H.E. MINISTER PRESIDENT OF THE SUPERIOR COURT OF JUSTICE

Ref: RMS ng 60698/RJ

GOOGLE BRASIL INTERNET LTDA. and GOOGLE LLC, for their lawyers, already qualified in the records of the appeal, wherein the JUDGE OF THE 4s VARA CRIMINAL FROM THE CITY OF RIO DE JANEIRO/RJ, comes to Your Excellency, timely1, based on art. 102, III, *a,* of the Federal Constitution, to file a **REcuRse ExrRAoR01NAR10** (doc. No. 01) against the decision of fls. 407-40, for the reasons explained.

The plaintiffs request that, after the usual procedures, the present case be sent to the Federal Supreme Court.

On these terms, they request that the case be granted. Brasilia, September 22, 2020.

FERNANDO SANCHEZ DE SOUZA
OAB/SP nQ 426.344

JACQUELINE DE SOUZA ABREU
OAB/SP nQ 356.941

--/4-?,,,1v. R°"" '1---Cr.

FELIPE MENDONc;A TERRA
OAB/RJ nQ 179.757

EDUARDO MENDONc;A
OAB/RJ nQ 130.532

[1] The appealed decision was made available in the DJe on 03.09.2020 (Thursday), and is considered published on 04.09.2020 (Friday). Thus, considering that 09.07.2020 (Monday) was a national holiday (Law 662/1949, art. lQ - doc. nQ 02), the period of 15 (fifteen) days, provided for in art. 1.003, § SQ of the CPC and counted in the The period begins on September 8, 2020 (Tuesday) and ends on September 22, 2020 (Tuesday).

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APPELLANTS: GOOGLE BRASIL INTERNET LTDA. AND GOOGLE **LLC.**

RECORD: **MR.** JUDGE OF THE **4th** CRIMINAL COURT OF THE CITY OF RIO DE JANEIRO/RJ

REASONS OF THE APPELLANTS

Eg. Court:

1. **With all due respects, the present appeal aims to rule out a new and unconstitutional mode of *fishing expedition,* equivalent to an anti-protection of personal data.** What is being questioned is the decision of the Third Section of the Superior Court of Justice, which, by majority vote, has maintained a **generic, collective and unprecedented determination** in order to break the secrecy of telematics.

2. **What we have is a gigantic *ex.*A technology company is forced to perform an *exploratory* operation of reverse engineering to identify thousands of users who are known to be innocent and united by a simple and casual circumstance: having searched the Internet for free information from certain common terms and even of public relevance (the name of a councilwoman, the name of a busy street in downtown Rio de Janeiro and the name of a social project) in a certain period of time.** All this in the counterfactual hope that, in this infinity of data, there are some that may contribute to the identification of new suspects of a crime. **The imposition is aggravated, in this case, by the consideration that:**

(i) the systems were not developed for this purpose, so there is no guarantee of accuracy commensurate with the severity of a criminal investigation. **More than that, data collection depends on active user choice *(opt in)* and the system still allows data to be deleted or edited freely at user's decision;**

(ii) **in response to specific orders, data from hundreds of users has already been provided,** which would have contributed to the filing of charges against two defendants. this makes the generic orders even more questionable, especially because

without any concrete justification as to its potential utility. The general reference to the seriousness of a crime cannot automatically substitute for the need for specific justification as to the viability and necessity of a

such an invasive measure.

3. **This is an unparalleled measure from the point of view of health protection.**

privacy and personal data. The intention of obtaining a dossier of people who have made trivial searches on the Internet - including by terms that may denote political leanings - **goes against all efforts in the world in this matter, represented by laws and decisions that prevent the government from accessing personal data without legal basis and specific justifications, much less in a maximalist and generic way.**

This same logic has already been carefully delimited by this High Court when it prohibited the unrestricted sharing of personal data with state authorities, in light of the protection of privacy and data secrecy of art. s2, X and XII, of the Federal Constitution2. Under no circumstances has this Court ever considered *trivializing* the legal protection of this type of personal data, as applied by the appealed judgment.

4. So excessive and comprehensive, the **order affects basic communicative freedoms, including freedom of information and expression:** for the most diverse reasons, people all over the world make hundreds of millions of searches daily on Internet search engines, without the expectation that their data can be accessed by criminal prosecution authorities.

5. **If this kind of generous and broad power prevails, there is no way to exaggerate the risk of similar and even broader attacks, nor the risk of leaks or misrepresentations. The system of fundamental rights was conceived precisely to limit the power of the State, but here it is being relativized with**

Investigating and punishing crimes is an essential activity in the Rule of Law, but it is equally essential that it be done strictly within the bounds of the legal system. There is no known virtuous police state.

[2] STF, j. May 7, 2020, Referral of MC in ADI 6387, Reporting Justice Rosa Weber.

6. As can be seen, the appeal is about constitutional issues of greater relevance. With all due respect to the investigative authorities and the illustrious majority formed in the STJ, the appellants could not fail to bring to this Supreme Court the **serious constitutional implications of generic sweeping measures of this nature, in this case and the many cases that will follow if this possibility is sanctioned. Less visible cases than this one, in which the risks of trivialization, equivocation, and abuse will be even greater.**

7. It is in this context that the present extraordinary appeal seeks to demonstrate that the appealed appellate decision violated art. SQ, Xe **XII,** and art. 93, IX, of the Federal Constitution, under at least three autonomous aspects:

I. **Art. 52. X and XII. of the Federal Constitution and the essential core of the protection of**

privacy and personal data: incompatibility with exploitative orders that affect an indeterminate number of innocent people.

the intimacy and private life of someone. In these terms, there can only be mitigation of the right to privacy on such searches in a contextual way,

and based on just cause with respect to the subject affected by the intervention - **that is, in an individualized manner.** It violates the Constitution to promote a generic scanning of search data to provide a generic list of personal data of unsuspecting users, united by the simple circumstance of having made searches by generic keywords (including common and popular terms such as the name of a public authority or a busy street).

II. **Articles 52. X and XII. and 93. IX of the Federal Constitution: unconstitutionality of secrecy orders with insufficient and unspecific grounds on**

to the measure granted. The Constitution imposes a specific duty to

The Court's decision to order the lifting of secrecy is not based on the mere allegation that the measure is indispensable. The maintenance of the

republic depends on the adequate justification of the decisions restricting rights. In criminal investigation, it is primarily a duty that contemplates in a specific and contextual way the just cause for the restriction of fundamental freedom of affected individuals. In fact, the prohibition of generic breaches and the need to demonstrate the necessity of the measure are drawn from the very Constitution, especially the need to substantiate judicial decisions. Even if generic breaches of secrecy were admitted - and they are not, it should be reiterated - the burden of justification would be even greater - not less, as the appealed appellate decision supposes.

III. Art. s2, X and XII. of the Federal Constitution and the principle of proportionality. in its three aspects: measure that transforms an Internet search service into an investigative tool for the purpose of creating criminal evidence.

The considerations of the appealed appellate decision regarding the supposed proportionality of the measure are markedly general regarding the weighting between privacy and public security. In concrete and specific terms, the order is: **(i)** ***inadequate,*** since, even if it were compatible with the constitutional system, the measure does not offer the slightest guarantee that it will lead to the author or authors of the offense under investigation - the search service depends on an active account and can be subject to deletion or editing, and it is certain that the search terms indicated are generic and associated with people, projects and places of public relevance; **(ii)** ***unnecessary: it is*** not enough to mention generically that the measure is necessary to enable investigations;:(**iii)** ***disproportionate*** in the ***strict sense*** - in a true exercise of random fishing, the determination accepts the collateral damage of breaking the secrecy of thousands of innocent people who have simply done searches on the Internet, assuming that the extreme measure would be justified by the eventual possibility of obtaining some clue about additional suspects.

8. Before moving on to the analytical development of the theses, it is necessary to briefly contextualize the hypothesis submitted to this High Court and demonstrate the fulfillment of the admissibility requirements.

I. BRIEF SUMMARY OF THE RELEVANT FACTS

9. The appellants filed the present writ of mandamus against a **general order to break the telemetric secrecy,** issued together with other orders that were promptly fulfilled**.** The order was issued in the records of Police Inquiry nQ 901-00385/2018, formalized in the scope of an investigation conducted by the Homicide Division of the Civil Police of Rio de Janeiro, and requested by the Public Prosecutor's Office of the State of Rio de Janeiro. The context of the order is the investigation of the homicide crimes that resulted in the death of Councilwoman Marielle Franco and Anderson Gomes, on March 14, 2018.

10. As already noted, the company has **complied with several other orders of the Justice associated with this investigation. In summary.**

Regarding the origin investigation alone, 11 Conze} court orders were processed and served, - including the lifting of the secrecy of more than 50 users identified by their cell phone IMEI number and more than 30 users identified with a Google account. What led to the filing of the writ of mandamus was the **generality and scope of this item in**

The order, which is directed at **any and all users who may have searched for confidential, public information using certain keywords on the Internet, is** tantamount to using the plaintiff's systems to perform an unprecedented interference with the privacy of innocent, uninvestigated persons.

11. Specifically, **the contested item of the court order determined that the company provide the *"IPs or DEVICE Ids that have used Google Search (either through the application or its WEB version) in the period between 03/10/2018 and 03/14/20181 to query the following search parameters:*** *FMARIELE FRANCO1; FVEREADORA MARIELe; 'AGENDA VEREADORA MARIELe; FcAsA DAS*

PRETAS1; 'RUA DOS INVALIDOS ,1221 or 'RUA DOS INVALIDOS"'. This is item nQ 5 of the decision (pages 229).

