

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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NATHAN VAN BUREN,)
 Petitioner,)
 v.) No. 19-783
UNITED STATES,)
 Respondent.)
- - - - -

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9
10 Washington, D.C.
11 Monday, November 30, 2020
12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:36 a.m.
16

17 APPEARANCES:
18 JEFFREY L. FISHER, ESQUIRE, Stanford, California;
19 on behalf of the Petitioner.
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21 Department of Justice, Washington, D.C.;
22 on behalf of the Respondent.
23
24
25

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1 P R O C E E D I N G S

2 (11:36 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 19-783, Van Buren versus
5 United States.

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER
8 ON BEHALF OF THE PETITIONER

9 MR. FISHER: Mr. Chief Justice, and
10 may it please the Court:

11 The CFAA is an anti-hacking statute.
12 It prohibits obtaining information from a
13 computer without authorization. And to ensure
14 comprehensive coverage, the statute also
15 prohibits "exceeding authorized access." As
16 Judge Kozinski put it, this -- this ensures that
17 the statute covers not just outside but also
18 inside hackers.

19 In this case, however, the government
20 seeks to transform the supplemental prong of the
21 CFAA into an entirely different prohibition. In
22 the government's view, this prong covers
23 obtaining any information via computer that the
24 accessor is not entitled "under the
25 circumstances" to obtain.

1 It is no overstatement to say that
2 this construction would brand most Americans
3 criminals on a daily basis. The scenarios are
4 practically limitless, but a few examples will
5 suffice. Imagine a secretary whose employee
6 handbook says that her e-mail or Zoom account
7 may be used only for business purposes. Or
8 consider a person using a dating website where
9 users may not include false information on their
10 profile to obtain information about potential
11 mates. Or think of a law student who is issued
12 a log -- log-in credentials for Westlaw or Lexis
13 for educational use only.

14 If the government is right, then a
15 computer user who disregards any of these stated
16 use restrictions commits a federal crime. For
17 example, any employee who used a Zoom account
18 over Thanksgiving to connect with distant
19 relatives would be subject to the grace of
20 federal prosecutors.

21 The main argument the government
22 offers in response to that startling result is
23 that a single two-letter word in the CFAA's
24 definition of "exceeds authorized access," the
25 term "so," demands it.

1 But that word requires no such thing.
2 The word simply clarifies that a use -- that the
3 user must be prohibited from obtaining the
4 information merely by a computer. It relieves
5 the government of having to negate every
6 possible alternative means by which the
7 defendant might permissibly have obtained the
8 information at issue.

9 But that is all the word does. It
10 does not transform the CFAA into a sweeping
11 Internet police mandate. The Court should
12 reverse.

13 And I'm happy to take any questions.

14 CHIEF JUSTICE ROBERTS: Mr. Fisher, in
15 Musacchio versus United States, this is what we
16 said: That statute provides two ways of
17 committing the crime of improperly accessing a
18 protected computer: obtaining access without
19 authorization and obtaining access with
20 authorization but then using that access
21 improperly.

22 You didn't mention that case in your
23 opening brief. The government relied on it.
24 You didn't mention it in your reply brief. I
25 wonder what your -- your answer to that quote

1 is.

2 MR. FISHER: Mr. Chief Justice, my
3 understanding in that case was the Court was
4 simply giving a thumbnail summary of how the
5 statute works. Of course, the question
6 presented here was not presented there. And, in
7 fact, not even the "exceeds authorized access"
8 prong was at issue there in the conspiracy issue
9 the Court reached.

10 I understood what the Court to be
11 doing in that summary simply to be using the
12 word "improperly" as a shorthand for whatever it
13 is that the "exceeds authorized access" prong
14 prohibits and then moving -- and moving right
15 along.

16 CHIEF JUSTICE ROBERTS: Well, but
17 that's not what it -- that's not what it says.
18 It says -- and this seems to me to go to the
19 point at issue here -- that the second way you
20 can violate it is by obtaining access with
21 authorization but then using that access
22 improperly. Doesn't --

23 MR. FISHER: Well, Mr. Chief --

24 CHIEF JUSTICE ROBERTS: Go ahead.

25 MR. FISHER: I'm sorry. I -- I -- I

1 think my answer would simply be just to look at
2 the words of the statute. And I think the
3 definition of "exceeds authorized access"
4 doesn't talk about improper use. It talks about
5 obtaining information that the accessor is not
6 entitled so to obtain.

7 And as we've explained in our papers,
8 we think the definition of that term leaves out
9 improper purposes because we know Congress, in
10 fact, had those -- those words in the very
11 original provision of the statute and they took
12 them out in 1986. And we know from other
13 enactments that we've cited, for example, at
14 page 19 of our blue brief, that when Congress
15 wants to criminalize or otherwise prohibit
16 improper use or unauthorized purposes, it does
17 so expressly.

18 CHIEF JUSTICE ROBERTS: Just to make
19 sure I have your interpretation correct, if --
20 if a -- if a bank has a policy barring employees
21 from accessing Facebook, and an employee exceeds
22 her authorized access and would be covered if
23 she goes onto Facebook, but it wouldn't be a
24 violation if she used that access to look up
25 customers' Social Security numbers to sell them

1 to a third party, right?

2 MR. FISHER: I'm not sure I follow,
3 Mr. Chief Justice. I think my position is that
4 it would not violate the CFAA for the employee
5 to go on Facebook.

6 If you're asking me about the Social
7 Security numbers, for example, it would depend
8 on whether the employee actually had access to
9 that information. As we explain in our brief,
10 if -- if that employee has to use certain log-in
11 credentials that -- of somebody else's, for
12 example, to get that information, that would not
13 -- that would -- that would be a violated --
14 violation of the statute.

15 CHIEF JUSTICE ROBERTS: Thank you.

16 MR. FISHER: The question again --

17 CHIEF JUSTICE ROBERTS: Justice
18 Thomas.

19 JUSTICE THOMAS: Thank you, Mr. Chief
20 Justice.

21 Mr. Fisher, you gave a brief list -- a
22 list, a parade of horrors. In CA 11, this has
23 been the rule for a while. Has there been --
24 can you give us some actual examples of -- of
25 that happening, someone getting -- violating

1 this provision because of accessing Zoom or
2 something like that, or Facebook?

3 MR. FISHER: Justice Thomas, not in
4 the Eleventh Circuit, but the papers discuss,
5 for example, the Drew case out of the Ninth
6 Circuit, which was issue -- which was before the
7 Ninth Circuit issued the Nosal decision, where
8 somebody was prosecuted for misusing MySpace.
9 There's a case involving Ticketmaster that we've
10 cited in the brief.

11 But, more generally, Justice Thomas,
12 I'd also point you to two other things. One is
13 remember that the language of this statute has
14 its own deterrent effect. And so, for people
15 who use the Internet every day, they have to be
16 aware of the criminal law, both on the criminal
17 side and, remember, this statute has a civil
18 component.

19 And I think that's the -- the critical
20 thing, is that the Court said in Marinello and
21 many other cases that you can't construe a
22 statute simply on the assumption the government
23 will use it responsibly. So, if the government
24 has withheld the full brunt of the federal
25 prosecutorial power, that doesn't enable the

1 Court to simply construe the statute on that
2 promise.

3 And so I think that's the -- that's
4 the critical problem with the government's point
5 here.

6 I'd also point you to the Committee
7 for Justice brief, which gives another example
8 of just not everyday Zoom use or Facebook use
9 but also political prosecutions, like the case
10 in Kelly last term and McDonnell a little bit
11 earlier, and I think there's a persuasive case
12 made in that brief how any one of those
13 prosecutions could simply be repackaged as a
14 CFAA prosecution if the government were to win
15 here.

