No. 20-50052

United States Court of Appeals for the Ninth Circuit

United States of America,

Plaintiff–Appellee,

v.

Carsten Igor Rosenow,

Defendant–Appellant.

On Appeal from the United States District Court
for the Southern District of California

Case No. 3:17-cr-3430-WQH

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. SUPPORTING APPELLANT'S PETITION FOR REHEARING EN BANC

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Corporate Disclosure Statement

In accord with the requirements of Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that *amicus curiae* Restore the Fourth, Inc. is a nonprofit organization that has no parent corporation or shareholders subject to disclosure.

Respectfully submitted,

Dated: June 21, 2022

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Amicus Identity, Interest, & Authority to File

A. Identity of the Amicus

Restore the Fourth, Inc. is a national, non-partisan civil liberties group dedicated to robust enforcement of the Fourth Amendment. Restore the Fourth advances this mission by overseeing a network of local chapters whose many members include lawyers, academics, advocates, and ordinary citizens. Restore the Fourth submits amicus briefs in consequential Fourth Amendment cases. *See, e.g.*, Brief of *Amici Curiae* Restore the Fourth, Inc., et al. in Support of Petitioner, *Lombardo v. City of St. Louis*, 141 S. Ct. 2239 (2020) (per curiam); Brief of *Amici Curiae* Restore the Fourth, Inc., et al. in Support of Reh'g En Banc, *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019).

B. Interest of the Amicus

The *Rosenow* panel decision holds that compelled preservation of records related to a person's private electronic communications is not a Fourth Amendment "seizure." *United States v. Rosenow*, No. 20-50052, 2022 U.S. App. LEXIS 11371, *34–35 (9th Cir. Apr. 27, 2022). Under this decision, as long as a person can "access[] his account," compelled preservation does "not meaningfully interfere" with a person's "possessory interests" in his own data. *Id.*

In response, Fourth Amendment scholar Orin Kerr warns that *Rosenow* is "wrong on a vast scale," giving "any government official a blank check to order any preservation of anyone or everyone's

account[s] without limit."[1] Kerr stresses that absent panel or en banc rehearing, *Rosenow* will have a "dramatic effect" on how "the Fourth Amendment applies to computers and the Internet."[2]

For this reason, Restore the Fourth is interested in *Rosenow* – a decision that "shrink[s] the realm of guaranteed privacy" under the Fourth Amendment. *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001). Through cursory reasoning devoid of any historical analysis, *Rosenow* places every person's digital papers "in the hands of every petty officer." *Boyd v. United States*, 116 U.S. 616, 625 (1886).

C. Authority of the Amicus to File

Restore the Fourth files this brief under Ninth Circuit Rule 29-2(a). This rule authorizes the filing of amicus briefs in support of petitions for rehearing en banc with the parties' consent, which both the Government and Defendant Rosenow have given.

Restore the Fourth also certifies under FRAP 29(a)(4)(E) that in this case, no party nor counsel for any party either: (1) wrote this amicus brief in part or in whole; or (2) contributed money meant to fund the preparation or submission of this brief. Only Restore the Fourth, including its members and counsel, have contributed money to fund the preparation and submission of this brief.

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1 Orin S. Kerr, *The Ninth Circuit's Stunner in* Rosenow, REASON (May 13, 2022), https://bit.ly/3y7yQhV.

2 *Id.*

Argument

"[T]his case is distasteful"—indeed, it is "worse than that." *McDonnell v. United States*, 579 U.S 550, 580–81 (2016). Defendant Carsten Rosenow stands convicted of serious offenses related to child exploitation. Rosenow's case nevertheless raises "broader legal implications" that warrant this Court's "concern." *Id.*

The government "directed" an electronic communications service provider "to preserve records related to Rosenow's private communications." *United States v. Rosenow*, No. 20-50052, 2022 U.S. App. LEXIS 11371, *34 (9th Cir. Apr. 27, 2022). The *Rosenow* panel held this conduct was not a Fourth Amendment "seizure" because it "did not prevent Rosenow from accessing his account." *Id.*

This analysis contravenes the "degree of protection" that the Fourth Amendment "afforded when it was adopted." *United States v. Jones*, 565 U.S. 400, 411 (2012) (plurality op.). Founding era history reveals a systematic concern for safeguarding private papers against government invasions. American common-law tradition, in turn, establishes that compelled preservation does meaningfully interfere with a person's possessory interests in their private papers.

The Court should thus grant rehearing to uphold these norms. The true test of Fourth Amendment rights are "controversies" that often "involv[e] not very nice people." *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

Rosenow is one of those controversies.

I. The Court should grant en banc review to reaffirm the original meaning of the Fourth Amendment.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their … papers … against unreasonable searches and seizures." In applying this guarantee to government-compelled preservation of a person's digital papers, the *Rosenow* panel notes that a seizure of property requires "some meaningful interference" with a person's "possessory interests." 2022 U.S. App. LEXIS 11371 at *34–35. The panel then neglects to follow through with historical analysis of this point—i.e., the seminal events of the founding era that gave rise to "the norms that the Fourth Amendment [is] meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168 (2008).

