No. 17-2

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICROSOFT CORPORATION

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

MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS AND REMAND THE CASE WITH DIRECTIONS TO DISMISS AS MOOT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rule:

Statutes and rule—Continued: Page

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Pursuant to Rule 21.2(b) of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the Court vacate the judgment of the United States Court of Appeals for the Second Circuit and remand the case to that court with instructions to vacate the district court's contempt finding and to direct the district court to dismiss the case as moot.

This case involves a challenge to a probable-cause-based warrant issued under 18 U.S.C. 2703. The question presented is whether a United States provider of email services must comply with such a warrant by making disclosure in the United States of electronic communications within that provider's control, even if the provider has decided to store that material abroad. On March 23, 2018, Congress passed and the President signed the Clarifying Lawful Overseas Use of Data Act

(CLOUD Act) as part of the Consolidated Appropriations Act, 2018, H.R. 1625, Div. V, 115th Cong., 2d Sess. (2018). The CLOUD Act resolves the question presented by specifying that a service provider responding to a Section 2703 order must produce information within its "possession, custody, or control, regardless of whether such * * * information is located within or outside of the United States." CLOUD Act § 103(a). The United States has obtained a new warrant under the CLOUD Act, and Microsoft's sole objection—that the prior warrant was impermissibly extraterritorial—no longer applies.

The United States respectfully submits that this case is now moot. As a result, pursuant to this Court's "established practice," the Court should "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Although the CLOUD Act precludes similar legal disputes in the future, vacatur remains appropriate because the court of appeals' erroneous opinion could otherwise "spawn[] * * * legal consequences" in future cases, *id.* at 41, on critical issues involving extraterritoriality and privacy.

STATEMENT

A. The Section 2703 Warrant Issued To Microsoft

As explained in the government's initial brief (at 4-7), this case involves a warrant issued to Microsoft under the Stored Communications Act, 18 U.S.C. 2703, requiring disclosure of email information for a particular email account. J.A. 22-26. The government's application for the warrant established probable cause to believe that the account was being used to further illegal drug activity in, or manufacturing for importation into, the United States. Pet. App. 2a; see J.A. 25. Microsoft

moved to quash the warrant with respect to the contents of the emails in the account, which it had "migrate[d]" to a datacenter in Ireland. Pet. App. 7a, 10a. Microsoft contended that it would be an impermissible extraterritorial application of Section 2703 to require a service provider to disclose electronic information stored outside the United States. See *id.* at 20a-21a, 73a-74a.

The magistrate judge denied the motion to quash, concluding that the Section 2703 warrant at issue did not operate extraterritorially. Pet. App. 97a. The district court affirmed. *Id.* at 102a. After the parties stipulated that Microsoft had not complied with the warrant and would not do so while it sought further review, the district court held Microsoft in civil contempt, without imposing any sanctions, in order to ensure jurisdiction for an appeal. *Id.* at 12a n.9, 103a. A panel of the court of appeals then reversed the denial of the motion to quash and vacated the civil contempt finding. *Id.* at 1a-48a.

This Court granted the government's petition for a writ of certiorari on October 16, 2017. The parties filed briefs, and the Court heard oral argument on February 27, 2018.

B. The Passage Of The CLOUD Act

On March 23, 2018, Congress enacted the Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong., 2d Sess. (2018). The President signed the Act into law on the same day.

Division V of the Consolidated Appropriations Act is called the Clarifying Lawful Overseas Use of Data Act, or the CLOUD Act. The CLOUD Act amends the Stored Communications Act by adding 18 U.S.C. 2713, which states:

> A provider of electronic communication service or remote computing service shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States.

CLOUD Act § 103(a). The CLOUD Act includes legislative findings that "[t]imely access to electronic data held by communications-service providers is an essential component of government efforts to protect public safety and combat serious crime" and that such efforts have been "impeded by the inability to access data stored outside the United States that is in the custody, control, or possession of communications-service providers that are subject to jurisdiction of the United States." *Id.* § 102(1)-(2).