12. **As can be seen, these are common terms, potentially searched by thousands of people for the most diverse and fully legitimate purposes. The search itself, therefore, is about private search data, to be made available under the dangerous strategy of profiling people by search terms - including political leanings - through personal data3, to use the legal definition.**

13. As is intuitive, this is not data that already exists in a structured form. To fulfill such a determination, it would be necessary to perform an engineering effort that is not typical of the services provided by the company: scanning
In this case, the search results would necessarily only cover a fraction of the searches performed, since using the search tool does not require the user to be logged in. **Even with this effort, the result would necessarily cover only a fraction of the searches performed, since using the search tool does not require the user to be logged in. Even when logged in, data collection does not necessarily generate permanent records.**

14. On the contrary, this is about **data whose eventual availability is directly associated with the configuration options of the Google user over his own account.** In effect, the collection and storage of the user's personal data related to the search performed depends on the activation of the "Search History" by the user and his while he is logged on to the platform, so that the records are stored in your account. In practice, the feature allows logged-in users to make and create **"diaries"** about surveys. Even when this option is taken, **the data can still be deleted and/or edited by the users themselves at any time.**

15. **What we have, therefore, is an attempt to force the applicants t o use the search platform to provide the authorities with a directory of information.**

[3] Decree nQ 8.771/14, art. 14, I: "personal data - data related to an identified or identifiable natural person, including identification numbers, locational data, or electronic identifiers, when these are related to a person; and".

identification of a gigantic number of people from random criteria. And, even so, to reflect reality in an intrinsically incomplete and almost voluntaristic way: here we have an unusual index whose existence or not depends solely on the

of the suspects' will. All this without any criminal imputation, including a multitude of people known to be innocent, united by the simple and easy circumstance of having searched for certain key words on the Internet.

16. The violation of fundamental rights resulting from this lottery is serious, as a matter of principle and also due to the concrete scope of the determination. ***In***

First of all, **the key words indicated by the coercive authority create the concrete risk of affecting a totality of innocent people, since they include the name of a popular City Councilwoman of Rio de Janeiro/RJ ('Marielle Franco'), the name of a cultural space and social project ('Casa das Pretas') and the name of a traditional street in one of the most populated and busy neighborhoods of Rio de Janeiro, which is part of the city's Street Carnival circuit and appears on a multitude of Brazilian cultural artifacts ('Rua dos Invalidos').**

17. ***Second,*** **the indicated time window comprises a period of 4 days or 96 hours, during the Carnaval period of the year 2018. A large number of innocent people will have searched for information about these terms in that time frame,** for a variety of perfectly legitimate reasons. These include citizens and journalists interested in the activities of an active parliamentarian, those interested in collaborating with or receiving support from the social project in question, as well as people who wanted to reach any address located in a busy street in the center of Rio, including because it is part of the itinerary of Carnival street blocks, or who searched for episodes of the religious life of the character Capitu, from Machado de Assis' Dom Casmurro.

18. ***In third place,*** despite this immense generality, the order does not have any pertinent reasoning: it only mentions generically that this and the other 40 requests for breach of secrecy determined by the decision would be *"measures that are necessary, because indispensable to reach all those who, in some way,*

may have participated in the crime under investigation, as well as the circumstances in which the *criminal Jet was developed".* **Nothing else. A general justification that, with all due respect, could be inserted in any decision to break secrecy, on any subject.**

19. **The measure was requested, processed and granted in the ambit of many other requests, including those already individualized, as if it were *another* daily breach of secrecy.**

20. The same general and generic tone of banality continued after the filing of the present writ of mandamus. After the distribution of the *writ,* the eminent Judge Rapporteur requested **that the impetted authority provide information** (pp. 43-5). The latter, in turn, limited itself to pointing to the "magnitude of the investigation" and to transcribing the content of its decision (pp. 46-51), failing once again to **try to justify the order for the general lifting of confidentiality.**

21. The majority of the First Criminal Chamber of the High Court of Justice of Rio de Janeiro (TJRJ) decided to deny the security and maintain the impetted order for a generic and indiscriminate breach of secrecy. The **dissenting vote (pages 101-102), in turn, emphasized the violation of constitutional guarantees due to** (i) **the lack of individualization of targets and** (ii) **the non-existence of an accusation of illegal conduct to those affected.** See the following excerpt

of the dissenting vote of the eminent Associate Justice Marcos Basilio:

> *"From what the lawyer on the stand said during t h e oral argument, it seems that the diligence requested and granted* ***is not important for t h e e l u c i d a t i o n o f t h e crime itself.***
>
> *But, even so, I cannot follow* the *majority vote, because, I repeat, I don't think* ***it is passive/ the breach of secrecy in a generic and random way, not being identified, particularized or individualized any target, which makes the attacked decision without concrete grounds, being flagrantly violated*** **the** ***principle of due legal process, presumption of innocence, privacy and proportionality itself.***
>
> *As* with *telephone secrecy, I believe that the identification required* ***requires a concrete fact to authorize the mitigation of the basic constitutional principle of intimacy, and that the criminal investigation cannot start by a kind of 'fishing'.***
>
> *Once one or several direct targets are identified, which should occur* ***through concrete facts or indications, it*** *is evident that the contested breach or the information requested is feasible. Not, however,* the *totally generic request presented.*

22. Subsequently, Google filed an ordinary appeal with STJ. When summoned to present its opinion, **the Federal Public Ministry, through the Subprocurator General of the Republic Marcelo Antonio Muscogliati, manifested (pages 249-59) by granting the appeal,** highlighting that: *"The invasive measure, certainly, implies a burden for users of the Google search tool as well as for the appellants themselves. A/em of attacking the rights and guarantees of individuals unrelated to the*

the *crime, the breach of confidentiality generically implies in undue interference in the licit activity performed by the companies, which authorizes* the *use of the mandamus to safeguard Jim's clear and certain right (the regular exercise of his core business)".*

23. **Along the same lines is the opinion of the MPF in the records of RMS 63239/RN, issued by the eminent Deputy Attorney General of the Republic Raquel Dodge, which highlights, among other reasons, that** *"(...) **personal records can not be accessed by the State1 without an evident reason1 without there being a legal and valid cause1 defined in law. And only documents that are in direct correspondence with* **the** *illicit Jet under investigation can be accessed. Outside these limits1 the state action is arbitrary, triadic and unconstitutional"* **(doc. n2 03).**

24. The point was also corroborated by a technical opinion by Professor Gilson Dipp joined by the appellants (pages 249-59), which, among other reasons, concluded that

(i) *"Breach of the inviolability of the communications themselves and of the records and data, including registration data, when applicable, depends on judicial authorization, for which the individualization of the target is required.* ***The*** *correct answer indicates that it is not passive/to exclude the individualization of the target and the eventual alteration of the nature of the data is irrelevant for this purpose";* **(ii)** ***"The*** *breach of the inviolability of the telematics data without the individualization of the targets, constitutes violation of the right to due legal process, to the exercise of ample defense and prejudices* the *regular adversary. The persons eventually reached by the restrictive measure thus judicially authorized become indirectly investigated without being object of the investigation and especially with manifest offense to fundamental rights";* and **(iii)** *"The investigation cannot advance on people who have no connection with the Jatos and* the *assumption that the investigation will not be carried out by the Judiciary is that it will be carried out by the Judiciary.*

/6gico and that to investigate people there must be reasonable indications of authorship and

certainty of materiality. Thus, investigating people presumed innocent violates the guarantee

constitutional innocence".

25. Despite this, the Third Section of the Superior Court of Justice (STJ), by majority vote, decided to dismiss the ordinary appeal to maintain the order. Specifically, the vote sustained that: **(i)** the judicial request would have as object *"static personal data",* that although they were protected by art. SQ X, of the Constitution, would not be object of protection of art. SQ, **XII; (ii)** for the supply of these data it would not be necessary the indication of *"any element of personal individualization in the judicial decision"* and of demonstration of the indispensability of the measure, because these requirements would be limited to the data covered by art. SQ, **XII, of** the Constitution; **(iii)** the judicial decision would be properly grounded, in accordance with the provisions of art. 93, IX, of the Constitution, as it would have duly exposed *"the evidence of the crime", "the justification for the measure", "the reasons for the crime", and "the reasons for the measure".*

use of the measure" and the *"period to which the records refer";* and **(iv)** the order would be proportional, considering *"the realization of proportionality in its three essential guidelines"* and the gravity of the facts under investigation.

26. As it was said, the v. agreement incurred in serious violations to Constituic;:ao Federal[4]. The violations were recognized in the divergent vote presented by the eminent Minister Sebastiao Reis Junior, who voted for the granting of the security, by consider that the contested measure: **(i)** promotes *the "invasion of users' privacy";* and **(ii)** *"does not present, at any time, sufficient justification regarding the extension of the information requested",* reaching *"an unidentified number of people".*

27. After the necessary contextualization of the constitutional debate, we will move on

the demonstration that the present extraordinary appeal is well-founded.

[4] The eloquent words of United States Supreme Court Justice Oliver Wendell Holmes Jr. *Northern Securities* Co. *v. United States* (1904), applies perfectly to the present hypothesis: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance.....but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.

II. ADMISSIBILITY OF EXTRAORDINARY APPEAL

11.1. GENERAL REPERCUSSION OF THE CONSTITUTIONAL THESIS

28. As is known, in the form of art. 102, § 2Q, of the Federal Constitution, and art. 1035 of the CPC, there is general repercussion when there are issues "that go beyond the subjective interests of the process. In the terms of the already consolidated orientation of the STF, this transcendence of the matters discussed in the appeal admits at least two senses: (i) when the legal theses discussed are not restricted to the parties, but involve several other legal relations, so that they can be faced in other lawsuits; and (ii) a theoretical dimension, derived from the importance of a particular discussion for the constitutional system - in which the impact of the legal thesis on the interpretation is verified:(ii) a theoretical dimension, derived from the importance of a given discussion for the constitutional system - in which the impact of the legal thesis on the interpretation of the Constitution and the determination of the meaning and reach of its clauses, including from a political, social, and economic point of view, is verified.

