statutory override of international law only when there is both evidence of an intent to override the norm and a text that is irreconcilable with the norm.

Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1167 (1990).

Thus, federal law requires that the Court look to customary international law to determine the proper contours of the ECPA. And since the ECPA lacks any "explicit, comprehensive, and conscious" override, suggesting that Congress intended to modify these principles, ECPA should be read narrowly so as to avoid any conflict with international law.

B. Customary International Law Bars One Nation From Conducting Law Enforcement Operations In The Territory Of Another, Without The Host Nation's Consent

Under customary international law, the principle of sovereignty refers to "a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there." Restatement

of Foreign Relations § 206 cmt. b; *see also* Luzius Wildhaber, *Sovereignty and International Law*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 425, 436 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 1983) (defining modern conception of sovereignty as "the power of each state freely and autonomously to determine its tasks, to organize itself and to exercise within its territory a 'monopoly of legitimate physical coercion.'").

1. The Principles of Sovereign Equality and Non-Intervention Are Well-Established Under Customary International Law

The federal courts have long recognized that under international law, a sovereign has exclusive jurisdiction within its territorial boundaries, and another country may not act within its borders absent its express or implied consent. *See, e.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute"); *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, ("*Compagnie*"), 636 F.2d 1300, 1316 (D.C. Cir. 1980) ("under traditional principles of absolute territoriality, 'the laws of a nation can have no force to control the sovereignty or rights of any other nation within its own jurisdiction.'") (quoting *The Apollon*, 22 U.S. at 370).

The sovereignty of one nation necessarily acts as a limit upon the actions of

all other nations within their territory. As this Court has recognized, "[t]he United States has no right to enforce its laws in another country without that country's consent or acquiescence." *United States v. Blanco*, 861 F.2d 773, 779 (2d Cir. 1988) (citing Restatement of Foreign Relations § 432(2)); *see also* Restatement of Foreign Relations §432 cmt. b ("It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent."); *Compagnie*, 636 F.2d at 1314 n. 67 ("The first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary[,] it may not exercise its powers in any form in the territory of another State.").

Indeed, sovereign equality is a foundational principle of international law. U.N. Charter ch. 1 art. 2 para. 1 (stating that the United Nations is "based on the principle of the sovereign equality of all its Members."). The concept that all states are equal members of the international community "constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest." Antonio Cassese, INTERNATIONAL LAW 48 (2d ed. 2005).

The principle of sovereignty thus implies the complementary principle of non-intervention. As the Canadian Supreme Court has explained:

> Each state's exercise of sovereignty within its territory is dependent on the right to be free from intrusion by other states in its affairs and the duty of every other state to refrain from interference. This principle of non-intervention is inseparable from the concept of sovereign equality and from the right of each state to operate in its territory with no restrictions other than those existing under international law.

R. v. Hape, [2007] 2 S.C.R. 292, 2007 SCC 26, 319 ¶ 45 (Can.); *see also* Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 Leiden J. Int'l L., 346 (2009) (the non-intervention principle is "a corollary of every state's right to sovereignty, territorial integrity and political independence") (quotation omitted).

The federal courts have applied the international law principle of non-intervention in numerous cases. *See, e.g.*, *The Apollon*, 22 U.S. at 371 ("[i]t would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations.").

In addition, the United States has endorsed this fundamental principle of non-intervention and respect for sovereign equality in numerous international agreements. For instance, the United Nations Convention Against Transnational Organized Crime, a multilateral treaty ratified by the United States on November 3, 2005, expressly addresses the "protection of sovereignty." The Convention

obliges the State Parties to carry out their treaty obligations "in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States." Art. 4, para. 1, Nov. 15, 2000, 2225 U.N.T.S. 209. The Convention also makes clear that "[n]othing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law." *Id.* para. 2.

Similarly, the Final Act of the Conference on Security and Cooperation in Europe, signed by the United States on August 1, 1975, provides that "[t]he participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations." Principle VI, para. 1, 14 I.L.M. 1292 (Aug. 1, 1975).