16 JUSTICE THOMAS: So you seem to be
17 making a point that, well, if you don't have the
18 authority to access a certain area, for example,
19 you're -- you have a level A clearance, but you
20 access information that is at a level B or
21 something, that -- that that would be --
22 certainly would -- would -- would exceed
23 authorization.

24 But why can't you have the exact same
25 thing on the other end, that is, that you have

1 authority to access information, but you are
2 limited -- that authorization is limited as to
3 what you can do with it?

4 For example, you work for a car rental
5 and you have the access to the GPS, but rather
6 than use it to determine the location of a car
7 that may be missing, you use it to follow a
8 spouse, or as in this case, the -- the use of
9 the information is a problem.

10 So I don't understand why you make the
11 distinction between these two levels or ways
12 that you can have or not have authorization.

13 MR. FISHER: Because -- because of the
14 language of the statute, Justice Thomas. The
15 statute simply asks whether the user is -- is
16 entitled to obtain the information.

17 And to use your car rental example,
18 the user there is entitled to obtain that GPS
19 information.

20 Now it may be a breach of company
21 policy. It may be -- in the case of the
22 stalking example that the government gives in
23 its brief like that, it may be a different
24 crime, but the question in -- in front of you
25 here is whether it violates the CFAA as enacted

1 and existing right now. And so my only --

2 CHIEF JUSTICE ROBERTS: Justice
3 Breyer.

4 JUSTICE BREYER: All right. The
5 argument on the legislative history I'm
6 interested in because there was an earlier
7 statute which did say pretty clearly it's a
8 crime to use your access for purposes to which
9 such authorization does not extend. And then
10 that was changed to the present language. But,
11 at that time, the history says they didn't mean
12 to make a substantive change.

13 So what do you respond to that?

14 MR. FISHER: Well, two things, Justice
15 Breyer. Remember, first of all, that that
16 original provision of the statute was
17 exceedingly narrow. It applied just to certain
18 federal employees and certain information.

19 When Congress changed that law two
20 years later in 1986, you're right that at one
21 point of the committee report it talked about
22 simply clarifying the statute, but in the other
23 part of the committee report, dealing with
24 exactly the same words, what the -- what the --
25 what Congress said is that they had removed one

1 of the murkier grounds for -- for liability and
2 refocused the statute on its principal object.

3 And so you have those cross-cutting
4 pieces of legislative history. And even the
5 government, I would stress, does not argue that
6 all that amendment did is clarify. The
7 government says that that amendment actually
8 dramatically expanded the statute to go even
9 beyond improper purposes to a violation of any
10 stated use restriction.

11 So nobody here is arguing that the
12 statute didn't change in 1986. It's just a
13 question of whether it expanded dramatically or
14 took away that purpose language.

15 And I think, Justice Breyer, the other
16 thing I would stress about the legislative
17 history is, because this is a criminal case, we
18 think it's improper if not, at the very least,
19 very dangerous to rely on legislative history to
20 resolve ambiguity.

21 Instead, what you should look to are
22 things like the Rule of Lenity and the principle
23 of last term in Kelly and in Marinello where the
24 Court has always resisted construing ambiguity
25 in federal criminal statutes to vastly enlarge

1 the sweep of criminal liability.

2 JUSTICE BREYER: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Alito.

4 JUSTICE ALITO: Mr. Fisher, in this
5 case, we've received amicus briefs from a number
6 of organizations and individuals who are very
7 concerned about what your interpretation would
8 mean for personal privacy.

9 There are many government employees
10 who are given access to all sorts of highly
11 personal information for use in performing their
12 jobs. But, if they use that for personal
13 purposes to make money, protect or carry out
14 criminal activity, to harass people they don't
15 like, they can do enormous damage.

16 And the same thing for people who work
17 for private entities. Think of the -- the
18 person in the fraud detection section of a bank
19 who has access to credit card numbers and uses
20 that information to sell for a personal profit.

21 Do you think that none of that was of
22 concern when Congress enacted this statute?

23 MR. FISHER: Justice Alito, with due
24 respect, I do not think it was. What Congress
25 was concerned about was computer hacking, and

1 that's up and down the legislative history, this
2 new problem of computer -- of -- of hacking.

3 And I think that the two things I
4 would add to that, because I understand the
5 concern, and there -- there are powerful briefs
6 about the policy question you raise, and it's
7 possible Congress may want to step in and
8 regulate that and even criminalize it to some
9 effect, but the question is, what does the
10 statute you have in front of you right now do?

11 And the problem with the government's
12 view or those -- or those amicus briefs is
13 there's no way to reach the federal -- the
14 government employee or the -- or the financial
15 employee that you're imagining without also
16 reaching every other ordinary employee who
17 violates an employee handbook --

18 JUSTICE ALITO: Well, let me ask you
19 -- let me --

20 MR. FISHER: -- every student who
21 violates the course --

22 JUSTICE ALITO: Yeah, let me ask you
23 about that, because you rely heavily on former
24 Judge Kozinski's parade of horrors, but, in
25 doing that, you read the provisions of this

1 section very, very broadly.

2 Take -- take the example of the person
3 who puts -- who lies about weight on a dating
4 website. How would that be a violation of this
5 statute?

6 MR. FISHER: Well, under the
7 government's theory, it's a violation to use a
8 website in violation of the terms of service. I
9 think the government --

10 JUSTICE ALITO: Well, but the statute
11 says --

12 MR. FISHER: -- its own theory of this
13 fact --

14 JUSTICE ALITO: -- if you obtain
15 information, obtain or alter information. How
16 is that person obtaining or altering
17 information?

18 MR. FISHER: Well, I think, typically,
19 when you use it --

20 JUSTICE ALITO: They're putting in
21 information.

22 MR. FISHER: No, it's -- it's not the
23 entering of the false information, Justice
24 Alito. It -- it's then obtaining information on
25 a dating website, for example, about a potential

1 mate. So you are obtaining information from the
2 website through a profile that is false, and
3 that violates the terms of service of that
4 website, and it falls squarely within the
5 government's theory because you have obtained
6 that -- you've gotten on that website with
7 authorization, with your log-in credentials,
8 because you're a single person and not married,
9 et cetera, and you have obtained information in
10 violation of the stated use restrictions on that
11 website. So I don't see how the government gets
12 out of that hypothetical.

13 JUSTICE ALITO: All right. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: Counsel, I very
17 much understand the concerns of my colleagues
18 about the amicus briefs of illegal conduct that
19 this would not cover, including the one at issue
20 here, your client, a local police officer -- not
21 your client, I'm sorry -- yes, your client -- a
22 local police officer who paid for information he
23 got from a federal computer system, which -- for
24 personal reasons.

25 But the fact that there isn't this

1 federal crime doesn't mean this conduct isn't
2 prosecuted in other ways, does it?

3 MR. FISHER: No. For example, my
4 client in this case was prosecuted also under a
5 separate count that's pending on remand. And as
6 I said in the -- in our reply brief, other types
7 of misconduct the government talks about, like
8 the stalking example or like mis-obtaining
9 health information, misuse of trade secrets, all
10 of those things can be prosecuted under
11 different federal statutes.

12 And if -- if -- if Congress decided,
13 it could enact the -- the proposal the
14 Department of Justice has given it a couple
15 times over the last several years to expand the
16 CFAA in certain limited respects.

17 But, as I was trying to say earlier,
18 Justice Sotomayor, the core of the problem is
19 there is no foothold in the statute to inch the
20 statute forward to cover the conduct in this
21 case without also covering all kinds of other
22 violations of purpose-based restrictions that
23 could appear in terms of service contracts,
24 employee handbooks, course syllabuses, syllabi
25 at universities, or even oral dictates.