29. In the concrete case, the issues discussed in this appeal present general repercussion in two senses. ***Firstly,*** this is a decision with the potential of multiplying in countless other criminal investigations throughout the country, against not only Google, but also other Internet application providers and companies that process personal data. Objectively speaking, **Google receives and complies with thousands of judicial orders to provide data in Brazil every year. As an example, in 2019, the company received and processed more than 6 thousand orders, affecting more than 30 thousand users5. Brazil is also the third country in the world that most issues**

orders to provide company-directed data.

30. For no other reason, and in view of the repercussion of the thesis established, the STJ affected the case for direct judgment by its Third Section. Along the same lines, the STJ judgment was also widely reported by the press[6], which increases the

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Data available in: < https://transparencyreport.google.com/user-data/overview?hl=en&user_requests_report_period=series:requests,accounts;authority:BR;time:&lu=user_requests_report_period>

[6] ESTADAO. Dangerous precedent: Premature answers to Marielle Franco's death do not justify the trampling of Constitution. Available at at: https://opiniao.estadao.com.br/noticias/notas-e-informacoes, dangerous-precedent,70003419340. Accessed at

The potential for the case to serve as a yardstick for other orders and judgments.

31. ***Secondly,*** the theme is manifestly relevant. From the ***legal*** **and** ***political*** point of view***, this*** is a question of great impact on Brazilian society, especially in the information age: whether, despite constitutional guarantees such as the protection of privacy, intimacy and personal data, the public interest in investigating crimes justifies the use of an atypical and exploitative investigative technique that is highly invasive:Whether, despite constitutional guarantees such as the protection of privacy, intimacy and personal data, the public interest in the investigation of crimes justifies the use of an atypical and exploratory investigative technique, highly invasive, which denatures a platform of access to information and knowledge into a vigilantist tool for the production of a directory of sensitive user data - including political opinions and even when the measure reaches people with no relation to the crimes under investigation.

32. This is a discussion with profound impact on the protection of personal data and the right to privacy in a Rule of Law in face of the prerogatives of state intervention in investigations. In the current context, called by some as the data era, and in the face of growing applications of *the Internet of Things* and *big data,* the relevance of defining constitutional parameters for breaches of secrecy of personal data becomes even more relevant.

33. Not surprisingly, the case law of the Supreme Federal Court corroborates the relevance of the matter. As already anticipated and will be further developed below, this Court has analyzed cases that deal with the provision of personal data[7] . In all these judgments, **the Court has reaffirmed the constitutional protection of personal data even in the context of the rapid and**

growing technological innovations in the matter, highlighting the evolution of the understanding of the constitutional right to privacy and data secrecy and the importance of covering the new technologies[8] . In the same way, this Egyptian Court has also reiterated the relevance and

16 Sep 2020; 0 GLOBO. Marielle case: Experts say that breaking confidential data of people who are not investigated e subject polemic. Available at in: https://oglobo.globo.com/rio/caso-marielle-especialistas-dizem-que-quebrar-dados-sigilosos-de-pessoas-que-nao-sao-investigadas-subject-polemico-1-24608111. Accessed on 16 Sep. 2020

[7] STF, Apr. 24, 2020, MC in ADI 6387, ratified by the Plenary on May 7, 2020, Reporting Justice Rosa Weber; STF, j. Aug. 13, 2020, MC in ADI 6529, Reporting Justice Carmen Lucia; STF, DJe Jun. 25, 2020, ADPF 695, Reporting Justice Gilmar Mendes (monocratic decision).

[8] STF, Apr. 24, 2020, MC in ADI 6387, ratified by the Plenary on May 7, 2020, Reporting Justice Rosa Weber: "Such information, related to the identification - effective or potential - of a natural person, constitute personal data

general repercussion of cases that deal with the limits of the investigative powers of the State, including under the specific aspect of the data secrecy regime of art. SQ, X and **XII, of** the Federal Constitution. Some examples are given:

> *"CONSTITUTIONAL/ONAL. CRIMINAL PROCEDURE. EXPERTISE PERFORMED BY THE*
> *POLICE AUTHORITY ON A CELL PHONE FOUND BY CHANCE AT THE CRIME SCENE. ACCESS TO PHONE BOOKS AND CALL LOGS WITHOUT JUDICIAL AUTHORIZATION. APPELLATE DECISION/00 THAT RECOGNIZED THE ILLEGALITY OF THE EVIDENCE (CF, ART.* SQ, *ITEM LV/1) FOR VIOLATION OF THE SECRECY OF COMMUNICATIONS (CF, ART.* SQ,
> *INC/SOS XII}. EMINENTLY CONSTITUTIONAL ISSUE. MATERIAL PASS(VELLE OF REPEAT IN A NUMBER OF CASES, REPERCUSSING IN THE SCOPE OF PUBLIC INTEREST. THEME WITH GENERAL REPERCUSSION."*[9]

> *"DATA PACKAGE ENV/0 OPENING ENTORPECTIVE SUBSTANCE PROOF L/CITUDE DECLARED IN THE ORGINARY COURT EXTRAORDINARY RESTRICTION ARTICLE/GO* SQ, *INC/SO XX/I, OF THE FEDERAL CONSTITUTION GENERAL REPERCUSSION CONFIGURATED.* (...)
> *2. The jets are well outlined in the standardized agreement. A package was posted in the mail aiming at delivery to the addressee. When opened, the package was found to contain narcotic substances. A criminal trial was held and, based solely on this evidence, the appellant was convicted. There is a questioning about the lawfulness to be solved, considering the application, by the Supreme Court, of item XX/I of article* SQ of *the Federal Constitution.*[10]

> *"CONSTITUTIONAL/ONAL. CRIMINAL PROCEDURE. SHARING WITH THE PUBLIC MINISTRY, FOR CRIMINAL PURPOSES, OF THE TAXPAYER'S BANKING AND TAX DATA, OBTAINED BY THE TAX AUTHORITIES IN THE LEGITIMATE EXERCISE OF THEIR DUTY TO INSPECT, WITHOUT THE INTERMEDIATION OF THE JUDICIARY. TRANSFER OF INFORMATION IN LIGHT OF THE CONSTITUTIONAL PROTECTION OF PRIVACY AND DATA SECRECY. ART.* SQ, *SUMMARIES X AND XII, OF THE FEDERAL CONSTITUTION. EMINENTLY CONSTITUTIONAL QUESTION. MATER/A PASS(VELLE OF REPEAT IN A NUMBER OF CASES, REPERCUSSING IN THE SCOPE OF PUBLIC INTEREST. THEME WITH GENERAL REPERCUSSION."*[11]

> *"CONSTITUTIONAL/ONAL. CRIMINAL. REV/STA (NT/MA FOR ENTRANCE IN PR/SIGNAL ESTABLISHMENT. VEXATIOUS PRACTICES AND RULES. PR/NC/PIN OF HUMAN DIGNITY. PRINCIPLE OF INTIMACY, HONOR AND IMAGE OF PEOPLE. OFFENSE. ILLEGALITY OF THE EVIDENCE. RELEVANT SOCIAL AND LEGAL ISSUE. GENERAL REPERCUSSION*

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and integrate, to that extent, the ambit of protection of the constitutional clauses guaranteeing individual freedom (art. SQ, caput), privacy and free development of personality (art. SQ, Xe XII). Its manipulation and treatment, thus, must observe, under penalty of damage to these rights, the limits outlined by the constitutional protection".

[9] STF, 23 Nov. 2017, Repercussao Geral no Recurse Extraordinario com Agravo 1.042.075, Min. Dias Toffoli.
[10] STF, *DJ* 37 May 2019, General Repercussion in RE 1116949, Min. Marco Aurelio.
[11] STF, DJ 30 April 2018, General Repercussion in RE 1055941, Min. Dias Toffoli.

> *RECOGNIZED. The adoration of vexatious practices and rules with the intimate search for entering a prison establishment is a constitutional theme worthy of submission to the systematic of the repercussio* gera/."[12]

34. The transcendence of the issue is also unequivocal from the ***social* and *economic point*** of view. Not only Internet applications and technological devices involving data collection and use are used in several daily activities, but traditional companies are increasingly modernizing and incorporating functionalities related to data treatment. Specifically in relation to the order, search engines are the main tool used by most citizens for searches, which can involve from professional or academic interests to personal issues - including those that are not shared with anyone else. In this context, the relevance of the subject is evident, and can affect the way people use the Internet.

35. The perception of the adequate level of protection of personal data is also a relevant economic indicator nowadays. As is known, this indicator is taken into consideration by companies, investors and international organizations for the conclusion of business deals, definition of investments and even to admit or not the entrance of a certain country in relevant multilateral blocks. In this aspect, there is a strong global perception that sustainable economic development necessarily involves the alignment of countries with good practices in the matter. Symptomatically, the absence of a guarantee of an adequate level of data protection in the face of investigative and intelligence agencies may represent obstacles to international data transfers and bilateral commitments undertaken by Brazil .[13]

36. From all these points of view, therefore, **there are noteworthy repercussions**

the constitutional thesis of violation of art. s2, X and XII, of the Federal Constitution. In summary, what is being asked of the STF is that it recognize the general repercussion of the discussion
about the unconstitutionality of orders for breach of telemetric secrecy that, in an exploitative manner, require a private technology platform to provide personal data of

[12] STF, DJ 15 jun. 2010, General Repercussion in RE 959.620, Min. Edson Fachin.

[13] In this sense, for example: Court of Justice of the European Union, July 16, 2020, *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* (Schrems II - C311/18).

a generic collectivity of users not investigated, with no imputation of criminal activity. As will be developed further on, the theses sustained arise not only from the understanding of the essential core of the rights to privacy, intimacy, secrecy of information and protection of personal data, but also the requirement of specific grounds for measures restricting rights and of proportionality in data protection orders. breach of secrecy.

37. As can be seen, the relevance of the definition of the interpretation of the Constitution in the present case largely transcends the interests of the parties and is of notorious legal, political, social and economic interest. Therefore, the requirement of general repercussion is present.