Other examples abound. *See*, *e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 25/2625, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970) (affirming "the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter" and that "[a]ll states enjoy sovereign equality"); Charter of the Organization of American States, Art. 6, Apr. 30, 1948, 2.2 U.S.T. 2394 ("States

are juridically equal, enjoy equal rights and equal capacity to exercise these rights"); *id.* Art. 15 ("No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.") (ratified by the United States, June 15, 1951); Montevideo Convention on the Rights and Duties of States, Art. 8, Dec. 26, 1933, 159 L.N.T.S. 199 ("No state has the right to intervene in the internal or external affairs of another.") (ratified by the United States, Jun. 29, 1934).

International and foreign tribunals, including the International Court of Justice, have similarly recognized that the principle of non-intervention prohibits the violation by one state of the sovereignty and territorial integrity of another. *See*, *e.g.*, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 2005 WL 6746908 ¶¶ 164 (Dec. 19) (the Court has "made it clear that the principle of non-intervention prohibits a State to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State.") (quotation omitted); *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 45 (Sept. 7) ("the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State"); *see also Island of Palmas Case (Neth. v. U.S.)*, 2 U.N. Rep. Intl. Arb. Awards 829, 838 (Perm. Ct. Arb. 1928) ("Sovereignty in the relations

between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”).

2. These Principles Preclude One State From Exercising Law Enforcement Jurisdiction In the Territory Of Another State

The principle of non-intervention precludes one nation from conducting law enforcement activity on foreign soil. As this Court has recognized, “it takes little to imagine the diplomatic and legal complications that would arise if American government officials traveled to another sovereign country and attempted to carry out a search of any kind, professing the authority to do so based on an American-issued search warrant.” *United States v. Odeh,* 552 F.3d at 171; *see also* Restatement of Foreign Relations § 432 (2) (“a state’s law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.”); Patricia L. Bellia, *Chasing Bits Across Borders* (“Bellia”), 2001 U. Chi. Legal F. 35, 48 (2001) (“customary international law generally prohibits law enforcement officials from one country from exercising their functions – such as conducting searches or making arrests – in the territory of another state without that state’s permission.”).

Thus, the International Court of Justice has ruled that the United Kingdom could not unilaterally enter territorial waters to collect evidence of explosions that

had damaged its ships. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 34-35 (Int'l Ct. of Justice Apr. 9, 1949). Similarly, in *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26, 319, ¶¶ 1-3, 46, 68-69 (Can.), the Supreme Court of Canada explained that international law required Canadian police officers to obtain consent from the Turks and Caicos Islands to conduct an investigation into money laundering and execute searches and seizures in Turks and Caicos. The Restatement of Foreign Relations Law § 432 reporters note 1 provides an additional example where the Swiss government arrested two French customs officials who traveled to Switzerland to interrogate a former official of a Swiss bank. The French officials were convicted of committing prohibited acts in favor of a foreign state and violation of Swiss banking and intelligence laws, and were given substantial sentences. *Id.*; *see also* OPPENHEIM'S INTERNATIONAL LAW 387-88 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) ("It is . . . a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime. Where this has happened, the offending state should – and often does – hand over the person in question to the state in whose territory he was apprehended."); Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 Leiden J. of Int'l L., 372 ("The exercise of enforcement jurisdiction in the territory of another state, without its consent, breaches the non-intervention principle. . .

extraterritorial enforcement measures will nearly always be considered illegal.”).[2]

The United States Attorneys’ Manual itself recognizes that “virtually every nation enacts laws to protect its sovereignty and can react adversely to American law enforcement efforts to gather evidence within its borders as a violation of that sovereignty . . . .” United States Attorneys’ Manual §§ 9-13.510; *see also* United States Attorneys’ Criminal Resource Manual § 267 (“Virtually every nation vests responsibility for enforcing criminal laws in the sovereign. The other nation may regard an effort by an American investigator or prosecutor to investigate a crime or gather evidence within its borders as a violation of sovereignty.”).