1 So just take -- go back to the facts
2 of this case and imagine Mr. Van Buren's
3 supervisor had told him, please don't do any
4 license plate searches this evening until you've
5 finished your paperwork, or tomorrow, when
6 you're out on patrol --

7 JUSTICE SOTOMAYOR: Counsel --
8 counsel, are -- counsel, are there targeted
9 changes that could be made to limit the reach of
10 this statute to exactly the fears that I think
11 one of my colleagues expressed of the kind of
12 conduct that we would think of as subjecting
13 someone to punishment?

14 I know, for example, most statutes
15 have a obtaining information and using it for
16 financial gain.

17 MR. FISHER: Yes, Justice Sotomayor,
18 the government itself has proposed amendments to
19 the statute that we cite in our brief.
20 Professor Kerr in his amicus brief describes
21 those proposals as well and endorses them. And
22 -- but I think, again, the critical point I
23 would make is that that should come from
24 Congress.

25 Just back to this statute, as I was

1 saying, what about oral directives to a -- to an
2 officer that tomorrow, when you're out on
3 patrol, don't run license plates, just in
4 ordinary traffic stops; I want you to be more
5 efficient.

6 You know, there's any number of
7 questions that would have to be addressed. Just
8 look at subsection 1 of this statute, Justice
9 Sotomayor. It does restrict federal employees'
10 use of information in giving it to third
11 parties. That is not part of the provision at
12 issue here. So -- so, again, that would be a
13 choice for Congress to make, and all these
14 things should be done on a legislative basis.

15 CHIEF JUSTICE ROBERTS: Justice Kagan.

16 JUSTICE SOTOMAYOR: Thank you,
17 counsel.

18 JUSTICE KAGAN: Mr. Fisher, could you
19 tell me again what you think "so" means?

20 MR. FISHER: "So" means in the manner
21 so described. That's the Black's Law
22 definition. And so translated to this statute,
23 what it means is that you've accessed and
24 obtained the information via computer as opposed
25 to some other means.

1 JUSTICE KAGAN: So could -- could you
2 just parse that for me a little bit? In a -- in
3 a manner so described asks for some kind of
4 reference back. So what are we referring back
5 to on your theory?

6 MR. FISHER: You're referring back to
7 -- to "access a computer with authorization."

8 So, Justice Kagan, two things that
9 might flesh this out for you. One is we give an
10 example of another federal statute on page 2 of
11 our yellow brief that uses "so" in this manner.
12 It just picks up what was said before, that was
13 earlier.

14 And maybe the government's own
15 hypothetical, I think, is the best way this
16 plays out, where the government worries about a
17 federal contractor obtaining salary information
18 from a salary database that he does not have
19 access to. And what "so" does is it prohibits
20 that person from defending himself in a
21 prosecution for hacking into that database by
22 saying, oh, I could have filed a FOIA request or
23 I could have called the employees themselves and
24 asked them what they made, and, therefore, I was
25 entitled to obtain the information.

1 That defense is off limits because of
2 the word "so." And, in fact, in that way, "so"
3 helps the government.

4 JUSTICE KAGAN: Okay. On your parade
5 of horrors, a similar question to Justice
6 Alito's, but one of your -- the -- the -- the
7 features of your parade is -- is an employee
8 checking Instagram at work. How is that
9 obtaining or altering information?

10 MR. FISHER: It's -- it's obtaining
11 information because you are literally obtaining
12 the words or pictures out of Instagram, and it
13 would violate the government's rule. Remember,
14 the prosecutor himself told the jury this at
15 closing argument, it would violate the
16 government's rule because the employee would be
17 at least theoretically prohibited from using her
18 work computer for personal reasons.

19 And so checking Instagram through your
20 work computer would be an improper purpose. It
21 would be an improper use. And you would obtain
22 the information from the computer in the form of
23 those pictures or -- or words or whatever they
24 might be.

25 JUSTICE KAGAN: Thank you, Mr. Fisher.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch.

3 JUSTICE GORSUCH: Good morning,
4 Mr. Fisher. Picking up on your parade of
5 horrors, could you explain to us what the
6 constitutional implications are of your parade?
7 Just to give you an opportunity, rather than
8 just make a policy argument, try and link it up
9 to something bigger.

10 MR. FISHER: Thank you, Justice
11 Gorsuch. I think the -- there are two
12 constitutional problems. One are the First
13 Amendment problems with certain applications of
14 -- of -- of -- of the government's rule that are
15 described in the amicus brief. Secondly,
16 there's the vagueness problem, and that's what
17 I'll focus on.

18 Under the government's view, remember,
19 using -- obtaining information via computer that
20 you're not entitled "under the circumstances to
21 obtain" violates the statute. That is an
22 impossible vagueness problem because either one
23 of two things has to be correct.

24 Either "under the circumstances" means
25 literally every possible circumstance you could

1 imagine, right down to somebody orally telling
2 you not to do that. Imagine a parent telling --
3 telling her teenager, don't use Instagram
4 tonight until your homework is done or don't use
5 Face -- Facebook to -- to talk to your friends.

6 And so there's -- the opportunities
7 for prosecutorial discretion are probably
8 broader than any statute the Court has ever seen
9 if the government is right in literal terms.

10 The only alternative is that "under
11 the circumstances" somehow puts some of those
12 circumstances in and some of them out. But
13 that's a wholly indeterminate problem that I
14 think violates just the most basic fair notice
15 principles of the criminal law.

16 JUSTICE GORSUCH: And then, on the
17 reverse parade of horrors we've heard from the
18 other side, I guess I'm struggling to imagine
19 how -- how long that parade would be given the
20 abundance of criminal laws available.

21 So, if this one didn't cover that kind
22 of conduct, but there were troublesome forms of
23 it, like your client's behavior in this case,
24 misusing a police database, I assume there are
25 ample state laws available that criminalize a

1 lot of that conduct. Am I mistaken?

2 MR. FISHER: No. In fact, this case
3 comes from Georgia, and Georgia itself has a
4 statute about -- about hacking or otherwise
5 misusing computer information. The government,
6 as we point out in our -- in our reply brief,
7 the government gave a few hypotheticals in its
8 brief, and almost every one of them is already
9 addressed by some other provision of the -- even
10 the U.S. Code, let alone state law.

11 And -- and even -- remember, my client
12 himself has already lost his job and has other
13 forms of punishment that have already been
14 brought to bear. So, if Congress decides
15 somehow that is not enough and it wants the CFAA
16 to also be available in situations like this, it
17 could amend the statute. But -- but I don't
18 think there's anything like a comparable problem
19 on the other side in terms of the sort of
20 breadth issue in front of the Court.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh.

23 JUSTICE KAVANAUGH: Thank you, Mr.
24 Chief Justice.

25 And good afternoon, Mr. Fisher.

1 Picking up on Justice Gorsuch's question there
2 at the end and following up on questions from
3 earlier, one of the concerns, I suppose, is
4 government employees or financial company
5 employees or healthcare company employees who
6 have access to very sensitive personal
7 information, then disclose it.

8 And I'd appreciate if you could give
9 us a sense of the federal statutes that you
10 think would cover such -- such disclosures, if
11 any. I -- I take your reference to state
12 statutes, but are there any federal statutes
13 that you want to identify that would cover that
14 kind of situation?

15 MR. FISHER: Sure. I think I'd start
16 with page 19 of our blue brief, Justice
17 Kavanaugh, where we cite a federal statute that
18 prohibits obtaining classified information and
19 using it for an unauthorized purpose. So that's
20 one very important statute. We cite a couple of
21 others involving Social Security Administration
22 information. There's also the trade secrets
23 statute that was passed in 1996.

24 Again, this circles back to Justice
25 Breyer's question, but, remember, that was

1 passed right alongside amendments to the CFAA.
2 And so, when Congress wanted to criminalize an
3 improper purpose, it knew exactly how to do so
4 when it did so with respect to trade secrets.
5 So I think those are the ones that I would
6 highlight.

7 The government, of course, in this
8 case also tried to use the wire fraud statute,
9 and that may be available in some situations as
10 well. So I think you have for the most part
11 already fairly comprehensive coverage.