11.2. PRESENCE OF THE OTHER ADMISSIBILITY REQUIREMENTS

38. Besides the presence of the general repercussion of the constitutional theses developed in the present appeal, all other requisites indispensable to the hearing of the present extraordinary appeal are present, since: (i) the filing is timely; (ii) it is a challenge to a decision rendered by the Superior Court of Justice in an ordinary appeal; (iii) the appealed decision directly violated norms of the Federal Constitution; (**iv**) the matters were duly pre-questioned by the decision; and **(v)** the issues discussed herein are purely legal and do not involve a rehearing of the facts established in the origin. Points (i) and (ii) have already been duly demonstrated, and point (iii) will be better discussed in the merits part of this appeal. It remains, therefore, to demonstrate points (iv) and (v) above.

39. The thesis sustained by the appellant is of an ***exclusively legal*** nature***, and*** does not intend to review facts and evidence, so that the 6bice of the STF Summary No. 279 does not apply. In particular, the appellant has already established the factual premise s necessary to settle the controversy: the court order requires the provision of data from an undetermined number of persons, in order to try to identify possible additional suspects of participation in the crime under investigation. The STJ did not rule out any of these premises - which

are therefore uncontroversial.

40. The fact is that, based on them, the appealed appellate decision established the juridical understanding that the measure would not import a violation of privacy, under the argument that it is not a matter of interception of communications, but of the breach of secrecy of *"static data".* As we will see, the agreement disregarded the basic sense of the guarantees constitutional and the understanding firmed by this eg. STF as to the existence of protection to personal data - and not only to the content of communications. For no other reason, recent decisions of this Court have reaffirmed the understanding that the Brazilian legal system prohibits orders of an "exploitative nature" - which only reinforces the strictly legal nature of the present discussion[14].

41. Furthermore, the thesis discussed in the appeal involves direct violation of the norms of the Federal Charter. In effect, the fundamental premise of the appealed appellate decision was the thesis that the guarantees contained in arts. SQ, clauses X and **XII, of** the Constitution, include the determination that the personal data of thousands of internet application users be searched, united simply because they had made a certain search for free information on the internet. It is, therefore, a type of *fishing expedition* that has always been prohibited by the jurisprudence of this Egyptian Court[15], here justified only by the fact that a serious crime is being investigated and that the measure could be useful. On the other hand, what is intended with this appeal is that this Court, in the exercise of its role as guardian of the Federal Constitution, recognizes the unconstitutionality of general breaches of secrecy, which expose the private lives of an indeterminate number of people without any justification.

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[14] STF, j. May 7, 2020, Referral of the MC in ADI 6387, Reporting Justice Rosa Weber; STF, j. Aug. 20, 2020, Referral of the MC in ADPF 722, Reporting Justice Carmen Lucia

[15] STF, DJe 06 may. 2020, lnq 4831, Rel. Min. Celso de Mello: And the reason to observe the existence of connection with the allegedly criminal events under criminal investigation lies in the fact that **our legal system, in addition to supporting the constitutional principle of personal privacy, repels evidentiary activities that characterize true and harmful "fishing expeditions", that is, the Brazilian positive system repudiates measures for obtaining evidence that translate into illicit investigations merely speculative or random. Also known as diligent prospecting.** simply prohibited by the Brazilian legal system (...)" (. And yet: "The prior judicial control to authorize the search and seizure and essential in order to verify the existence of just cause, in order to avoid fishing expedition (generic investigations to seek incriminating elements randomly, without any basis prior)" (STF, DJe 31 July 2020, HC 163.461, Reporting Min Gilmar Mendes). In the same sense: STF, DJe 18 mar. 2015, HC 106.566, Reporting Min Gilmar Mendes; STF, DJ 09 nov. 2007, lnq 2245 AgR, Reporting Min Joaquim Barbosa, Reporting for judgment Min. Carmen Lucia; STF, DJe 31 jul. 2020, HC 144.159, Reporting Min Gilmar Mendes;

evidence of involvement in the crime under investigation.

42. Finally, the ***prequestioning of*** the appellate thesis and of simple confirmation. In fact, the issue discussed here - conflict between the public interest in investigating crimes and the constitutional guarantees of data protection and privacy, as well as the parameters for assessing proportionality - was precisely the core of the question examined by the appealed appellate decision. Specifically, the appealed appellate decision made textual mention of the constitutional provisions involved. Check out the excerpt from the appealed appellate decision that leaves no doubt as to the prequestioning of the plaintiffs' thesis:

> **Violation of arts. 5!!, X and XII, of the Constitution:** *"Certainly, art.* SQ, X*, of CF/88 guarantees the inviolability of intimacy and privacy, including when the informatic data are contained in databases or more sensitive virtual files. However, we repeat,* the *access to such registered data or virtual files is not the same* as *the interception of communications and, for this very reason, the amplitude of protection cannot be the same.*
> *In this regard,* the *STF has already decided that "the protection contained in article* SQ, *item XII, of the Federal Constitution is restricted to the secrecy of telephone and cell phone communications, not covering data already stored on electronic devices".*
> *(HC no. 167.720/SP, Reporting Justice Luiz Fux, Ole 14/4/2019, emphasis added). Therefore,* the *Brazilian legal system protects differently* the *content of communications between individuals and, in turn, the information of connection and access to Internet applications, ensuring protection also to this second category of data, even if not so large";*
>
> **Violation of art. 93, IX, of the Constitution:** *"As stated* in *art. 93, IX, CF, "all judgments of the 6 organs of the Judiciary will be public, and all decisions must be reasoned, under penalty of nullity, and the law may limit the presence, in certain acts, to the parties themselves and their lawyers, or only to them, in cases where the preservation of the right to privacy of the person concerned in confidence does not harm* the *public interest in information.*
> (...)
> *It can be seen, therefore, that both the indications of the commission of the crime and* the *justification as to the use of the measure and* the *period to which the records refer were duly exposed by the first degree Magistrate. Indeed, the nature of the measure is not consistent* with *the imposition of prior indication of the authors of the criminal offense under investigation, since this is precisely* the *purpose of the measure, i.e., to discover, through the request of records and data, the possible author or participant in the offense;*
>
> **Violation of the principle of proportionality:** *"Bringing this doctrine to* the *examination of the concrete case - in which* the *right to security and the preservation and restoration of public order have a/some overlap with the right to data secrecy - one can see the implementation of proportionality in its three essential guidelines.*

43. Thus, made the relevant records regarding the admissibility of the extraordinary appeal, we demonstrate the reasons that lead to its

provision.

III. No MER1RO: REASONS FOR THE DISMISSAL OF THIS APPEAL. V10LAc;.ii.o TO ART. 52, X AND XII, AND TO ART. **93, IX OF THE FEDERAL (ONSTITUI<;ATION, AS WELL AS THE PRINCIPLE OF PROPORTIONALITY**

44. As seen, the appealed decision upheld an order that affects a random and undetermined universe of people, united only by the casual circumstance of having searched for information on an Internet search engine, based on certain common keywords and in an extensive temporal window. In other **words: without even any indication of any illegal conduct by the targets. The generic nature of the order and its impact on innocent people is incontrovertible, having been recognized by the v. judgment itself that the order reaches an undetermined number of people.**

45. Despite recognizing these premises, the v. agreement maintained the possibility that Internet search engines can be subverted into investigative tools, admittedly exploratory, to offer generic lists to investigative authorities and form a repository of *big data for* fishing purposes of suspects. This would be legally possible because (i) the information to be sought and provided would be *"already existing information records or already collected data",* supposedly not covered by the protection of art. SQ, XII and only superficially protected by art. SQ, X; (ii) the judicial decision would be sufficiently reasoned when pointing out the practice of illicit, informing the possible usefulness of the measure and indicating the period to which the records refer; and (iii) there would be proportionality because the search is for the elucidation of crimes and no publicity would be given to the data.

46. As already noted, the appealed appellate decision violates constitutional provisions and extensive jurisprudence of the Federal Supreme Court, which prohibits broad and general orders for breach of secrecy that do not individualize targets, as well as guarantees
enhanced protection of personal data and privacy in the constitutional system
Brazilian.

47. This conclusion can be developed from three autonomous practices, which represent, each one in itself, a violation of the Constitution: (i) the constitutional protection of privacy and of personal data is not compatible with governmental

(ii) in the context of criminal proceedings, orders restricting rights are subject to a specific onus of fundamentatio;:(ii) in the criminal procedure, orders restricting rights are subject to a specific onus of substantiation, which is not supplied by the mere allegation of public interest in the criminal investigation; and (iii) collective and comprehensive orders to create a "dossie" of users who made certain searches on the Internet also violate the principle of proportionality, in

all of its aspects. Together, these three violations of the Federal Constitution

may lead to the dismissal of the present appeal.

111.1. article 52, **x** and XII, of the federal constitution and the essential nucleus of the protection of privacy and **personal** data.

INCOMPATIBILITY WITH EXPLOITATIVE ORDERS AFFECTING AN INDETERMINATE AMOUNT OF INNOCENT PEOPLE

48. For the majority formed in the appealed appellate decision, it would be possible to determine a sweep of information about the Search History of Internet users and the provision of lists of people's identifications, generically and even without indicating their involvement with crime, under t h e argument that this information *"has already been collected"* and would not constitute the content of communications. With all due respect,

such an understanding blatantly violates the right to privacy and the protection of personal data contained both in art. SQ, X and in art. SQ, **XII, of** the Constitution.

49. The point will be developed from three central ideas: **(1)** the right to privacy encompasses and protects information about what someone searches on the Internet, since it concerns thoughts, opinions and interests expressed in the private and intimate domain;

(2) the right to privacy can only be removed in a contextual, specific way and through probable cause relative to the affected individual, and it is true that the jurisprudence of the

(3) if there was a historical moment in which it made sense to associate constitutional protections with the static character of a

information, this understanding could never facilitate a dehydration of fundamental rights in the face of technological advances. In line with what various Constitutional Courts around the world have done, and what this Court has done in recent decisions, the case requires a solution that looks to the present and the future, and not based on normative pretexts founded in the past.