This is a problem. The Fourth Amendment "is to be construed in the light of what was deemed an unreasonable search and seizure **when it was adopted**." *Carroll v. United States*, 267 U.S. 132, 149–50 (1925) (bold added). In modern times, the Supreme Court has made this point clear through decisions upholding "that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). The Court has, for example, reinvigorated the "common-law trespassory test" for gauging when police conduct triggers the Fourth Amendment. *Jones*, 565 U.S. at 409; *see Carpenter v. United States*, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting) (emphasizing that traditional approaches to Fourth Amendment questions are vital to a "sound" and "fully protective" Fourth Amendment jurisprudence).

The importance of the Fourth Amendment's original meaning cannot be overstated. As Justice Frankfurter explains, the Fourth Amendment's words "are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words." *Rabinowitz*, 339 U.S. at 69 (Frankfurter, J., dissenting). The "makers of our Constitution" conferred "as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *United States v. Olmstead*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). "One cannot [then] wrench [the phrase] 'unreasonable searches [and seizures]' from the … historic content of the Fourth Amendment." *Rabinowitz*, 339 U.S. at 70 (Frankfurter, J., dissenting).

The historic content of the Fourth Amendment teaches that during the founding era, one of the greatest threats to liberty was the "general warrant," which allowed British authorities to seize "books and papers that might be used to convict their owner." *Boyd v. United States*, 116 U.S. 616, 626 (1886). Against this threat stood Lord Camden's decision in *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)—"a wellspring of the rights now protected by the Fourth Amendment." *Stanford v. Texas*, 379 U.S. 476, 484 (1965).

Lord Camden declared unlawful a general warrant that allowed Crown messengers to "ransack[]" publisher John Entick's home for "four hours" and "cart[] away quantities of [Entick's] books and papers." *Id.* at 483–84. Observing that "papers are often

the dearest property a man can have," *Entick*, 95 Eng. Rep. at 817–18, Lord Camden emphasized that private papers "are so far from enduring a seizure, that they will hardly bear an inspection." *Boyd*, 116 U.S. at 628 (quoting *Entick*). Private papers were thus subject to the same rules of trespass that dictated "[n]o man can set his foot upon my ground without my license"—even when "the damage be nothing." *Id.* at 627*; see id.* ("By the laws of England, every invasion of private property, be it ever so minute, is a trespass.").

The Supreme Court took these lessons to heart in its earliest Fourth Amendment cases. In *Boyd v. United States*, the Court held that "Lord Camden's judgment" extended beyond mere "breaking of … doors" and "rummaging of … drawers" to "all [government] invasions" into the "privacies of life." 116 U.S. at 630. "Breaking into a house and opening boxes and drawers" were "circumstances of aggravation"—not "the essence of the offence." *Id.* Honoring *Entick* then required courts "to be watchful" for government searches and seizures that were "**divested of** many of the **aggravating incidents** of actual search and seizure" to ensure "unconstitutional practices" did not get their "first footing." *Id.* at 635 (bold added).

In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the Supreme Court enforced these rules against an unlawful seizure "material papers." *Id.* at 391. The government maintained that the Fourth Amendment did not prevent the government from retaining "[p]hotographs and copies" of the papers after the lower court had

ordered a "return of the originals." *Id.* The Supreme Court rejected the government's argument, pronouncing that "the protection of the Constitution" under the Fourth Amendment was not limited to whether the government had "physical possession" of the originals. *Id.* The Court explained that any other conclusion would "reduce[] the Fourth Amendment to a form of words." *Id.*

Taken together, *Entick*, *Boyd,* and *Silverthorne* establish that the Fourth Amendment—in forbidding "unreasonable" searches and seizures[3]—safeguards private papers against any "insidious disguise[]" that the government might use to control such papers. *Boyd*, 116 U.S. at 630. This strong protection reaches government-compelled preservation of a person's papers "wherever they may be." *Ex parte Jackson,* 96 U.S. 727, 733 (1877). Lord Camden "never would have approved" of government-compelled preservation of Entick's papers (e.g., Crown messengers making copies)—even if Entick remained able to access his papers. *See Boyd*, 116 U.S. at 630. For Lord Camden and the Framers, courts were bound to guard the "secret nature" of papers against "any stealthy encroachments thereon." *Id.* at 628, 635. And what founding-era history teaches on this point, common-law tradition reinforces. *See id.*

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[3] As Justice Thomas explains: "[t]he search-and-seizure practices that the Founders feared most—such as general warrants—were already illegal under the common law, and jurists such as Lord Coke described violations of the common law as 'against reason.'" *Carpenter*, 138 S. Ct. at 2243 (Thomas, J., dissenting).