12 And as I said --

13 JUSTICE KAVANAUGH: Counsel, can I
14 interrupt --

15 MR. FISHER: -- I'll just say it one
16 more time --

17 JUSTICE KAVANAUGH: Sorry to
18 interrupt, Mr. Fisher. The 1984 version of the
19 statute likely would have covered this kind of
20 activity. Why do you think Congress would have
21 narrowed it in 1986 when they were so concerned
22 about this kind of activity?

23 I get your textual point, but I'm just
24 trying to figure out why Congress would have
25 narrowed it in that sense?

1 MR. FISHER: Well, for two reasons, I
2 think, Justice Kavanaugh. One is, remember, it
3 actually would not have covered this case in
4 1984 because that statute dealt only with
5 federal employees and --

6 JUSTICE KAVANAUGH: Yeah.

7 MR. FISHER: -- certain particular
8 kinds of information.

9 JUSTICE KAVANAUGH: Yeah, this -- this
10 kind of --

11 MR. FISHER: And I think that's --

12 JUSTICE KAVANAUGH: -- I take your --
13 I take your point.

14 MR. FISHER: -- getting at the answer,
15 is that when Congress expanded the statute
16 eventually to cover all computers, basically, in
17 the United States, it also did, at the same
18 time, remove that murky ground of liability
19 because it was not, as Congress said in the
20 report, the core of the statutory problem.

21 JUSTICE KAVANAUGH: Yes. No, that's
22 -- I take your point and I meant to say this
23 kind of activity, right, not this case, but --
24 and in a different context, and I take your
25 point about the kind of computers covered.

1 Why wouldn't a mens rea requirement
2 solve your problems if the Court were to read
3 "intentionally" to require knowledge of the law,
4 not just the facts?

5 MR. FISHER: Well, I -- I think the
6 most the mens rea requirement could require
7 would be knowledge that you are violating a use
8 restriction and that the --

9 JUSTICE KAVANAUGH: Well, what if we
10 read it -- let me just challenge the -- your
11 premise. What if we read it to avoid the
12 concerns to require knowledge of the law, as we
13 do with statutes that use the term "willfully,"
14 for example?

15 MR. FISHER: I think even there,
16 Justice Kavanaugh, it would just be such a
17 remarkably broad statute, and -- and then -- and
18 then you'd -- you'd have the problem of people
19 who use Westlaw for personal reasons, they use
20 their work computers for personal reasons, they
21 use any number of other websites, as I was
22 describing, and are told on a daily basis by
23 supervisors and parents and all kinds of other
24 people, don't use the computer for this.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 MR. FISHER: And I do think --

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett.

5 JUSTICE BARRETT: Good afternoon, Mr.
6 Fisher. We've been focusing on the "exceeds
7 authorized access" prong, you know, which is the
8 prong that mattered for Mr. Van Buren. But I
9 want to ask you how that prong relates to the
10 other prong, the "accesses a computer without
11 authorization" prohibition.

12 Let's imagine that Van Buren faced a
13 very firm departmental policy that said he could
14 not use the computer itself for any personal
15 purpose, and he gets into the computer and does
16 what he did here and looks up license plates for
17 a personal use.

18 Has he violated the earlier prong, the
19 "accesses a computer without authorization"
20 prong?

21 MR. FISHER: I think probably not,
22 Justice Barrett. I think the question you're
23 asking raises the question described in some of
24 the amicus briefs about whether the -- I'm
25 sorry, the "without authorization" prong covers

1 just code-based restrictions or other -- other
2 kinds of directives.

3 And I think the best evidence I can
4 give you that it covers just code-based
5 restrictions is subsection 6 at the top of 3(a)
6 of the government's appendix. This is the
7 statute --

8 JUSTICE BARRETT: Well, let me
9 interrupt you for one second, Mr. Fisher,
10 because I'm actually getting, I think, at a
11 different point, perhaps inartfully.

12 It seems to me that the way that
13 you're reading this statute uses authorization
14 as an on/off switch, you know, either you're
15 authorized to use a computer or you're not;
16 either you're authorized to get into a
17 particular database or get a piece of
18 information or you're not.

19 So, here, Van Buren could get the
20 license plates, and it didn't matter if he was
21 getting them for a reason that he was not
22 supposed to get them for. So it -- it seems to
23 me that you are looking at authorization in a --
24 in a bright gates up or gates down kind of way,
25 whereas the government is looking at scope of

1 authorization as included.

2 So, for example, my baby-sitter might
3 have a key to my car so she can pick up my kids
4 from school, but then she uses the car to go run
5 some personal errands. She's exceeded the scope
6 of her authority.

7 And I guess what I'm trying to get at
8 is, why should we understand entitlement or
9 authorization to be just an on/off switch and
10 not to have a scope component?

11 MR. FISHER: Well, I think for two
12 reasons. One is that the statute itself doesn't
13 have a scope component or a purpose component or
14 anything like that. It simply asks whether the
15 person -- now I'm back to our prong -- was
16 entitled to obtain the information. And the
17 answer here is yes, he was, and that --

18 JUSTICE BARRETT: But doesn't the idea
19 of entitlement or authorization itself have a
20 scope component? That's what we would think of
21 in, you know, an agent's authority that the
22 principal has given him, for example.

23 MR. FISHER: It can sometimes, Justice
24 Barrett. I don't disagree with that. And so --
25 but the question is whether it necessarily does.

1 We don't think as a statutory construction
2 matter it necessarily does.

3 And when you compare this to other
4 statutes that do carve out improper purpose, we
5 think that's evidence that Congress didn't --
6 didn't think this was one of those kinds of
7 statutes.

8 And so -- so I think that's the other
9 -- the other piece of it, is to compare back
10 again to the prong that you started with, which
11 is the "without authorization" prong.

12 We know from -- from the provision I
13 was starting to read to you that Congress
14 thought of that as sort of a password-type
15 restriction or a -- or a technological-based
16 restriction. And that's what Congress was
17 concerned about, not other kinds of softer
18 scope-based restrictions.

19 JUSTICE BARRETT: Thank you, Mr.
20 Fisher.

21 CHIEF JUSTICE ROBERTS: A minute to
22 wrap up, Mr. Fisher.

23 MR. FISHER: Thank you. I think, Mr.
24 Chief Justice, what I'd leave you with is the
25 dialogue that I was just having with Justice

1 Barrett and Justice Kavanaugh.

2 Just the core problem here is that
3 once you take -- if you think the statute is
4 ambiguous as to whether or not scope
5 restrictions or purpose restrictions come in,
6 the statute gives you no tools to distinguish
7 the kinds of hypotheticals, some of which are
8 troubling and some of which are more everyday,
9 like Justice Barrett was asking me about -- you
10 cannot distinguish all those hypotheticals from
11 the ones that -- that the government wants to
12 point to the most troubling.

13 So you have this cascade of
14 contract-based restrictions, employee handbook
15 restrictions, course syllabus restrictions, oral
16 restrictions, all the other things that could --
17 that can directly restrict the scope of use in a
18 way that, even as Justice Kavanaugh imagined, if
19 the reader knew, if the user knew that that
20 violated the statute, and that would be just the
21 vast sweeping criminal law that would bring the
22 over-criminalization concerns this Court has had
23 over the last several years really home to roost
24 in just one single statute. And so we urge you
25 not to go that far in this case.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Feigin.

4 ORAL ARGUMENT OF ERIC J. FEIGIN

5 ON BEHALF OF THE RESPONDENT

6 MR. FEIGIN: Thank you, Mr. Chief
7 Justice, and may it please the Court:

8 I don't think you heard my friend
9 spend much time on the text, and I want to start
10 right there. In the words of Section 1030,
11 Petitioner used his access, that is, the
12 credentials entrusted to him as a police
13 officer, to obtain database information that he
14 was "not entitled so to obtain" when he looked
15 up a license plate in return for a bribe.