50. ***In the first place,*** as it is known, the **right to privacy** serves to protect the **free development of the human personality** and refers fundamentally to the respect for dignity itself. It is a prerogative conferred to the individual to manage with whom to share aspects of his life, in respect of his moral self-conscience, individuality and free critical judgment[16] . This right assures a person a private environment and sphere of control over aspects of his personality. In these terms, the exercise of the right to privacy does not necessarily mean keeping everything to oneself, but having the freedom to choose not to share certain aspects with nobody, to share only with trusted people and professionals, to share with certain groups or with everyone. **Unequivocally, this protection contemplates the prerogative of disposing about thoughts, opinions, interests, feelings and personal projects** - the **central nucleus of intimacy.**

51. As is also known, this protection of privacy is essential not only for moral autonomy from a private perspective, but also from a public perspective, and as such, essential to **democracy.** The fundamental basis of a society and informed, participative and deliberative self-government, in which people can freely inform themselves, make decisions about the life they want to lead, besides training and reformulate their political preferences. The protection of privacy plays a central role in this: it serves critical autonomy, the diversity of convictions and personalities, free decision-making, and non-conformist questioning - characteristics indispensable to integrity of a democratic rule of law. People without privacy would make decisions always contaminated by fear of criticism, unwanted exposure, and

[16] See Edward Blaustein, Privacy as an aspect of human dignity: an answer to Dean Prosser, *New York University Law Review 39:1003 (1964}; Alan Westin, Privacy and Freedom, 1697; Helen Nissenbaum, Privacy as Contextual Integrity, Washington Law Review 79:119-158 {2004}; Mireille Hildebrandt, Privacy and Identity, In: Erik Claes, Antony Duff and Serge Gutwirth, Privacy and the criminal law, 2006.*

even sanctions, generating a hostile environment for the democratic project[17].

52. **The present case is precisely about privacy in the context of the highest importance from a personal and social-democratic perspective.** Internet search engines are a popular mechanism for accessing information and content, with a legitimate expectation of privacy. Search queries often concern people's most intimate matters and interests - including those you don't share with anyone else. Search queries reflect what people care about, who they associate with, what their doubts are, what pessimistic and dreaming thoughts are, what stage of life they are at, how they conceive their own identity. In doing so, they offer a portrait of someone's private life and intimacy.

53. There is a **strong expectation of privacy about** this activity. For no other reason, search engines are frequently associated with the environment of a "confessional": from the most concrete interests to the most experimental cogitations, the tool is a domain of search for information, subjects and contents, based on the premise that private environments are indispensable to the free development of personality and to democracy itself[18]. It is a service that acts, in the modern world, directly on the way people research, educate themselves, and communicate - activities that are at the center of the natural process of free development of personality and, therefore, of the raison d'être of the protection of the private domain.

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[17] See Julie Cohen, Examined lives: informational privacy and subject as object, *Stanford Law Review* 52:1426-7, 2000.

[18] **During pandemic, Google searches for 'coma help' hit record high**. Available at in: https://www. ennbrasil.com. br/tecnologia/2020/04/14/ durante-pandemia-buscaso-google-por-como-aj udar-batem-record. Accessed on: 12 Sep. 2020). EXAME. **The strangest things people search on Google.** Available at at: https://exame.com/tecnol ogia/as-co-sisas-ma is-strangest-things-that-people-search-on-google/. Accessed on: 12 sep. 2020; Hoje em Dia. **Searches on Google reflect events and behavior of Brazilians.** Available at in: https://www. hojeemdia.com.br/almanaque/google-searches-reflect-events-and-behavior-of-people -brasileiros-1.682757. Accessed on: 12 Sep. 2020; CLAUDIA. **Mental health hits record in Google search in the quarantine.** Available at in: https://claudia.abril.com.br/saude/saude-mental-google-search-at-a- quarantine/. Accessed at em: 12 sep. 2020; 0 GLOBO. **In times of coronavfrus, searches for 'medita ao' and 'Deus' hit record on the Internet.** Available at at: https://oglobo.globo.com/sociedade/coronavirus-servico/tamojunto/em-tempos-de-coronavirus-buscas-por-meditacao-deus-batem-record- na-internet-24345230. Accessed on: 12 sep. 2020.

54. In respect of this basic expectation, search engines are bound to high duties of confidentiality regarding the information of their users. In **fact, users use the service under the confidence that such information is protected and will be treated within the limits of the law and in accordance with their consent.** What's more, the public interest itself

The fact that the tool allows searches by subjects and contents - and thus enables access to information - is based on the confidence that the act of searching for information is fully licit. And, this being so, such an act is not sufficient nor can it contribute to justify

inquisitive state measures, let alone involving people in a criminal investigation. To do otherwise would be to sacrifice trust in the service and to produce inhibitory effects that

compromise the very values and goals that are intended to be achieved with the right to privacy.

55. **To deny that the protection of personal search information on the Internet and the *secrecy of* intimate information is supported by the Federal Constitution would be both textually mistaken and normatively absurd.** In line with numerous documents of international relevance[19], the Brazilian Federal Constitution protects the right

privacy in its art. SQ, X, which states that intimacy and privacy are inviolable.

private life. It is, as seen, a fundamental guarantee that imposes limits to the powers of intrusion of third parties - including the State itself - in individual freedom. After all, without the existence of such markers, the individual's sphere of control over his personality and autonomy would be annulled.

56. This general provision in the Brazilian Constitution is broken down into other more specific ones, with emphasis on the rule of art. SQ, **XII,** which qualifies as *"inviolable the secrecy of correspondence and telegraphic communications, data and communications*

telephony". This is a corollary of the concept of the right to privacy as a protection of

a negative personal sphere against intrusions in a specific field: that of communication by correspondence, telegraphs, telephony and data - especially telematic and

[19] In this sense: Universal Declaration of Human Rights (UN, 1948), art 12; American Convention on Human Rights (Sao Jose da Costa Rica, 1969; Dec. Leg. nQ 226/91; Dec. nQ 592/92), art 11, § 2Q; European Convention on Human Rights (Council of Europe, 1950), art 8; Charter of Fundamental Rights of the European Union, art 8Q_.

that relate to the protection of the individual's private life.

57. In this context, **it is certain that telematics data relative to what was searched on the Internet are protected not only by the constitutional protection of privacy (art. 52, X), but also by data secrecy (art. 52, XII).** As we have seen, this data is generated by the user in an environment of confidentiality and linked to the thoughts, opinions, interests, projects and doubts of someone - a context which, in the online, concerns the essential core of privacy[20]. In light of recent jurisprudence of this Eg. STF[21], the **autonomous protection of the right to the protection of personal data** is also pertinent, since it deals with information associated with a natural person identified or identifiable. Not to mention that the intrusion on research may affect several other confidentialities - resulting from sensitive inferences about political opinions, religious stance, financial situation, health conditions, sexual orientation and life habits, among others.

58. Having said that, **and *in second place, it* is not argued here - as it has never been done in this case - that secrecy is absolute or that privacy can never be mitigated. The point is that one cannot extract from this concession a generalized opening that would void the very concept of the right, as the appealed judgment did. In** fact, the Constitution does not assume that such rights are absolute and not susceptible to restriction. proportional to the protection of other individual rights and public interest. In the case of art. SQ, **XII,** the possibility of breaking the secrecy by judicial decision, in the exclusive ambit of the Public

Prosecutor.

[20] The information searched on Google is done in a private environment, out of public knowledge, which in itself attracts the application of the right to privacy. But not only this: in numerous occasions, the information searched for concerns the "intimacy in the strict sense" of the German theory of privacy spheres - the most important core of the right to privacy.
This is the most intimate part of this right: "Adopting the *theory of spheres,* one can clearly conclude that there is a distinction between *intimacy* and *private life and*, even more so, differentiate them from secrecy. The protection of private life - the largest sphere - consists of the right to keep from public knowledge in general facts of private life which do not reveal extremely private aspects of the individual's personality. On the other hand, intimacy - *Intimsphare* or intimacy, in a broad sense in German theory, refers to the prerogative to exclude oneself from the knowledge of third parties the most sensitive information of the individual, such as aspects concerning sexual, religious and social life.
political; shared only with the most intimate people and in a private way. Finally, the sphere of secrecy, *Geheimnsphare* or intimacy in the strict sense in German theory, comprises the information related to the feelings, dreams and emotions of the person; not shared with anyone or shared only with close friends". Tatiana Malta Vieira, 0 *direito a privacidade na Information society:* effectiveness of this fundamental right in the face of information technology advances, 2007. p. 30.

[21] STF, j. May 7, 2020, Referendum of the MC in ADI 6387, Reporting Min. Rosa Weber; STF, DJe 25 jun. 2020, ADPF 695, Reporting Min Gilmar Mendes (monocratic decision); STF, j. Aug. 13, 2020, MC in ADI 6529, Reporting Min. Carmen Lucia.

of the criminal investigation or the criminal process, was textually registered. As is natural, the decision that will determine the measure must be based on legal permissive and justified in a specific way, in attention to the art. 93, IX, of the Constitution. Moreover, when it comes to the restriction of fundamental rights, the duty to state reasons becomes more intense.