The CLOUD Act also establishes a statutory comity analysis, under which a service provider subject to a Section 2703 disclosure order may move to modify or quash the order if the provider reasonably believes both that the customer whose data is requested is neither a U.S. person nor a U.S. resident and that "the required disclosure would create a material risk that the provider would violate the laws of a qualifying foreign government." CLOUD Act § 103(b) (adding 18 U.S.C. 2703(h)(2)). "[Q]ualifying foreign government[s]" will include governments that provide appropriate protections for data and that enter agreements under the CLOUD Act with the United States to facilitate data sharing. *Ibid.* In those circumstances, the CLOUD Act

authorizes courts to perform a comity analysis to determine whether to enforce the full scope of the Section 2703 order. *Ibid.* When the statutory comity analysis under Section 2703(h) does not apply, the CLOUD Act does not affect the availability or application of a common-law comity analysis. *Id.* § 103(c); see U.S. Br. 50-52.

The CLOUD Act does not specify an effective date.

ARGUMENT

A. This Case Is Now Moot

Under the CLOUD Act, Microsoft must produce information of the sort requested here. The government sought and received a probable-cause-based Section 2703 warrant requiring Microsoft to disclose information pertaining to a user's email account that Microsoft stores in a foreign datacenter. Microsoft is a U.S. provider, subject to the jurisdiction of U.S. courts. And Microsoft has never contested that the requested information is within its "possession, custody, or control." CLOUD Act § 103(a).

1. The CLOUD Act directly governs the warrant at issue in this case because it changes the law in a way that does not have an impermissibly retroactive effect. The Court has long applied a presumption against the retroactive application of new legislation. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994). But "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Id.* at 269. "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-270. "Changes in procedural

rules," for example, "may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Id.* at 275.

The application of the CLOUD Act to the original Section 2703 warrant at issue in this case would not be retroactive. Microsoft's production of the requested information has not been "completed," *Landgraf*, 511 U.S. at 270, as it remains possible for Microsoft to comply fully with the government's demand for disclosure. The Section 2703 warrant remained valid after the CLOUD Act, and no real consequences have attached to Microsoft's failure to comply with the warrant up to this point. (The contempt finding was entered only to facilitate appellate review, and no sanctions have or will attach if Microsoft now complies. See pp. 7-8, *infra.*)

In that sense, this case mirrors *United States Department of Justice* v. *Provenzano*, 469 U.S. 14 (1984) (per curiam). In *Provenzano*, the parties disputed whether certain records should have been disclosed under the Freedom of Information Act, 5 U.S.C. 552, or had been properly withheld under a withholding statute. 469 U.S. at 14. While the case was pending in this Court, Congress amended the relevant statute to make clear that it did not permit withholding. *Id.* at 14-15. The Court then explained that "[t]he new legislation * * * plainly renders moot" the question presented, as the "requests for records now are to be judged under the law presently in effect." *Id.* at 15. Other cases have adopted similar approaches to new legislation. See, *e.g.*, *United States Dep't of the Treasury* v. *Galioto*, 477 U.S. 556, 559 (1986) (finding case moot where the new legislation "significantly alter[ed] the posture of th[e] case"); *Diffenderfer* v. *Central Baptist Church of Miami, Fla.*,

Inc., 404 U.S. 412, 414 (1972) (per curiam) (explaining that the Court evaluates state "law as it now stands, not as it stood when the judgment below was entered" and that "[t]he case has therefore lost its character as a present, live controversy") (citation omitted); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam) (similar); see also *American Bar Ass'n* v. *FTC*, 636 F.3d 641, 643 (D.C. Cir. 2011) ("It is well established that a case must be dismissed as moot if new legislation addressing the matter in dispute is enacted while the case is still pending.").

2. Nevertheless, Microsoft has refused to acknowledge either that the CLOUD Act applies to the Section 2703 warrant at issue in this case or that Microsoft plans to disclose the required information under the original warrant.