16 But such serious breaches of trust by
17 insiders are precisely what the statutory
18 language is designed to cover. If a statute
19 prohibited accessing a warehouse with
20 authorization -- with -- with authorization and
21 using such access to obtain items in the
22 warehouse that the accessor is not entitled so
23 to obtain, everyone would understand that
24 language to cover an employee who's allowed to
25 take items for work who instead takes them for

1 himself.

2 Section 1030 used the same language to
3 extend the same property-based protection to the
4 private computer records that contain our most
5 sensitive financial, medical, and other data.

6 Petitioner's trying to gut the statute
7 and leave all of that data at the mercy of
8 anyone who ever has any legitimate ground to see
9 it under any circumstance. But, in doing that,
10 he fails to give effect to every word of the
11 statute, as his answer to Justice Kagan showed,
12 and he ignores its clear history and design, as
13 his answer to Justice Breyer showed.

14 He's -- what he's -- what he's instead
15 relying on here is a wild caricature of our
16 position that tries to bury his own heartland
17 statutory violation beneath an imaginary
18 avalanche of hypothetical prosecutions that he
19 can't actually identify in the real world for
20 seemingly innocent conduct.

21 But those invented cases would
22 implicate textual limits, such as the need for
23 an authorization-based system, and use of the
24 access to reach otherwise inaccessible data that
25 his own conduct clearly satisfies.

1 CHIEF JUSTICE ROBERTS: Mr. Feigin, is
2 your friend correct that everyone who violates a
3 website's terms of service or a workplace
4 computer use policy is violating the CFAA?

5 MR. FEIGIN: Absolutely not, Your
6 Honor. And I think the reasons are different in
7 the two hypotheticals you've given.

8 First of all, on the public website,
9 that is not a system that requires
10 authorization. It's not one that uses required
11 credentials that reflect some specific
12 individualized consideration.

13 CHIEF JUSTICE ROBERTS: Okay. Then
14 limit my -- my question to any computer system
15 where you have to, you know, log on.

16 MR. FEIGIN: So, Your Honor, I don't
17 think all log -- all systems that require you to
18 log in would be authorization-based systems
19 because what Congress was driving at here are
20 inside --

21 CHIEF JUSTICE ROBERTS: All right.
22 Well, then every -- every system that has a
23 password.

24 MR. FEIGIN: No, Your Honor, and let
25 me explain why. What Congress was aiming at

1 here were people who are specifically trusted,
2 people akin to employees, the kind of person you
3 -- that had actually been specifically
4 considered and individually authorized.

5 I don't think we say that about --

6 CHIEF JUSTICE ROBERTS: Well -- well,
7 you just talked about what Congress was aiming
8 at. I'm -- I'm concerned with the text of the
9 statute.

10 MR. FEIGIN: Sure, Your Honor. I
11 think this -- this text -- our reading of the
12 text is consistent -- reading of the word
13 "authorization" to mean -- require
14 individualized consideration makes sense in this
15 context. It's consistent with the Court's
16 decision in Washington County and the dictionary
17 definitions cited in pages 37 to 38 of our
18 brief. And I think it makes sense as just a
19 matter of plain English.

20 I don't think you'd say that a system
21 -- that the Museum of National African American
22 History and Culture required authorization to
23 enter when you had a sign-up sheet and anybody
24 from the public could come in, they just had to
25 register for a particular time.

1 Services like Facebook and Hotmail
2 that will give accounts to anybody who has a
3 pulse and -- and even people who don't, because
4 they don't really check, those aren't
5 authorization-based systems.

6 And I -- I think that narrow meaning
7 makes a great deal of sense in the statute, and
8 it takes care of, like, nearly an entire parade
9 of horrors.

10 CHIEF JUSTICE ROBERTS: Well, I don't
11 understand your -- your example of the museum.
12 I mean, if the guard says -- it would be natural
13 for him to say, are you authorized to enter at
14 this time? I don't -- I don't know -- I don't
15 understand your focus on authorization as a
16 limiting term.

17 MR. FEIGIN: Well, Your Honor, I think
18 authorization clearly, as the Court used it in
19 Washington County and as various dictionaries
20 use it, refers to some level of consideration
21 and affirmative thought-out permission.

22 And the question there is --

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas.

1 JUSTICE THOMAS: Thank you, Mr. Chief
2 Justice.

3 Mr. Feigin, I'd like you to respond to
4 Mr. Fisher's argument about the Rule of Lenity.
5 He seems to think that even if this is a toss-up
6 or it looks like a toss-up, we should rely on
7 that since this is a criminal statute. What's
8 your response to that?

9 MR. FEIGIN: I have two, Your Honor.
10 Number one -- and I'm happy to get into this --
11 I don't think there's -- this is a grievously
12 ambiguous statute or even an ambiguous one. I
13 think it clearly supports us, and his reading is
14 textually insupportable.

15 The second -- and I'll get back to
16 that in a second -- but the second thing I'd say
17 is, if the Court does think the Rule of lenity
18 ought to apply here, I think the better place to
19 apply it is on words like "authorization," as I
20 was just discussing with the Chief Justice, or
21 the word "use," which I think really has to
22 require that the access is instrumental to
23 obtaining data that the user -- that would
24 otherwise be inaccessible.

25 If you'd like, I can drill down on

1 that textual point.

2 JUSTICE THOMAS: No, that's -- that's
3 good enough. I'd like -- I'd like to go to
4 something slightly different.

5 The language in -- before the '84
6 amendments seemed to cover this more precisely
7 or expressly. Of course, we have a change in
8 there are fewer words, and it -- it flows a bit
9 better, but would you work through -- would you
10 explain your -- without getting too much in the
11 legislative history, the change in language and
12 why you think it actually expands its coverage
13 as opposed to compressing it, as Mr. Fisher
14 seems to think?

15 MR. FEIGIN: Your Honor, I don't know
16 that it expands it so much as it -- it really
17 just clarifies it. I mean, it's much simpler
18 and more concise.

19 And I think one thing that it does is,
20 if you look at the previous language, I think it
21 was potentially subject to the interpretation
22 that you had to look to the purposes the --
23 behind the authorization, like why is this
24 particular person authorized to use the system,
25 whereas the current language is much more

1 focused on the express limits that are inherent
2 in the authorization itself. And I think it
3 really clarifies that point and doesn't --
4 doesn't invite any -- any further inquiry.

5 And, Your Honor, I -- I know the
6 question was made without reference to
7 legislative history, but I think the legislative
8 history is quite clear that -- on -- on this
9 particular point.

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

13 JUSTICE BREYER: Well, I take it that
14 if I go to my PC, there are, seems to me, dozens
15 and dozens and dozens of sites where they say
16 you may enter this site and use the information
17 here if you agree to the following terms of
18 access. And then you have a big list in small
19 print that goes on for quite a long ways, pages.
20 I take it that would be covered and the terms of
21 access would be what's permitted and what isn't,
22 authorized and not, correct?

23 MR. FEIGIN: No, Your Honor.

24 JUSTICE BREYER: No? Why not?

25 MR. FEIGIN: "Authorization" in this

1 statute has a meaning of being granted specific
2 individualized permission. And so --

3 JUSTICE BREYER: I'm not granted that
4 when I -- they say in this piece of paper -- or
5 not on a piece of paper -- it says in the thing,
6 you've -- here are the terms of access, you can
7 -- you can use whatever we're giving on this
8 site for the following purposes but not for the
9 other purposes. Now that isn't covered?

10 MR. FEIGIN: No, Your Honor, no more
11 so than, I think, you would think that your --
12 you've been specifically authorized to enter if
13 you walk into a building and there's a sign
14 posted on the outside about some things you're
15 not supposed to do in a building.