In an analogous case, the D.C. Circuit has held that the principle of non-intervention precludes interpreting the FTC Act to extend U.S. enforcement jurisdiction into the territory of France. In *FTC v. Compagnie*, 636 F.2d at 1313, the court voided the FTC’s effort to serve an administrative subpoena by mail “upon a foreign citizen on foreign soil, without warning to the officials of the local state and without initial request for or prior resort to established channels of international judicial assistance.” *Id.* Although the service of process had been

[2] A state may seek to exercise extraterritorial jurisdiction through prescriptive jurisdiction, such as when it seeks to regulate conduct occurring beyond its borders, or through enforcement jurisdiction, such as when a state seeks to enforce its laws beyond its territory. Law enforcement activities are a classic form of enforcement jurisdiction. *See*, *e.g.*, Jamnejad & Wood, *supra*, at 372-73.

initiated in the United States, the consummation of that action—the compulsory collection and production of documents—would take place in France, in violation of French sovereignty. *See id.* at 1316. Because Congress would not implicitly confer upon the FTC such authority, the D.C. Circuit held that the FTC Act could not be read to permit such an intrusion. *Id.* at 1323 ("courts are bound wherever possible to construe strictly federal statutes conferring subject matter jurisdiction on domestic agencies to avoid possible conflicts with contrary principles of international law.").

Moreover, the fundamental principles of international law described above should not turn on whether the search and seizure is conducted physically or remotely. Any unilateral intrusion into another state's ability to protect the privacy and property rights within its borders is a violation of that state's sovereignty:

> to the extent that states seek to conform their actions to perceptions of applicable international law rules, there is a strong argument that the general rule against conducting investigative activities in the territory of another sovereign applies even when the searching state's officials do not enter the target state's territory, but merely interfere with the target state's power to provide privacy or property protections there.

Bellia, 2001 U. Chi. Legal F. at 79.

3. The District Court Construed ECPA in a Manner That Would Violate International Law

Here, the United States has initiated an action in the United States by obtaining a warrant compelling production from Microsoft, a U.S. corporate

person. Yet neither the government nor Microsoft can consummate the seizure of the records at issue without collecting the information from a server in Ireland, where those records are stored. Such an action is plainly directed at the territory of Ireland and effectuates a search subject to the sovereignty of Ireland. It is of no moment that Microsoft's systems permit it to search for and seize the electronic documents without a U.S. person physically traveling to Ireland because the customer content itself is physically located in that jurisdiction. Bellia, 2001 U. Chi. Legal F. at 44 ("[t]he customary international law prohibition on conducting investigations in the territory of another sovereign should apply even when a state conducts cross-border searches remotely."). If Microsoft produces these records, then it may do so only by accessing the server in Ireland and taking data from that server.

The District Court did not deny that the records were located in Ireland, but held that there would be no violation of Irish sovereignty under *Bank of Nova Scotia* and similar decisions, which permit a U.S. court to "order a person subject to its jurisdiction to produce documents, objects, or other information . . . even if the information or the person in possession of the information is outside the United States." Restatement of Foreign Relations 442(1)(a); *see also In re Grand Jury Proceedings ("Bank of Nova Scotia")*, 740 F.2d 817 (11th Cir. 1984); *Marc Rich & Co. v. United States*, 707 F.2d 663 (2d Cir. 1983).