Microsoft has suggested that the CLOUD Act does not apply to the original warrant and render this case moot because the case involves Microsoft's appeal of a contempt order issued by the district court. See J.A. 27-28; Pet. App. 103a. If Microsoft were to face sanctions based on a period of non-compliance before the CLOUD Act was enacted, application of the CLOUD Act to that dispute would raise serious retroactivity concerns under *Landgraf*. The contempt citation in this case, however, creates no meaningful risk based on Microsoft's pre-CLOUD Act conduct. The district court "impose[d] no other sanctions" when it held Microsoft in contempt—which it did "to permit prompt appellate review." Pet. App. 103a. And the court noted that the government could seek sanctions only if there were "materially changed circumstances in the underlying criminal investigation" or if Microsoft were to maintain

its non-compliance after the government prevailed on appeal. *Ibid.*

The government has not sought sanctions to this point, and Microsoft's disclosure of the requested information under the CLOUD Act would negate both of the avenues identified by the district court for doing so. Meanwhile, the civil contempt finding itself poses no real consequences. See *Marshall* v. *Whittaker Corp., Berwick Forge & Fabricating Co.*, 610 F.2d 1141, 1145 (3d Cir. 1979) ("Unlike a criminal conviction or involuntary commitment to a mental hospital, an adjudication of civil contempt carries with it no possibility of collateral deprivations of civil rights or other specifically legal consequences.") (footnote omitted). As a result, the CLOUD Act does not attach "'a new disability' to conduct over and done" before its enactment. *Vartelas* v. *Holder*, 566 U.S. 257, 267 (2012) (quoting *Society for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C. N.H. 1814) (No. 13,156) (Story, J.)); see *Landgraf*, 511 U.S. at 268-269.

3. Because Microsoft has thus far refused to comply with the original warrant, the government has determined that the most efficient means of acquiring the information sought is through a new warrant under the CLOUD Act. The specific legal question that prompted the government to seek certiorari has now been resolved by the CLOUD Act. The government is now unquestionably entitled to require Microsoft to disclose foreign-stored data under the Stored Communications Act (absent a comity showing that Microsoft has never sought to make). The resolution of the question presented is thus no longer necessary to address a critical threat to public safety and national security, as the government urged in its petition for certiorari (at 26-29).

Nor is it essential for this Court (or the lower courts) to resolve any dispute about the retroactivity of the CLOUD Act.

Accordingly, on March 30, 2018, the government applied for a new warrant covering the relevant information requested in the Section 2703 warrant at issue in this case. A magistrate judge issued the warrant that same day. Under the new warrant, which will replace the original warrant and which the CLOUD Act indisputably governs, Microsoft must produce any covered information within its "possession, custody, or control." CLOUD Act § 103(a). Microsoft no longer has any basis for suggesting that such a warrant is impermissibly extraterritorial because it reaches foreign-stored data, which was the sole contention in its motion to quash. See C.A. App. 20-34. There is thus no longer any live dispute between the parties, and the case is now moot. See *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) ("A case becomes moot * * * when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.") (citation and internal quotation marks omitted).

B. The Judgment Below Should Be Vacated Under *Munsingwear*

Where, as here, an appeal becomes moot before the appealing party can obtain review, the Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That rule is "commonly utilized," *id.* at 41, and is the "normal" procedure for mootness, *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011). See, *e.g.*, *Trump* v. *Hawaii*, 138 S. Ct. 377 (2017); *Burke* v. *Barnes*, 479 U.S. 361, 365 (1987); *Great*

W. Sugar Co. v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam). The rule serves important purposes: Vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

1. The government did not attempt to evade judicial review

Vacatur generally protects a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance" and "ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (*Bancorp*). Because vacatur is an "equitable remedy," the Court has carved out an exception where "the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 24-25. Thus, where a party agrees to a settlement, he often "voluntarily forfeit[s] his legal remedy." *Id.* at 25. But even that is not a rigid rule: The ultimate "determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of" vacatur even when a party acts to produce the mootness. *Id.* at 29; see, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75 (1997).