16 I -- the word "authorization" under
17 the dictionary definitions that this Court made
18 clear in Washington County requires some kind of
19 individualized permission. And --

20 JUSTICE BREYER: So, if your employer
21 tells you, Mr. Jones, you work for me, here is a
22 PC, you will get all kinds of e-mails on this
23 PC, you are never to use this e-mail for a
24 personal purpose, and then he does, uses it for
25 personal purposes --

1 MR. FEIGIN: So --

2 JUSTICE BREYER: -- that doesn't
3 violate the statute?

4 MR. FEIGIN: So, Your Honor, this gets
5 to the second limiting feature of the statute.
6 So let -- let's assume it's an employee who has
7 satisfied the definition of authorization. He's
8 been specifically individually authorized to use
9 the computer. I don't think the word "use"
10 necessarily requires that the user do something
11 the user couldn't otherwise do.

12 And I think there's two reasons for
13 that in this statute. First, the statute refers
14 separately to accessing the computer and using
15 the access, which shows that using the access
16 has a further narrowing function.

17 And, second, the user has to use the
18 access, not just the computer itself. So if I
19 -- you decide to send an e-mail to your friend
20 about when you're going to have lunch together,
21 and that's something you could do from your
22 phone, there's nothing special about using the
23 access.

24 I point you back to the warehouse
25 example I gave in -- in -- in my introductory

1 remarks that just substitutes the word
2 "warehouse" for "computer" and "items" for
3 "information." I don't think we'd have any
4 trouble really understanding these distinctions.
5 If that's a statute that's aimed at insiders who
6 are people trusted to get into the warehouse who
7 do obtain the items in -- in ways that they're
8 not supposed to obtain, then I don't think we'd
9 -- we think it would be covering these -- these
10 other kinds of scenarios.

11 If I were to tell you that -- if I
12 were to talk about a statute where somebody
13 steps on a ladder and uses such step to retrieve
14 an item, you'd think it was an item that the
15 person couldn't get without stepping on the
16 ladder and using the ladder, not an item that
17 was easily reachable from the ground.

18 CHIEF JUSTICE ROBERTS: Justice Alito.

19 JUSTICE ALITO: Well, I find this a
20 very difficult case to decide based on the
21 briefs that we've received. In response to the
22 concerns about the effect on personal
23 property -- personal privacy of adopting
24 Mr. Fisher's recommended interpretation, he says
25 don't worry about that because there are other

1 statutes that cover it, but I don't really know
2 what those statutes are in many of those
3 instances.

4 And on your side, with respect to the
5 argument that adopting your interpretation would
6 criminalize all sorts of activity that people
7 regard as largely innocuous, you suggest that
8 there are limiting instructions, but -- limiting
9 interpretations, but I don't know exactly what
10 they are.

11 And it would really be helpful to see
12 them in writing. So what exactly is
13 authorization? What exactly does it mean to
14 obtain or alter information? What is this
15 statute talking about when it speaks of
16 information in the computer?

17 All information that somebody obtains
18 on the web is in the computer in a sense. I
19 have a feeling that's not what Congress was
20 thinking about when it adopted this. So I don't
21 really know what to do with -- I don't really
22 understand the potential scope of this statute
23 without having an idea about exactly what all of
24 those terms mean.

25 What -- what help can you give us on

1 that? Is this something that would be -- would
2 be helpful to have specific briefing on the
3 meaning of all these terms?

4 MR. FEIGIN: Well, Your Honor, I
5 actually think the answer to that is no, and the
6 problem you're facing is because of the way
7 Petitioner has teed up the case for you.
8 Petitioner is focusing on only one very small
9 bit of the language here, the entitled "so"
10 language, and hinging his entire parade -- he's
11 asking -- then he's trotting out this parade of
12 horribles and telling you the only way to avoid
13 it is to interpret that language, which I think
14 is quite clear, in his manner as a way that
15 would get rid of all the privacy protection that
16 the statute provides.

17 There are all these other limitations
18 that Your Honor has pointed to. I don't think
19 this is the case in which we can brief them
20 because he acknowledges that his own conduct
21 satisfies them.

22 We have identified for the Court the
23 ways in which -- some ways in which courts could
24 limit these things. I think the proof is in the
25 pudding, which is that I believe it was Your

1 Honor who asked him where the parade really is,
2 and he could identify two members of the parade;
3 one was the Drew case that didn't actually
4 result in a sustained conviction, and the other
5 was a Ticketmaster case in which the defendant
6 hired Bulgarian hackers to circumvent some
7 technological limitations.

8 And I think that shows that
9 everybody's understood this statute not to cover
10 that kind of conduct and to cover the kind of
11 conduct that's at issue here today --

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor.

14 MR. FEIGIN: -- just like the Court --

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Counsel -- I'm
18 sorry, Mr. Feigin. My problem is that you are
19 giving definitions that narrow the statute that
20 the statute doesn't have. You're asking us to
21 write definitions to narrow what could otherwise
22 be viewed as a very broad statute and
23 dangerously vague.

24 But more importantly to me, you said
25 that there is no ambiguity in this statute, but

1 let me give you an example. Imagine a law that
2 says anyone who drives on Elm Street who is not
3 authorized so to drive shall be punished.

4 The "so to drive" to me could mean if
5 you're not authorized to drive on Elm Street.
6 But, under your theory, it could be and might
7 very possibly be read as saying you can't ride
8 on Elm Street if you're driving on it with an
9 illegal purpose, you're speeding, you're
10 breaking the law on curfew, you're texting. It
11 could even cover people who drive on Elm Street
12 on their way to commit a different crime,
13 because they weren't authorized to be on Elm
14 Street for the purpose of committing a crime.

15 So, to me, if all you're relying on is
16 that word "so," I don't get around the
17 ambiguity, especially when the other side points
18 to so many examples in the criminal code where
19 the "so" refers to the -- in the manner that has
20 just been described.

21 MR. FEIGIN: Well, Your Honor, what I
22 think he -- or what I think Petitioner relies
23 both at argument today and on page 3 of his
24 reply brief is that "so" in this statute doesn't
25 refer back to accessing the computer. It refers

1 back to use such access.

2 Everyone agrees that "so" means in
3 that manner, and the statute refers to a
4 particular discrete act. So, if on some
5 occasion a user is not entitled to use his
6 access to obtain certain information, I think
7 he's clearly violated the statute.

8 He tries to get around that --

9 JUSTICE SOTOMAYOR: Don't you think
10 your -- Mr. Feigin, doesn't your reading sort of
11 render superfluous the second part of the
12 statute? I think what you're arguing is, if I'm
13 not authorized to go on the computer for this
14 purpose, then we don't need the second half of
15 the statute.

16 MR. FEIGIN: Are you talking about the
17 "without authorization" prong, Your Honor?

18 JUSTICE SOTOMAYOR: Exactly.

19 MR. FEIGIN: Actually, Your Honor, I
20 think it --

21 JUSTICE SOTOMAYOR: Well, without
22 authorization or exceeding -- or -- or exceeding
23 authorization access.

24 MR. FEIGIN: Sure. Your Honor, I
25 actually think it's their reading that collapses

1 the two prongs because, if all Congress were
2 concerned about were people who get information
3 they're not supposed to obtain, it would have a
4 simple one-prong statute that criminalizes
5 accessing a computer and obtaining information
6 that the accessor is not entitled to obtain.

7 Instead, it broke out a piece for
8 without -- people who access without
9 authorization, the hackers, and people who
10 exceed authorized access, the insiders. And the
11 main danger that insiders present is the precise
12 danger that this case exemplifies.

13 JUSTICE SOTOMAYOR: One last question,
14 counsel. Why do we need other parts of the
15 statute, like 3030(a)(4), that speaks about
16 exceeding authorized access for fraudulent
17 purposes? Under your theory of the case, that
18 is a completely superfluous provision.