The District Court overlooked a fundamental distinction between *Bank of Nova Scotia* and the search warrant here. In *Bank of Nova Scotia*, the government sought to compel a bank subject to U.S. jurisdiction to produce its own business records. *See, e.g.*, *Bank of Nova Scotia*, 740 F.2d at 19-20; Restatement of Foreign Relations § 442, cmt. b. Even though the records were located abroad, the United States had the legal right to compel the bank to produce its own information, and with or without the subpoena, the bank had the lawful authority to collect its records from the foreign jurisdiction and to provide them to a third party. Thus, the subpoena in that case did not implicate the sovereignty of another country.[3]

By contrast, here, the government has not sought to compel Microsoft to produce its own business records or to produce records reflecting its own communications with its customers. Rather, the government seeks to compel Microsoft to produce records that it holds as a custodian for customers in a foreign country. The U.S. government's ability to compel Microsoft to disclose such private communications arises entirely from its exercise of sovereign law enforcement powers in Ireland. Since the content is stored in a foreign country,

[3] The Restatement of Foreign Relations recognizes that even where a person is subject to U.S. jurisdiction and the government seeks its own records, there may be circumstances in which a court must respect foreign laws that limit the dissemination of such records to a third party. *See, e.g.*, Restatement of Foreign Relations § 442(2).

however, the government's ability to compel such disclosure necessarily involves the extension of that compulsory authority into Ireland and, absent consent, thereby constitutes a violation of the sovereignty of Ireland.

The *Charming Betsy* canon not only forecloses an interpretation of ECPA that would cause such a violation of international law, but points to an interpretative approach that avoids that very violation. There is no plausible argument that the District Court's interpretation is compelled by the statutory text. To the contrary, the Magistrate Judge admitted that the text was ambiguous, and in fact, the most natural interpretation of the statute is that when Congress chose to use the word "warrant" under ECPA, it understood the disclosure method to incorporate the traditional geographic limits on warrants (except as expressly modified by section 108 of the Patriot Act). As described in Section III *infra*, if the government wishes to obtain records stored abroad, then it should avail itself of the appropriate channels for promoting law enforcement cooperation under international law, such as by enlisting the cooperation of the Republic of Ireland pursuant to the US-Ireland MLAT. But using the ECPA as a path to this data necessarily construes an ambiguous statute in a manner that constitutes a clear violation of international law. As such, the District Court's order blessing the route that the government wishes to take is an invalid interpretation under the *Charming Betsy* canon.

II. THE DISTRICT COURT'S CONSTRUCTION OF THE ECPA VIOLATES THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Just as the *Charming Betsy* canon prevents interpretation of federal laws that would violate international law, the presumption against extraterritoriality serves the complementary purpose of avoiding conflicts by constraining the exercise of U.S. jurisdiction to within our borders. The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). It is a "longstanding principle of American law" that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010); *see also E.E.O.C. v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991) ("unless there is the affirmative intention of the Congress clearly expressed, we must presume [the statute] is primarily concerned with domestic conditions.") (quotations and citations omitted); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (presumption against extraterritoriality reflects the idea that "United States law governs domestically but does not rule the world"); *United States v. Gatlin*, 216 F.3d 207, 214 (2d Cir. 2000) ("the Supreme Court has long held that courts should apply a presumption against extraterritoriality when interpreting statutes") abrogated on other grounds by

United States v. Yousef, 750 F.3d 254, 262 (2d Cir. 2014). Thus, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, 561 U.S. at 248.

The District Court did not identify anything in ECPA's text to suggest that Congress had contemplated authorizing the issuance of warrants for searches outside the United States. Yet that it is precisely what the District Court has ordered. The District Court has authorized the government to seize documents located in Ireland. The fact that the seizure is to be effectuated by compelling Microsoft to act in that jurisdiction at the direction and upon the order of the United States is a distinction without a difference.

The Magistrate Judge opined that "the concerns that animate the presumption against extraterritoriality are simply not present here" because "an SCA Warrant does not criminalize conduct taking place in a foreign country; it does not involve the deployment of American law enforcement personnel abroad; it does not require even the physical presence of service provider employees at the location where the data is stored." Mem. & Order, Dkt. No. 5 at 21-22.