59. In particular, the reconciliation of the right to privacy with the interest criminal investigations and the efficiency of the criminal process imposes **the requirement that the removal of privacy is contextual, specific and based on just reasons** - as are the indications of someone's involvement in a crime. This is the basic mechanism of control against arbitrariness to which judicial decisions to break secrecy should meet. **The point was developed in the aforementioned opinion of the eminent Deputy Attorney General of the Republic Raquel Dodge in the records of RMS 63239/RN, also in order to recognize the unconstitutionality of generic measure of breach of secrecy.** Check it out:

> *"The Constitution protects* the *citizen against* the *tracking of his movements, his data, his correspondence and his opinions by the State. This protection* is *important to guarantee freedom of thought and expression,*
> *of opinion and assembly. Without probable cause to commit an illicit act, every individual is protected from personal search by the State. This* is *what t h e Constitution guarantees.*
> *The historical root of this protection goes back to the period of the American Revolution and has its origins in a specific high-profile incident. British officials under King George searched the residence of an individual, John Wilkes, for his diaries. They wanted to identify him as the author of anonymous pamphlets criticizing* the *king, and fined* him the *princely sum of one thousand pounds. They had no indication*
> *that he Josse is* the *author of the flyers.*
> *This Jet gave birth to the protection of privacy:* the *principle that residence, correspondence, personal records cannot be accessed by the State, if there is no obvious reason, without a licit and valid cause, defined by law. And it can only be*
> *documents that are in direct correspondence* with the *illicit act under investigation will be accessed. Outside these limits, the state action is arbitrary, tyrannical and*
> *unconstitutional. It would allow prospecting individuals at random, in pursuit of and dissenters, to minorities and the discriminated against, inflicting pain and suffering on individuals.* ***The*** *investigation of offenders,* with *access to their privacy data,* is *valid and necessary. Prosecution without cause* is *unconstitutional"* (bold added).

60. In this line, the **jurisprudence of this Supreme Court always rejects orders of secrecy breaking that assume the profile of *fishing expeditions:* investigative fishing tactics about who and what is going to be investigated, because they are generic and are not subject to the same rules.**

lack of probable cause (evidence of involvement in criminal activity) against those affected. Contrary to what Eg. STJ assumes, it is not admissible the contempt for the privacy of innocent people, as if it were an acceptable collateral damage. **For this very reason, this high court has already**

invalidated a series of commands of an indiscriminate nature. See excerpts from paradigmatic decisions and votes:

> *"THE BREACH OF SECRECY CANNOT BE USED AS AN INSTRUMENT OF* ***NO CRIMINAL INVESTIGATION,*** *UNDER PENALTY OF OFFENDING THE GUARANTEE*
> *OF INTIMACY. - The* ***breach of secrecy cannot be manipulated, in an arbitrary way, by the government or its agents.*** *E*
> *that if this were not the case, the breach of confidentiality would become, illegitimately, an* ***instrument of generalized search and indiscriminate*** *invasion of* ***people's privacy, w h i c h w o u l d*** *give the State, in disagreement* with *the principles that inform the democratic regime, the* ***absolute power to search, without any limitations, confidential records of others.*** (...)
>
> ***For the exceptional measure of the breach of bank secrecy not to be deprived of its legitimate purpose,*** *it is indispensable that the state act that decrees it, in addition to being adequately grounded, also indicates, in a precise manner, among other essential data,* ***the identification elements of the account holder (notably*** **the** ***number of his CPF registration)*** *and the period of time covered by the order of rupture of the confidential records kept by the financial institution" .*[22]
>
> *"For a better understanding of the controversy, I highlight excerpts from the r. decisions taken at the ordinary instances:*
>
> *1 - D.JUDGE'S DECREE REFUSING THE DEFENSE'S REQUESTS FOR DILIGENCIES (f/s. 62-64}:* (...)
>
> *# - as for the request to break the secrecy of the ERBs that cover the regions delimited by the geographic coordinates specified at 951, I reject the*
> *request, considering that the request contains an indeterminate number of ERBs that will certainly include users that are not parties to the process, not forgetting that the respective ERBs of the telephone line numbers were already contained in the respective breaches of secrecy.* (...)
>
> ***Finally,*** **the** ***requirement to break the telephone secrecy of some base stations*** *during the period between 08:00 AM on 07/01/2012 and 24:00 AM on 07/05/2012* ***is also unreasonable.***
>
> ***As stated by*** **the** ***single magistrate,*** *in* ***addition to the requested measure reaching an infinite number of users with no connection to*** **the** ***process,*** *in the telephone records of the defendants, the respective ERBs referring to the numbers used by them during 07/05/2012, date of the crime, are found"*[23] .

[22] STF, *DJ* 16 jun. 2006, HC 84758, Rel. Min. Celso de Mello.

[23] STF, *DJ* 25 Nov. 2015, RHC 131538, Rel. Min. Carmen Lucia.

> *"THE BREAKING OF SECRECY - WHICH IS BASED ON GENERAL GROUNDS THAT* ***DO NOT INDICATE CONCRETE AND PRECISE FACTS CONCERNING THE PERSON UNDER INVESTIGATION*** *-* ***CONSTITUTES AN ACT VITIATED WITH NULLITY. -*** *The breach of secrecy inherent to* ***bank, tax and telephone records,*** *as it translates as an exceptional measure, proves to be incompatible with the constitutional order when it is based on deliberations made by a CPI whose decision support is based on* ***general formulations, devoid of the necessary and specific indication of probable cause,*** *which qualifies as a* ***legitimizing assumption of the rupture, by the State, of the privacy guaranteed to all by the Constitution of the Republic" ;***[24]
>
> *"Criminal and Criminal Procedural. Search and seizure in place different from that defined in the warrant. 3.* ***authorization of means of investigation at the address of a legal entity, but*** **the** ***act was performed at the home of individuals not listed on the list.*** *4. 1/egality that imposes the recognition of the illegality of the evidence. 5. order granted to declare the illegality of the probative elements obtained in the search and seizure carried out at the home of the persons physics and its derivatives, according to the terms of the judgment"*[25].

61. As can be extracted from the precedents transcribed, **the Constitution, following the world standard, deals with the judicial breach of secrecy with the note of exceptionality and, for this very reason, the measure could only be justified by the existence of concrete evidence of illegal activity by the delimited target, to be demonstrated in a reasoned judicial decision. This is the only interpretation compatible with the constitutionalism of a Democratic State of Law, committed to the protection of human rights. liberties.**

62. After all, the right to privacy emerged, together with the right to private property and the inviolability of the home, as the first frontier of limitation of the power of the State over the individual. This fundamental right would mean very little - or nothing at all - if could be removed by the State without there being elements to believe that the investigated individual committed some illicit act. In practice, as has been sustained since the petition of this writ of mandamus, **it is impossible to meet the constitutional guarantees without that there is the minimum provision of individualization of targets** to whom **concrete evidence of their involvement in illicit conduct** refers**.**

[24] STF, *DJ* 04 aug. 2006, MS 25668/DF, Rel. Min. Celso de Mello.

[25] STF, DJe 31 july 2020, HC 163.461, Rel. Min Gilmar Mendes.

63. Although the most famous examples of annulled *fishing expeditions* refer to collective search and seizure warrants or interception of telephone calls without specifying who is being investigated[26] , this Court has never limited the prohibition to these hypotheses. In a paradigmatic manner, in the Special Appeal in Complaint No. 2245-4, which preceded Criminal Action 470 (Mensalao) - dealing, therefore, with investigations of the utmost gravity and national relevance - this Court dismissed a court order that had the same logical structure as that upheld by the appealed appellate decision: the order for a **bank** to provide a **list with registration data identifying clients of a certain type of bank account.**

64. **The determination was considered invalid by this Court precisely because it recognized that the request for a generic list would reach people not involved in the investigation, without any probable cause that they had committed an illegal act.** Instead, it was authorized that the secrecy be removed only from those involved in the investigation. Confirm the preamble and excerpts from the votes that highlight the point:

> *INTERLOCUTORY APPEAL. INQUIRY. BREACH OF BANKING SECRECY. REMITTANCE OF A REPORT THAT IDENTIFIES ALL PERSONS WHO MADE USE OF THE NON-RESIDENT ACCOUNT HELD BY THE AGGRAVATING PARTY FOR PURPOSES OF REMITTANCE OF AMOUNTS ABROAD. GENERAL ACCOUNTING: IMPOSSIBILITY. POSSIBILITY*
> *as to the persons duly identified in the inquiry. AGGREGATE*
> *PROV/DO PAR/ALLY. 1. request to send the Federal Supreme Court a list identifying all persons who have made use of a non-resident account for the purpose of remitting money abroad: impossibility. 2. it* ***is illegitimate to break the bank secrecy of a generic list, with names of persons not directly related to the investigations (art. 5!2, inc. X, of the Constitution of the Republic).*** *3. exception to the possibility of* the *Federal Public Ministry formulating* a *specific request, regarding identified persons, defining and justifying precisely its claim. 4. appeal partially granted".*
>
> **Justice Carmen Lucia's vote:** "*Article* 5, section *X, of the Constitution of the Republic ensures everyone the right to privacy, private life, honor and image, being*
> The *right to banking secrecy is one of the main constitutional guarantees, which make that right effective.*

[26] On the subject, check out the CNJ report on the edition of Resolution nQ 217/2016 (which amended the aforementioned Resolution nQ 59/2008): *"Among the changes approved by the Plen6rum of the Council is the identification of the holders of the intercepted numbers or, exceptionally, within 48 hours, other numbers.* (...) *The intention is to avoid* the *so-called phishing, which occurs when the interception of a telephone ends up bringing other numbers of citizens (not necessarily linked to the crime under investigation), as well as* the *'smuggling' when* the *judge i s led to approve the lifting of telephone secrecy without identifying the holder, and that does not match* the *investigation in Jaco".*

*right to privacy. **In the present case, the breach of bank secrecy is characterized as undue, as it is due to the entry of a generic list, in which persons not directly related to the investigations carried out in the inquiry may be identified**. If, on the one hand, it is necessary to break bank secrecy as a way of making the investigations more efficient, and thus guaranteeing the State minimum conditions to punish those who act against* the *law, on the other hand, t h e privacy and intimacy of those who do not adopt questionable behaviors and, for this very reason, are not investigated, owing nothing, legally, to the State and to society, must be guaranteed";*

Justice Ricardo Lewandowski's vote"(...) *that I remain faithful and coherent to the vote that I gave in Inquiry No. 2.206, in which I rejected - at least at that moment -* the *opening, the breaking of the bank secrecy of a plurima account - as* the *eminent Justice Marco Aurelio says -* with *hundreds or even thousands of account holders that were not under any investigation. And this seems to me to be* the *case, too.*

I am not opposed, in theory, to the breaking of confidentiality, since it is authorized by the Federal Constitution and by the laws.