19 MR. FEIGIN: No, Your Honor.
20 Something that would come in under (a)(4) but
21 not (a)(2)(C) would be, for example, somebody at
22 Amazon who has access to the ordering database
23 who modifies that database to get an extra item
24 delivered to him or herself.

25 CHIEF JUSTICE ROBERTS: Justice Kagan.

1 JUSTICE KAGAN: Mr. Feigin, if -- if I
2 understand your brief correctly, you would
3 concede, wouldn't you, that if the word "so"
4 wasn't there, you would lose this case?

5 MR. FEIGIN: I think it would be a
6 much tougher case for us without the word "so,"
7 Your Honor.

8 JUSTICE KAGAN: Okay. So then the
9 question is what does "so" mean, and picking up
10 on what you were saying to Justice Sotomayor, if
11 I understand Mr. Fisher's argument, he says "so"
12 means by accessing a computer.

13 And you just said "so" means by using
14 your access. And why is it that we should pick
15 your choice of the prior reference rather than
16 his choice of the prior reference?

17 MR. FEIGIN: The anti-surplusage
18 canon, Your -- Your Honor. If all "so" is doing
19 in a statute -- and this is his reading -- if
20 all "so" is doing in the statute is to make sure
21 that the statute covers someone who could get
22 similar information from a non-computerized
23 source, then it's entirely surplusage.

24 JUSTICE KAGAN: I think he disputes
25 that and I think he has a point here. He's

1 saying that what that prevents is using the
2 statutes in -- in -- as to cases where you could
3 obtain the information in a non-digital manner.

4 MR. FEIGIN: Well, Your Honor, the
5 information is -- the statute's already limited
6 to information in the computer. That is the
7 computer record, the bits and bytes. And I can
8 -- that has to be the case because the statute
9 covers not only obtaining but also altering.

10 When it refers to altering information
11 in the computer, surely it's referring to
12 altering the specific record of, say, my
13 birthday, rather than the abstract fact of the
14 day I was born simply because it happens to be
15 contained in a computer or in the computer that
16 was accessed.

17 And so, if we're limiting this to
18 people who can't use their computer access, as
19 opposed to having somebody read them something
20 over the phone, then that limitation's already
21 quite clearly baked into the statute.

22 JUSTICE KAGAN: Thank you, Mr. Feigin.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch.

25 JUSTICE GORSUCH: Good morning, Mr.

1 Feigin. I guess I'm -- I'm curious about a -- a
2 bigger picture question, and that is this case
3 does seem to be the latest, as -- as the
4 Petitioner's pointed out, in a rather long line
5 of cases in recent years in which the government
6 has consistently sought to expand federal
7 criminal jurisdiction in pretty significantly
8 contestable ways that this Court has rejected,
9 whether we're talking about Marinello or
10 McDonnell or Yates or Bond. You pick your
11 favorite recent example.

12 And I'm just kind of curious why we're
13 back here again on a -- a -- a rather small
14 state crime that -- that is prosecutable under
15 state law and perhaps under other federal laws
16 to try and address conduct that -- that would be
17 rather -- rather -- rather remarkable, perhaps
18 making a federal criminal of us all.

19 MR. FEIGIN: Well, Your Honor, we
20 don't think the statute does that for -- for
21 reasons I -- I've tried to explain and we get
22 into in our briefs. And we do think the statute
23 is aimed at -- at precisely this sort of thing.
24 And I -- I can give you several examples of --

25 JUSTICE GORSUCH: But I'm -- I'm --

1 I'm asking a bigger question, and that is there
2 is -- there's -- there's this pattern, and I
3 would have thought that the Solicitor General's
4 Office isn't just a rubber stamp for the U.S.
5 Attorney's Offices and that there would be some
6 careful thought given as to whether this is
7 really an appropriate reading of these statutes
8 in light of this Court's holdings over now about
9 10 years, maybe more, in similar laws.

10 MR. FEIGIN: Your Honor, we do think
11 this is the correct reading of the specific
12 narrow portion of the language that is at issue
13 here.

14 We do not think that every prosecution
15 that they're positing or even every prosecution
16 we've brought, let's take the Drew prosecution
17 as an example, is one that would validly be
18 brought under this statute.

19 But the kind of misconduct we have
20 here, where a police officer tips off a criminal
21 about something, is exactly the kind of
22 misconduct that the statute was aimed at,
23 because the police officer is abusing his trust
24 and has access to state and -- and national
25 databases which he is -- Petitioner here abused.

1 JUSTICE GORSUCH: Thank you, Mr.
2 Feigin.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh.

5 JUSTICE KAVANAUGH: Thank you, Chief
6 Justice.

7 And good afternoon, Mr. Feigin. Let's
8 focus on the text a bit. I'd look at the text
9 and think "accesses a computer without
10 authorization" means someone who gets on a
11 computer that they're not allowed to get on.
12 And "exceeds authorized access and obtains
13 information," I would think, means you're
14 allowed onto the computer, but you go into a
15 file that you're not allowed to access and that
16 those two things are what the statute might
17 speak to and that disclosure of information that
18 you obtain or misuse of information you obtain
19 is something distinct.

20 But merely browsing around, obtaining
21 the information, that you're not -- in a file
22 you're not allowed to look at is what that
23 second prong is getting at.

24 So why is that wrong as a textual
25 matter?

1 MR. FEIGIN: Well, a couple of points,
2 Your Honor.

3 First, I -- I don't think that's all
4 the second -- I -- I don't think that's -- if
5 that's all the second prong covers, then,
6 basically, that's just like saying, if we do a
7 brick-and-mortar analogy, this is like saying
8 you can't -- it's a crime to go into the back
9 office -- for an employee of a store to go into
10 the back office and take money out of the shoe
11 box where we keep petty cash because he's not
12 allowed ever to get at the petty cash box.

13 But he can take as much money as he
14 wants for himself out of the cash register
15 because he's entitled to go into the cash
16 register to make change.

17 It's -- so it's not just limited to
18 files. We do think it -- it goes to the limits
19 of the authorization.

20 The -- the second point I would make,
21 just to get back to the text here, Your Honor,
22 is that, as I was trying to explain earlier to
23 the Chief Justice, authorization has a meaning
24 here, and everyone, I think, can fairly agree
25 that the meaning -- one meaning of

1 "authorization" is that you have given someone
2 specific permission. That's the definition that
3 we've cited in our briefs, and it's amply
4 supported. And the question -- there might be
5 questions how specific the permission has to be,
6 but, in context, I think the permission needs to
7 be fairly specific.

8 So there are going to be a number of
9 systems that aren't necessarily covered by
10 either prong directly --

11 JUSTICE KAVANAUGH: Again --

12 MR. FEIGIN: -- that would be --

13 JUSTICE KAVANAUGH: -- I'm sorry to
14 interrupt, but I -- I want to get one more
15 question in.

16 MR. FEIGIN: Yes.

17 JUSTICE KAVANAUGH: I think you
18 acknowledged to Justice Kagan that you would be
19 in trouble here if the word "so" were deleted.
20 And you relied on the surplusage canon, but she
21 pointed out that there is some meaning offered
22 by Petitioner to the word "so."

23 But even if it were surplusage, that
24 -- that canon can only take you so far, and this
25 would be, as Justice Gorsuch said, a fairly

1 substantial expansion of federal criminal
2 liability based on one word that you're saying
3 we have to interpret a particular way because of
4 avoiding surplusage.

5 Can you respond to that quickly?

6 MR. FEIGIN: Well, let me say a couple
7 of quick things about that.

8 One is -- this may sound a little
9 trite, but just because the word's two letters
10 doesn't mean the anti-surplusage canon ought --
11 ought not to apply.