Yet the Supreme Court rejected a similar argument in *Morrison*, where the plaintiffs had argued that the presumption against extraterritoriality should not apply because they sought to recover on account of fraudulent acts in Florida that had the effect of inflating stock prices on Australian securities markets. As the

Court explained, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison*, 561 U.S. at 266.

Here, the critical question is not whether Microsoft has a physical presence in the United States, or whether the government can compel action taken from here, but where the search in question is to be executed. There is no question that the warrant purports to regulate and direct the actions to be taken in a foreign country, namely the search for, and seizure of, content stored in Ireland. Whether or not Microsoft has the technology to collect the customer content remotely or whether it needs to rely upon foreign employees is simply happenstance. There is no basis in ECPA for distinguishing one circumstance from the other.

Indeed, the argument for applying the presumption against extraterritoriality here is even stronger here than in *Morrison* or *Aramco*. Those cases concerned an exercise of prescriptive jurisdiction, where the statutes authorized private rights of action, either under Title VII or the federal securities laws, regulating the conduct of parties otherwise subject to the jurisdiction of the U.S. courts. *See Morrison*, 561 U.S. at 273; *Aramco*, 499 U.S. at 259. By contrast, here, the statute concerns the government's authority to exercise its ***enforcement jurisdiction*** in the territory of another, an area where the principle supporting the presumption against extraterritoriality should be at its strongest. *See*, *e.g.*, Maziar Jamnejad & Michael

Wood, *The Principle of Non-Intervention*, 22 Leiden J. of Int'l L., 372 ("extraterritorial enforcement measures will nearly always be considered illegal."); *see also* Bellia, 2001 U. Chi. Legal F. 35 at 75 ("while a state can regulate extraterritorial conduct, it generally cannot take enforcement actions extraterritorially."). Congress plainly would not have extended U.S. prescriptive jurisdiction by silence.

The Magistrate Judge also erred, as did the District Judge in adopting the Magistrate's decision, by treating extraterritoriality entirely as a unilateral concept, when, in fact, it should be viewed bilaterally. The question is not simply what a U.S. court would regard as appropriate but what actions might incite "unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 133 S. Ct. at 1664. Here, the record suggests that the relevant foreign governments would believe that the execution of the warrant by the United States would in fact be an extraterritorial application of U.S. law.

As explained by Michael McDowell, the former Attorney General and Deputy Prime Minister of Ireland, Ireland's Data Protection Acts demonstrate that the Republic of Ireland has sovereign interest in guarding against unilateral foreign law enforcement activities within its borders. The law provides that disclosure of the communications that the warrant compels will only be lawful when required under Irish law and subject to the jurisdiction and control of Irish courts. *See In re*

Microsoft Corp., Declaration of Michael McDowell ("McDowell Declaration"), ¶¶ 1, 8-10, Dkt. No. 18. In addition, the record also contains a June 24, 2014 letter from Ms. Viviane Reding, the Vice President of the European Commission of Justice, Fundamental Rights and Citizenship, who expressed the Commission's concern that "the extraterritorial application of foreign laws (and orders to companies based thereon) may be in breach of international law and may impede the attainment of protection of individuals guaranteed in the [European] Union." *In re Microsoft Corp.*, Dkt. No. 71-1. These are but two examples of the potential for international discord—in this case and in future ones—wrought by the District Court's interpretation of the ECPA. Such examples demonstrate that the concern for conflict and international discord is more than purely speculative.

Finally, the Magistrate Judge sought to distinguish cases recognizing limits of the territorial reach of warrants by emphasizing that they dealt with "conventional warrants" issued by federal courts whereas "the requirement to obtain a section 2703(a) order is grounded in the SCA." *In re Microsoft Corp.*, Mem. and Order, Dkt. No. 5 at 23. The Magistrate Judge thus has interpreted the ECPA to provide the government with an extraterritorial power that it would not ordinarily have under federal law—the power to search and seize documents located abroad. Such an interpretation reads an extraterritorial reach into the

ECPA that is absent from the statute, and thus violates the presumption against extraterritoriality.