No such justification has been provided in this case with regard to the large number of people for whom this ***is possible**. I think,* with *all* due *respect, that it is more prudent to grant the appeal;*

Vote of Minister Cezar Peluso: *"It seems to me that simply dismissing the appeal would allow a raid, insofar as the spreadsheet would reveal the names of all the other people who, without having any connection* with the *Jatos covered by* the *investigation or who, at least apparently, would not have committed any act from which any illegal activity could be inferred, would have their privacy invaded.*

My vote is partial, in the sense of allowing t h e disclosure of the secrecy of those people that, besides Mr. Jose Eduardo and the Dusseldorf Company Ltda, the *Attorney General discriminates, including relatives whose inclusion may be justified, and whose names may have been used for the illegal transit of money abroad";*

Justice Celso de Mello's vote:"(...) *the breach of bank secrecy will end up imposing, in this case, an **unacceptable indiscriminate rupture of the sphere of financial intimacy of persons in relation to whom there is simply no probable cause to justify this exceptional act of disclosure**.*

*Under such aspect, Madam President, I remind you of the **constitutional** jurisprudence of this Supreme Court (RTJ 173/805-810 - RTJ 174/844 - RTJ 182/955-956, v.g.), reaffirmed in innumerous precedents **in** which* the *Federal Supreme **Court has warned, regarding this question, that the breach of confidentiality cannot be used as an instrument of indiscriminate surveillance**.*[27]

65. If the reasoning applies to financial secrecy - which, in the inspired illustration of the eminent Minister Carmen Lucia , refers to the "doter secrets"-, with very The more forcefully it is applied to the case in question, relative to the **"secrets of being".** To avoid any doubt, it is necessary to recapitulate the order that the appealed decision maintained: the

[27] STF, DJ 09 nov. 2007, Inq 2245 AgR, Rel. Min Joaquim Barbosa, Rel. for the record Min. Carmen Lucia.

(i) **generalized scanning over data from the Historical Research service, performed with an expectation of privacy and related to the intimacy of people's thoughts, opinions, pianos, doubts and desires** and (ii) **availability of an effective database**

A theme about people united by the manifestation of certain interests - thoughts and curiosities they have had about a public authority, pianos related to a certain street or social project. With all due respect, this is not only a new kind of ***fishing expedition,*** but also aggravated by its potential for **profiling people.** The risk of this type of state power, in the concrete case and in many others, is serious and intuitive.

66. By maintaining the order to **indiscriminately provide personal data of a large number of people who simply searched for information on the Internet over a long period of time, the appealed judgment authorized an incompatible measure with the constitutional requirements in this matter. As a logical consequence of the exceptional nature of the breaches of secrecy, the invasion of the privacy of indeterminate, and potentially massive, group of innocent people with the objective of perhaps obtaining some data that could contribute to arriving at new suspects. Contrary to what the appealed judgment affirmed, the requirement of individualization of targets of secrecy orders in criminal proceedings - as a measure inherent to the required contextual cut, specific and based on probable cause - is a result of the protection offered to personal data and privacy by the constitutional text itself.**

67. The point goes back to the most basic principles and foundations of the criminal justice system, such as the presumption of innocence and the due process of law (guaranteed in clauses LVII[28] and LIV[29] of art. SQ of the Federal Constitution, respectively). Such guarantees assign to the State the burden of accusation, which results in the need that

There must be evidence of unlawful conduct for the State to impose investigative measures that restrict privacy, especially in the intense form of breaking secrets[30] .

[28] Federal Constitution, art. SQ, LVII: "no one shall be considered guilty until a sentence against him has been passed in a court of law

[29] The Federal Constitution, art. SQ, LIV: "no one shall be deprived of his liberty or property without due process of law".

[30] Maurfcio Zanoide de Moraes, *Presun ao de inocencia no processo penal brasileiro,* 2010, p. 494.

68. Allowing such generic requests just because they refer to "computer records" would mean nullifying any right to privacy and data protection in the digital age. Even though a first identification may concern

devices, these are attributable to users, so that it is a matter of personal data that end up revealing aspects of personality. As noted by the eminent Minister Sebastiao Reis Junior in his dissenting vote, *"(.) in spite of the fact that, at first, it was not possible to have a*

If there is no personal identification of the user, it is evident that the search will be determined in the end,

this identification, otherwise it would have no reason to exist'.

69. **The eventual endorsement of determinations such as this would give rise to a**

state of permanent mistrust: nobody, at any time, would have the guarantee that they are not being surreptitiously watched by the authorities. An enormous chilling effect would also be generated: the simple act of searching for information of public relevance on the Internet could authorize state surveillance and subject the user to seeing his intimacy compromised or even being involved in acts of violence.

of criminal investigation. So atypical, as anticipated, the questioned order also affronts the intersections of the right to privacy with the right of access to information and freedom of communication (CF/88, art. SQ, items IV, IX, XIV, and art. 220)[31]. As it seems

Naturally, **these fundamental freedoms also include the individual's right not to be subject to state interference for the simple fact of having sought information about public people, social projects and busy streets, without being accused of illegal conduct[32]**.

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[31] STF, j. May 27, 2020, ADI 5527, vote of Min.il Rosa Weber, Available at: http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI5527voto.pdf>. Accessed on: 12 Sep. 2020: "The full exercise of freedom of expression and communication includes the ability of people to freely choose the information they wish to share, the ideas they wish to discuss, the language style used and the means of communication. **The knowledge that communication is monitored by third parties interferes with all these component elements of freedom of information: citizens may change the way they express themselves or even refrain from speaking about certain subjects, in what the doctrine calls the chilling effect on freedom of expression.** ( ) The consequences of the absence of this precondition in a society range from distrust of social institutions to general apathy and the weakening of intellectual life, making an environment in which communication activities occur in an inhibited or timid manner, in itself a serious restriction on freedom of expression. Also STF, 05 Jun. 2020, Informative 979. Available at in: <http://www.stf.jus.br/arquivo/informativo/documento/informativo979.htm>. Accessed on: 13 Sep. 2020.

[32] Along these lines, STF, j. Aug. 20, 2020, Referendum of the MC in ADPF 722, Reporting Justice Carmen Lucia. As recorded the vote of Min. Edson Fachin: "The right to free demonstration and the right to protest, such as the "anti-fascist" movement that would have led to the questioned report, **is not** - we will say exhaustively - an **infraction of criminal law and is not**

70. From this point of view, the order approaches the logic of a police state. With this, it puts public order at risk, given the serious compromise of citizens' trust in widespread tools for searching information, including information of public interest. This type of risk has always been a motive for high regard by this Supreme Court. For example, this Court has already suspended an order for the delivery of data on children for investigations of disappearances by the MPF because the measure

would compromise the statistical confidentiality, indispensable to the fidelity of the information, being certain

that **the duty of confidentiality provides security to those providing the information and contributes to the reliability of the surveys conducted by the IBGE**[3] **3.It has also suspended requests for the transfer of student data from INEP to the Federal Court of Accounts (TCU),** due to the transfiguration of purposes: **the new one being different from the one originally stated in the act of collection informed to the data subjects,** without consent and constituting a breach of trust that may compromise educational policies[34] .

71. In a similar line, in the German Constitutional Court, the activity of surreptitious installation of *spyware* by the authorities of the

investigation has even led to the recognition of the right to confidentiality and integrity

systems, since citizens should be able to have confidence in the very electronic devices they use[35] . **The same reasoning applies to users of online search services - who, by the mere act of searching for information on the Internet, cannot be exposed to investigations and profiled by state authorities on discretionary criteria. The result would be an inevitable breakdown of trust in search engines and in the transparency of investigative activities, generating serious inhibitory effects.**

72. In this context, **and *thirdly,* the requirement that restrictions on**

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is, therefore, subject either **to criminal investigation** or to intelligence activity. (...) Thus, the risk revealed by the possibility of **the construction of investigative dossiers,** disguised as intelligence reports, **against numerous public servants and citizens** belonging to the protest movement **should generate concern**
as to the constitutional limitation of the intelligence service".

[33] STF, *DJ* 08 May 2017, MC in SL 1103/SP, Rel2. Min2. Carmen Lucia.

[34] STF, *DJ* 13 Dec. 2018, MC in MS 36150/DF, Rel. Min. Lufs Roberto Barroso.

[35] Online-Durchsuchung case, BVerfGE 120, 274 - judgment of the Federal Constitutional Court.

privacy are linked to suspect individuals, being forbidden generic fishing, it is not ruled out because the measure discussed does not consist in the interception of telephone conversations. It is not neglected the judgments of this Court that associate the protection of art. SQ, XII to the flow of data communication and not to the data itself. In practice, this understanding has established the idea that the prospective interception of the flow of communication contents is necessarily subject to the requirements and parameters of Law 9.296/96. As we have seen, the appealed appellate decision sought to extract from this understanding the conclusion that the order

would automatically be constitutional. **With all due respects, besides being mistaken, the thesis of the judgment nullifies any notion of the right to privacy on the Internet.**

73. Contrary to what the appealed decision makes it seem, the constitutional protection of privacy, private life and personal data in the scope of investigations is not reduced to the context of telephone conversations, nor can it be limited to the maximum of a second in which a telemetric communication is in transit. The core of the constitutional protection must concern the material content of the fundamental right, and not lateral aspects. **The constitutional protection accompanies reasonable expectations of privacy, including electronic data that reflect and carry one's thoughts, opinions and personal projects.**

74. In this sense, the breach of confidentiality of historical research data must meet the same general assumptions of privacy restriction: be based on evidence of involvement of those involved in the wrongdoing - and thus be contextual, specific and

individualized. In other words: even if one understood to be in favor of eliminating the specific protection of art. SQ, **XII**, the protection of privacy established by incise X of the same

article, since it deals with **information that unequivocally concerns life**

privacy and intimacy {art. s2. X}. In this sense, generalized scans on histories of

searching users and making available thematic lists of those who have searched for certain information represent an unconstitutional intrusion on the right to privacy of those who have nothing to do with the crime under investigation. **The point was expressly recognized in the**

Sebastiao Reis Junior, which emphasized the existence of a "divergent vote" presented by Min.