II. The Court should grant en banc review to recognize that compelled digital preservation is a trespass.

The *Rosenow* panel decision contends that official "preservation requests" to Rosenow's electronic communication service provider "did not meaningfully interfere with Rosenow's possessory interests in his digital data because the[] [requests] did not prevent Rosenow from accessing his account." 2022 U.S. App. LEXIS 11371 at *34. This cursory analysis of 'meaningful interference' fails to account for the common law of constructive (i.e., non-physical) trespass.

"[C]onstructive trespass" is a "claim of dominion" that intends "to interfere" with another person's property "under pretence of … right or authority." *Haythorn v. Rushforth*, 19 N.J.L. 160, 165 (1842). "[A]ctual, forcible dispossession [of the owner] is not necessary." *Id.* "Any exercise or claim of dominion, though by mere words, the speaker having the [property] within his power, may constitute such a taking as will sustain an action of trespass." *Id.*

For example, "[m]erely making an inventory and threatening to remove goods" is a constructive trespass "although the goods are not touched by the officer." *Id.* Another example is an unauthorized sale. *E.g., Wall & Wall v. Osborn*, 12 Wend. 39, 40 (N.Y. Supreme Ct. 1834) ("By the act of selling the plaintiffs' property, the defendant assumed a control over it …."). In short, "any unlawful interference with or assertion of control over the property of another, is sufficient to subject the party to an action of trespass." *Id.*

Consider *Chicago Title & Trust Co. v. Core*, 223 Ill. 58 (1906). The Illinois Supreme Court affirmed a trespass verdict against a title company that wrongfully seized and sold a privately-owned hardware store. *See id.* at 60–61, 66. The title company argued that the trial court erred in refusing to instruct the jury to acquit if the jury "believed, from the evidence" that the store owner had in fact "voluntarily delivered possession" of the store to the title company. *Id.* at 62. This Illinois Supreme Court rejected this narrow view of what constitutes a trespass, explaining that "[a]ny unlawful exercise of authority over the goods of another will support trespass, even though no force [is] exerted [by the trespasser]." *Id.* at 63.

"Papers are the owner's goods and chattels …." *Boyd*, 116 U.S. at 628. Compelled digital preservation then entails a constructive trespass to chattels. The government exercises "control over the property of another," barring the owner from exercising sole control over his private papers. *See Wall & Wall*, 12 Wend. at 40. Compelled digital preservation thereby impairs the "condition, quality, [and] value" of the owner's originals, rendering these originals incapable of affording the owner sole possession of his papers. *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997) (quoting RESTATEMENT (SECOND) OF TORTS § 218).

Two common sense observations support these conclusions. **First**, sole possession and control of papers is what spurs people to create private papers in the first place. A person who knows that

every paper he creates is subject to government preservation is less likely to create such papers.[4] **Second**, exclusive possession is what affords people full enjoyment of their papers, in terms of being able to choose who gets to see one's papers and whether these papers are ever seen at all (e.g., deciding to toss a rough draft). *See, e.g., Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 457 (1977) ("Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances, or have deposited such materials with restrictions on their screening.").

Thus, so long as "[t]he papers we create and maintain … reflect our most private thoughts and activities," government-compelled preservation of these papers is a trespass. *United States v. Cotterman*, 709 F.3d 952, 957 (9th Cir. 2013) (en banc). And in the digital age, the magnitude of this trespass implicates "the sum of an individual's private life," considering that compelled digital preservation may reach "millions of pages of text, thousands of pictures, or hundreds of videos." *Riley v. California*, 573 U.S. 373, 394 (2014). With this in mind, *Rosenow* warrants rehearing. The panel decision otherwise leaves core property rights—and the privacy they protect—at "the mercy of advancing technology." *Kyllo*, 533 U.S. at 36.

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[4] *See* Alex Marthews & Catherine Tucker, *Government Surveillance and Internet Search Behavio*r 4 (Digital Fourth Amendment Research & Educ., Working Paper, 2017), https://bit.ly/2CAW0CB; *see also* PEN, CHILLING EFFECTS: NSA SURVEILLANCE DRIVES U.S. WRITERS TO SELF-CENSOR (2013), https://bit.ly/2K9sTIL.

Conclusion

The Court should grant en banc rehearing in *Rosenow* to: (1) uphold the original meaning of the Fourth Amendment; and (2) confirm that under the Fourth Amendment, government-compelled digital preservation of private papers is a meaningful interference with the owner's possessory rights.

Respectfully submitted,

Dated: June 21, 2022

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Certificate of Compliance

The undersigned counsel certifies under Fed. R. App. P. 32(g) that the foregoing amici brief in support of en banc rehearing meets the formatting and type-volume requirements established by Fed. R. App. P. 32(a) and 9th Cir. R. 29-2(c)(2).

This amici brief is printed in 14-point, proportionately-spaced typeface using Microsoft Word 2010 and contains **2,430 words**, including headings, footnotes, and quotations, and excluding all items identified under Fed. R. App. P. 32(f).

Dated: June 21, 2022

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Certificate of Service

The undersigned counsel certifies that on June 21, 2022, he electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. The undersigned counsel further certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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