III. EXISTING TREATIES PROVIDE A METHOD FOR THE GOVERNMENT TO OBTAIN THE DATA THAT IS CONSISTENT WITH INTERNATIONAL LAW

The District Court's ruling also should be reversed because the judicial warrant itself threatens to place the United States at odds with its international obligations by circumventing the established treaty procedures under the MLAT's with Ireland and the European Union. *See* Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Ireland, Jan. 18, 2001, T.I.A.S. No. 13137 ("US-Ireland MLAT"); Agreement on Mutual Legal Assistance, U.S.-EU, June 25, 2003, T.I.A.S. No. 10-201.1 ("US-EU MLAT"). As discussed above, the *Charming Betsy* principle would weigh against interpreting ECPA in a manner that threatens the treaty commitments of the United States. In addition, the federal courts should not issue a search warrant that threatens to place the United States in violation of its treaty obligations.

The US-Ireland MLAT provides that the parties "shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the investigation, prosecution, and prevention of offenses, and in proceedings related to criminal matters," including "executing requests for searches and seizures." U.S.-Ireland MLAT art. 1(1)-(2)(f). Article 14 of the treaty specifically sets out

procedures for search and seizure, including requests for the "search, seizure, and delivery of any item" in the territory of the requested party. *Id.* art. 14(1).

The US-EU MLAT supplements the US-Ireland MLAT and provides "for enhancements to cooperation and mutual legal assistance" between the United States, the European Union, and its member states. US-EU MLAT art. 1. This treaty explicitly reflects government concerns for efficiency by providing "for the use of expedited means of communication in addition to any authority already provided under bilateral treaty provisions" (*id.* art. 3(1)(d)), and by providing that mutual assistance may be "made by expedited means of communications, including fax or e-mail" and a requested state may "respond to the request by any such expedited means of communication." *Id.* art. 7.

Concern for the separation of powers between the branches of government also counsels against condoning the conduct of the government here. The MLATs were negotiated by the Executive Branch and ratified by the Senate. The United States has provided no basis for its decision to bypass the treaties enacted to accomplish the very task it seeks—to search and seize records held on the sovereign territory of Ireland.

Moreover, even if the Government's conduct does not directly violate the letter of the MLAT, it does violate its obligation to implement these agreements in good faith. *See, e.g.*, *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d

Cir. 2001) (following the foundational principle of international law that "a treaty in force is 'binding upon the parties to it and must be performed by them in good faith'") (quoting the Vienna Convention on the Law of Treaties Art. 26, May 22, 1969); Restatement of Foreign Relations § 321 & cmt. a (the principle that international agreements are binding and must be performed in good faith "lies at the core of the law of international agreements and is perhaps the most important principle of international law"); *see also United States v. Stuart*, 489 U.S. 353, 368 (1989) (treaties "should generally be construed liberally to give effect to the purpose which animates it"); *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) ("Treaties of every kind . . . are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith . . . the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by [treaty] stipulations shall be recognized and protected.").

The bedrock principle that treaties are binding and must be performed in good faith requires, for comity purposes, that the United States seek to utilize the MLAT procedures rather to circumvent them. Such an obligation seems particularly appropriate when there is solid support before the court for the conclusion that Ireland has cooperated efficiently and, when necessary, expeditiously with U.S. requests for records under the MLAT. McDowell

Declaration ¶¶ 3-4, 8; *In re Microsoft Corp.*, Supplemental Declaration of Michael McDowell ¶¶ 3-5, Dkt. No. 73. The federal courts should not abet an effort by the government to circumvent the established MLAT procedures by commanding Microsoft to transfer Irish records into the United States. Whether phrased as an application of principles of statutory construction, or an independent obligation on the federal courts to avoid a violation of international law, these principles require that the District Court's decision be reversed.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, according to the word-processing program with which it was prepared, complies with Rule 32(a)(7) of the Federal Rules of Appellate Procedure in that it contains a total of 6,997 words.

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