This Court has accordingly refused to vacate lower-court judgments where a party voluntarily initiates action to eliminate the controversy—for example, by agreeing to a settlement, see *Bancorp*, 513 U.S. at 25, or by failing to pursue an appeal, see *Karcher* v. *May*, 484 U.S. 72, 83 (1987). By contrast, even where a party exercises some agency in resolving a dispute, the Court has applied its default rule of vacatur so long as neither

a "desire to avoid review" nor "the presence of th[e] federal case" played any "significant role" in motivating the circumstances that caused mootness. *Alvarez* v. *Smith*, 558 U.S. 87, 96-97 (2009). For example, although the parties in *Alvarez* resolved underlying property disputes before this Court could decide a due process challenge to state forfeiture laws, the Court concluded that the resolution of the case "f[e]ll on the 'happenstance' side of the line." *Id.* at 95. As a result, the Court followed its "ordinary practice" of vacating the judgment below and remanding with instructions to dismiss the case. *Id.* at 97.

In this case, "the vagaries of circumstance" have deprived the case of an ongoing adversarial conflict. *Bancorp*, 513 U.S. at 25. After oral argument, Congress enacted the CLOUD Act, which resolved any question about a provider's obligation to disclose foreign-stored data under Section 2703. As this Court has previously recognized, vacatur is the proper course when a case becomes moot because of the expiration of a challenged law. See *Burke*, 479 U.S. at 365. The same is true when a case becomes moot because of the repeal of a challenged law. See *Diffenderfer*, 404 U.S. at 414-415 (vacating and remanding with leave to amend). And vacatur is equally warranted when a case becomes moot because of the amendment of a challenged law. See *Provenzano*, 469 U.S. at 15 (vacating and remanding for consideration of remaining disputes); see also *American Bar Ass'n*, 636 F.3d at 649 (explaining that the *Bancorp* exception does not apply when "a case is rendered moot by intervening legislation" and when the government seeks vacatur).

The government believes that the CLOUD Act settled the dispute in this case. But even if the CLOUD

Act alone did not render this case moot, the legislation resolved the key legal dispute in this case and set in motion the events leading to mootness. Although the government obtained a new warrant to avoid a needless and potentially protracted dispute about the retroactive effect of the CLOUD Act, any government contribution to this case's mootness is, as in *Alvarez*, not motivated by a "desire to avoid review" of the question presented. 558 U.S. at 97. It is motivated by the investigatory need for information that the government has sought since late 2013, see J.A. 22, and to which it is now clearly entitled.

The government does not believe that seeking a new warrant was necessary in order to compel Microsoft to act: In light of the CLOUD Act, Microsoft should have simply complied with the existing warrant, to which it can have no valid legal objection, purging any contempt. See, *e.g.*, *United States* v. *Zakharia*, 418 Fed. Appx. 414, 415 (6th Cir.) (concluding that "no live controversy remains" once the party in contempt "purged the contempt by complying with the court's order, with no resultant sanctions"), cert. denied, 565 U.S. 945 (2011); *In re Grand Jury Subpoena Duces Tecum, 91-02922*, 955 F.2d 670, 671-672 (11th Cir. 1992) (stating that the appellant "mooted this issue by surrendering the materials and purging his contempt," and collecting cases); *Marshall*, 610 F.2d at 1144 (adhering to "the rule enunciated by various courts of appeals that an appeal is moot once civil contempt has been purged"). Microsoft, however, chose not to do so. The government has thus shouldered the responsibility of taking a formal step to end the particular dispute that prompted this case. That formal last step does not preclude *Munsingwear* vacatur. See *United States* v. *Weatherhead*, 528 U.S.

1042 (1999) (vacating court of appeals' judgment as moot); Gov't Mot. to Vacate, *Weatherhead*, *supra* (No. 98-1904) (explaining that the government produced the requested documents, formally causing the mootness, in light of changed circumstances beyond its control).