12 The second thing I'd say is that the
13 word "so" here really does ensure that this is
14 covering the kind of conduct that Congress
15 wanted to cover. He would be -- like, it --
16 without our interpretation, this is going to
17 leave open anybody to use any information that
18 they have -- or -- or look up any information
19 for any -- under any circumstances whatsoever so
20 long as there's some narrow conceivable
21 circumstance under which they'd be allowed to do
22 so. And that doesn't --

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett.

25 MR. FEIGIN: -- really make a lot of

1 sense.

2 JUSTICE BARRETT: Good afternoon,
3 Mr. Feigin. I want to follow up on Justice
4 Kavanaugh's question. The interpretation that
5 he offered to you of that language, "accesses a
6 computer without authorization or exceeds
7 authorized access," is similar to the kind of
8 on/off switch that I was describing to Mr.
9 Fisher since you're either authorized to be
10 there or you're not, and it doesn't really take
11 into account questions of scope.

12 You say that "so" is what really makes
13 your argument. So are you saying that there
14 isn't any kind of inherent idea of a scope of
15 authorization simply in the word "authorize"
16 itself?

17 MR. FEIGIN: There -- there is
18 inherent in the word "authorized" the scope of
19 authorization, Your Honor. I -- I think that is
20 -- the access is the authorized access, and then
21 you're using the access in -- in a manner you're
22 not -- you're not permitted so -- so to use it.
23 So you are exceeding a limit on your
24 authorization. But I think "so" actually refers
25 back to the word "access."

1 But I -- I -- just to clear up the --
2 any confusion here, to -- the -- the word
3 "authorization" refers to specific
4 individualized permission, and there are going
5 to be systems that don't really require that at
6 all. And so, if I access a public website, you
7 know, just like I wouldn't really normally talk
8 about going to a public park with or without
9 authorization, it's just a thing everyone can
10 do, that wouldn't be a system -- a public
11 website wouldn't be a system that has
12 authorization --

13 JUSTICE BARRETT: I mean, it seems to
14 me --

15 MR. FEIGIN: -- in the sense used by
16 the --

17 JUSTICE BARRETT: -- though, you're
18 attributing an awful lot of specificity to the
19 word "authorization" that it doesn't, you know,
20 have. You can have very specific authorization
21 from an employer -- I mean, even from a
22 professor. What if a professor teaching a
23 class, a small class, very individualized, 12
24 seminar students, and she says you may use a
25 computer in class to take notes but for no other

1 reason?

2 MR. FEIGIN: Well, Your Honor, I --

3 JUSTICE BARRETT: For instance, check
4 personal Gmail.

5 MR. FEIGIN: Well, Your Honor, I don't
6 think that -- I don't think that's the kind of
7 authorization the statute's referring to. It's
8 talking about authorization by the owner of the
9 computer data, not just some external constraint
10 that's placed on anybody.

11 And I think that would be problematic
12 even under Petitioner's reading of the statute
13 because, all of a sudden, you're prohibited from
14 going into any file in your computer, and the
15 person has flatly prohibited that for that
16 period of time.

17 So he doesn't really avoid that. The
18 same way his parent/child hypothetical falters
19 on his own reading of the statute because you
20 could -- I could instruct my child not to go
21 into a particular file or use a particular
22 program.

23 I -- I -- I understand the Court's
24 reaction that we are pointing to a bunch of
25 limitations and trying to kind of spec them out,

1 but I really think that's a problem with the way
2 Petitioner's teed up this case. He's focused on
3 this very limited, specific portion of the
4 language. He's then argued that unless you do
5 what he wants, all of this other stuff's going
6 to be opened up. And we don't have much case
7 law on the other stuff because nobody has ever
8 really made any sustained effort to try to bring
9 those kinds of cases. They certainly haven't
10 resulted in any kind of liability.

11 Our point here isn't to defend or --
12 any particular case that isn't this one. And to
13 the extent we start to see cases like that,
14 that'll give courts, including this Court if
15 necessary, the opportunity to further articulate
16 those limits. I mean, it shouldn't --

17 CHIEF JUSTICE ROBERTS: A minute to
18 wrap up, Mr. Feigin.

19 MR. FEIGIN: Thank you, Your Honor.

20 I think -- just to continue with what
21 I was saying, I think what the Court should not
22 do is to interpret this particular portion of
23 the statute in an atextual manner that's
24 different from how the Court viewed the plain
25 language in Musacchio in order to avoid a parade

1 of hypotheticals that hasn't really occurred.

2 I mean, let me give you some examples
3 of things that, on his reading, wouldn't be
4 covered by this or any other federal statute so
5 -- so far as we know. A police officer tipping
6 off a friend with insider information that he
7 got from a database; he knows the friend is a
8 criminal, but he doesn't know the purpose to
9 which the friend's going to put it, so he can't
10 -- we can't get him for attempt, we can't get
11 him for conspiracy.

12 Someone who's leaving a company and he
13 takes the entire customer database with him,
14 it's not a trade secret, he just wants to use it
15 for himself. Or an IT technician at a court who
16 reveals predecisional e-mails from the court's
17 e-mail server.

18 Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Rebuttal, Mr. Fisher?

22 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
23 ON BEHALF OF THE PETITIONER

24 MR. FISHER: Thank you. I'd like to
25 make two textual points and one consequences

1 point.

2 First, as to the text, I don't think
3 it matters if Mr. Feigin said whether "so"
4 refers strictly to accessing the computer with
5 authorization or whether it refers to such
6 access. Either way, it's referring to the
7 manner of getting the information, which is by
8 computer.

9 And I think that also disposes of his
10 surplusage argument about the words later in the
11 statute "in the computer." Yes, it picks up "in
12 the computer," but that same information might
13 be available from some other source. And so
14 that's what "so" is doing.

15 The second textual point is about the
16 word "authorization." The government clearly is
17 putting an enormous amount of weight on that
18 term in this statute. But there's just very
19 serious problems with that.

20 For one thing, the statute talks about
21 either with authorization or without
22 authorization. And so, if you're going to say
23 that none of these public-facing websites are
24 being accessed with authorization, then it might
25 be they're all being accessed without

1 authorization, which would open up a whole other
2 set of problems.

3 But even as to the plain meaning of
4 the term that Mr. Feigin proposes, it just
5 escapes me why logging into your work computer
6 does not establish authorization or logging into
7 your Westlaw account or satisfying an age-based
8 restriction on Facebook or being single and
9 therefore being authorized to use a dating
10 website, et cetera, et cetera.

11 All of these websites and work
12 computers are accessed only with authorization,
13 as even Mr. Feigin defines the term, and so that
14 doesn't meaningfully narrow the statute.

15 And then I think what you're left with
16 is this problem about consequences. And the
17 best thing the government can say is we haven't
18 brought a whole bunch of these prosecutions yet.
19 Remember, even the government's 2014 charging
20 policy doesn't talk about any of these other
21 restrictions Mr. Feigin has been talking about
22 today. Instead, what it says is federal
23 prosecutors "may" decide not to bring these
24 kinds of cases.

25 But, for all the textual reasons we've

1 described, they would be available under the
2 government's reading. And then you're -- I
3 think you're left with Justice Gorsuch's point,
4 which is the Court over and over again has had
5 cases in recent years and even further back,
6 cases like Kozminski, where the government
7 offers a reading of a federal statute that would
8 sweep in everyday conduct, and it's never been
9 an answer to that kind of an argument to say
10 trust us, we won't bring those kinds of cases,
11 or even saying construe the statute the way we
12 ask now, and if those problems arise in the
13 future, then you can address them.

14 What the Court has done in every one
15 of those cases is apply the traditional tools of
16 construction to say any ambiguity in the statute
17 must be construed narrowly because of fair
18 notice and other -- federalism and related
19 principles.

20 So, for those reasons, we'd ask the
21 Court -- ask the Court to reverse.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 12:42 p.m., the case
25 was submitted.)

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