In these unusual circumstances, the case's inevitable mootness "fall[s] on the 'happenstance' side of the line" and does not reflect a deliberate government decision "to avoid review" in this Court. *Alvarez*, 558 U.S. at 95, 97; see *Bancorp*, 513 U.S. at 26 (noting the "emphasis on fault in [the Court's] decisions"). To the contrary, the government actively sought this Court's review, and continues to believe that the Second Circuit's errors should be cleared away by this Court. Its actions here reflect only the lack of prospective importance of the construction of Section 2703 in light of Congress's action clearly addressing that issue. Even if the Court attributes mootness in part to the government's decision to reissue the Section 2703 warrant, this case thus presents the "exceptional circumstances" discussed in *Bancorp*, 513 U.S. at 29. The Court should therefore adhere to its "established practice" of "vacat[ing] the judgment below and remand[ing] with a direction to dismiss." *Munsingwear*, 340 U.S. at 39.

2. Vacatur of the court of appeals' decision remains important

Although the CLOUD Act revises the Stored Communications Act and supersedes the court of appeals' specific holding, several aspects of the court of appeals' opinion could still "spawn[] * * * legal consequences" if the decision were to remain on the books. *Munsingwear*, 340 U.S. at 41. Vacatur would eliminate that risk. In *Camreta*, for example, the Court reviewed a

lower-court opinion that had found a constitutional violation but also had held that the defendants were shielded by qualified immunity. The case thereafter became moot, and this Court held that vacatur was appropriate because "a constitutional ruling in a qualified immunity case is a legally consequential decision." 563 U.S. at 713. Even though the defendants had ultimately prevailed on qualified-immunity grounds, the Court explained that the "adverse constitutional ruling" would continue to "injur[e]" them, because an official who "regularly engages in that conduct as part of his job * * * must either change the way he performs his duties or risk a meritorious damages action." *Id.* at 703.

Here, several parts of the court of appeals' decision have the potential to remain "legally consequential." *Camreta*, 563 U.S. at 713. First, in its extraterritoriality analysis, the court assessed the entire chapter in which Section 2703 appears rather than engaging in a provision-specific analysis. See Pet. App. 37a-39a, 41a-42a. As the government explained, that approach conflicts with this Court's decisions in *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), and *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010). U.S. Br. 18-21. That erroneous analysis could infect the court of appeals' interpretation of the "focus" of other provisions of the Stored Communications Act (*e.g.*, 18 U.S.C. 2701, 2702) that were not at issue in this case and not addressed by the CLOUD Act. Second, the court made sweeping statements about recipients of disclosure orders who store the communications of third parties, suggesting that such entities "seize[]" information within their control "as an agent of the government." Pet. App. 43a-44a. Yet this Court has never

treated parties who comply with orders to disclose information already within their control as government agents who seize the property of others. U.S. Br. 29-31. Third, and relatedly, the court of appeals further endorsed a "caretaker" exception to ordinary subpoena rules, Pet. App. 34a—an exception for which it provided no support in history or precedent, U.S. Br. 40-41.

Leaving the court of appeals' decision in place as circuit precedent could therefore generate uncertainty in future extraterritoriality, Fourth Amendment, or subpoena cases arising in the Second Circuit. Given the serious flaws in the court's reasoning, this case implicates the traditional need for vacatur to "clear[] the path for future relitigation of the issues" and to "eliminate[] a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

* * * * *

For the foregoing reasons, the Court should vacate the court of appeals' judgment and remand to the court of appeals with instructions to vacate the district court's contempt finding and to direct the district court to dismiss the case as moot. In the alternative, the Court should vacate the decision below and remand to the court of appeals for further proceedings as may be necessary in light of the CLOUD Act. See, *e.g.*, *United States* v. *Chesapeake & Potomac Tel. Co.*, 516 U.S. 415, 416 (1996) (per curiam) (vacating judgment and remanding "for consideration of the question whether [the cases] are moot"). Finally, if the Court elects to decide the question presented in the ordinary course in order to address the legal approach of the court of

appeals in this case, the judgment of the court of appeals should be reversed for the reasons described in the government's briefs and at oral argument.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

MARCH 2018