"invasion of privacy"* of *"an unidentified number of persons without any

justification for this".

75. As it is known, **the conception of the right to privacy is always followed the technological evolution.** Historically, in fact, the very articulation of such a right in the seminal article

The Right to Privacy {1890)[36] , by Warren and Brandeis, was due to the new technological capabilities of recording and capturing photographs. The inclusion of the protection of data communications in the 1988 Federal Constitution is the fruit of this advance: there was no thought of protecting individuals against the risks of the automated processing of information, including remote telematics communications, just as there was no talk of protecting telephone conversations before telephones existed.

76. In this sense, the interpretation that is given to constitutional guarantees must also be attentive to changing factual and social circumstances, including by revising outdated doctrines whose application, if relevant in the past, no longer matches new realities and new risks. **In this sense, if today people exercise their fundamental freedoms in the online world, the constitutional protections should also reach them in the online world.** To sustain, as the decision does, that general orders about an undetermined and potentially massive set of people would be admissible because they would deal with "already collected data" or "computer records" would mean watching the technological advance undermine any notion of the right to privacy, since many activities have moved to the Internet and this universe is all sustained on "already collected data" and "computer records".

77. For no other reason, the distinguished professor Tercio Sampaia Ferraz Jr. - the original author of the traditional distinction applied by the STF in that case - has recently highlighted, in a recent work, the difficulty or even impossibility of these same categories being transposed to the ambit of current electronic communications. Check it out:

"I recognize that the difficulty, which in my time didn't seem so difficult, is in dealing with the *telematic communication, let's call it, in terms of separating* the *flow from the result. I recognize, it is very difficult to do this, technically speaking. Now, in the mind of someone who has studied law inside the other*

[36] Samuel D. Warren and Louis D. Brandeis, The right to privacy, *Harvard Law Review, 5:* 193, 1890.

world, the solutions end up being this way, but they end up, so to speak, going off at a tangent, because you can't, unlike in other situations, deal with *this separation in a clear way.*
The storage example could give a certain strength to the *analogy: what you*
stores and, *so to speak,* the *result of communication;* the *flow* is *different from this storage. 56 that this storage, unlike in the physical world, is not* the thing *that is there and that* is *different from the flow itself, that* is the *problem. That is, the idea of original and copy, in this world, it no longer works that way*, *you no longer have the authentic and then the copy, the copy in computer terms* is *absolutely inseparable from the "original'* which *perhaps gives us this measure of difficulty between you separating the flux of the storage itself.* (...)
For the time being we treat it this way, but when you treat it this way, you end up interfering in inviolabilities that before you could separate' .[137]

78. As we can see, the original author of the referred distinction himself has highlighted the impossibility of replicating indistinctly this understanding, of almost 30 years ago, in the current technological context[38] . **In this sense, the technological advance - and its application in investigations - cannot mean the erosion of rights and the trampling of**

basic guarantees. In the words of the eminent Minister Gilmar Mendes, *"I have never been strange* to *constitutional jurisdiction the idea that the parameters for the protection of fundamental rights must be permanently open to technological evolution"*[39] . Constitutional Courts must be an *"instrument for the preservation of fundamental rights".* As has already been highlighted, in **an exemplary way and in line with other constitutional courts in the world, this Eg. STF did so recently when affirming the protection of personal data - independently of the protection of the content of communications. And it has repeatedly recognized t h e need to update the interpretation of rights** in **light of technological developments and new risks:**

"Such information, related to* the *identification* - *effective or potential* - of *a natural person, constitutes personal data and integrates, to this extent,* the *ambit of protection of the constitutional clauses ensuring individual freedom (art. 5!2, caput), of privacy, and of the free development of personality (art. 5!2, Xe XII}. *Its manipulation and treatment, thus, must observe, under penalty of damage to these rights, the limits outlined by constitutional protection. (...)*

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[37] Juliano Maranhao, 0 que e dado nao e comunicado? In: Jacqueline de Souza Abreu e Dennys Antonialli (Eds.), Direitos Fundamentais e Processo Penal na Era Digital: Doutrina e Pratica em Debate, vol. 1, 2018, p.53-4.

[38] In this sense, see Paula Pedigoni Ponce and Rafael Mafei Rabelo Queiroz, "Tercio Sampaia Ferraz Junior and 'Data Secrecy: the right to privacy and the limits to the State's supervisory function': what remains and what should be reconsidered", *Revista Internet & Sociedade* 1:1, pp. 64-90, 2020.

[39] STF, j. May 07, 2020, REF-MC na ADI 6389, vote of Min. Gilmar Mendes. Available at: <https://www.conjur.eom.br/dl/pandemia-reforca-necessidade-protecao.pdf>. Accessed on: 01 Sep. 2020.

In the classic article The Right to Privacy, written four times by the Justices of the Supreme Court of the United States Samuel D. Warren and Louis D. Brandeis, it was already recognized that political, social and economic changes demand the *recognition of new rights,* ***reason why it is necessary, from time to time, to redefine the exact nature and extent of the protection of privacy of the individual. Regardless of its content, changeable with technological and social evolution, however, the common denominator of privacy and self-determination remains the understanding that privacy is only a right of the individual.***

can yield in the face of consistent and legitimate justification. " ;[40]

"(...) **the *STF chance/au the autonomy of the fundamental right to the protection of personal*** *data* ***when*** *it* ***declared*** the ***unconstitutionality*** *of the* ***Provisional Measure 954/2020.***
million Brazilians with the *IBGE. (...)*
In this way, and under this view of the affirmation of the autonomy of the fundamental right to
It is in this case that the violation of the fundamental precepts must be examined in the present action. (...)
The *affirmation of a fundamental right t o privacy and the protection of* ***personal data derives*** *(...)* ***from an integrated understanding of the constitutional text based (****i) on the* ***fundamental right to t h e dignity of the human person,*** *(ii) on the* ***concretization of the permanent commitment to renew the normative force of the constitutional protection of privacy (art. 5!2, item X, of the CF/88} before the spreading of new risks derived from technological advances, and also*** *(iii)* ***in the recognition of the centrality of habeas data as an instrument of material protection of the right to informative self-determination.*** "[41]

Informative 944/STF (vote of Min. Gilmar Mendes in HC 168052): *"The Second Class began the trial of habeas corpus in which the nullity of criminal proceedings is discussed in which, in the scope of compliance with search and seizure measure, the police authority had access, without judicial authorization, to the cell phone of the patient, as well as the conversations that took place in the Whatsapp application. (...)*

The rapporteur affirmed that the change in physical and legal circumstances, the enactment of subsequent laws, and **the** ***significant development of communication technologies, data traffic, and smart phones, however, lead to a different solution today, in a typical case of constitutional change.***
Reputed that, even questioned the inclusion of access to information and data *contained in cell phones in the clause of item XII of Article 5!2, these data and information are covered by the protection to intimacy and privacy, contained in item X of the* ***same article****. (...)*
The normative advance in this important theme of protection of the right to privacy must be considered when interpreting the reach of the norms of art. 5!2, Xe XII, of the Federal Constitution.
As important as the alteration of the legal context and the impacting transformation of the physical circumstances, which bring new /uzes to the theme. In this sense, there has been an incredible development of communication and storage mechanisms for personal data in smartphones and cell phones in the last decade.
Nowadays, these devices are capable of registering the most varied information about their users. Cell phones are the main way for Brazilians and citizens of the country to access the Internet. This reason alone would be enough

[40] STF, j. Apr. 24, 2020, MC in ADI 6387, ratified by the Plenary on May 7, 2020, Reporting Justice Rosa Weber.

[41] STF, DJe 25 jun. 2020, ADPF 695, Rel. Min Gilmar Mendes (monocratic decision);

to conclude on the applicability of the standards on data protection, data flows and other information contained in these devices
The *trial was then adjourned due to a request for examination by Justice Carmen Lucia."*[42];

"Under these conditions, constitutional hermeneutics and legislative development cannot remain oblivious to these changes in time, with a view to maintaining the
balance between the protection of privacy and the limits of state action. And that the Constitution, as well as the *state of the art, institutes a set of restrictions on*
state action. As *Professor Lawrence Lessig analyzes, in a seminal essay on the implications of the development of networked communication technologies for constitutional interpretation, it is the combination of technological and legal constraints th at defines, at a given moment, the restrictions effectively faced by the state if it wishes to intervene in a particular aspect of a citizen's private domain.*
Far from having its meaning usurped, the written Constitution in the ana/6gic world
must be translated into* the *digital world, in order to preserve the interests, rights and freedoms it originally preserved. In this way,* the *meaning
of the words of the Constitution,* the *reach of constitutional protection,
preserved in the face of contextual change.": il:

"The *judgment is noteworthy not only for its unprecedented nature, but above all for settling, as in the brilliant manifestation by Minister Rosa Weber, that* ***political, social and economic changes demand* the *recognition of new rights, "reason why***
it is necessary, from time to time, to redefine the exact nature and extent of the protection of the individual's privacy'.
(...) the *technological impact of the changes society is going through require a permanent update of the scope of fundamental rights and guarantees."* .[44]

79. **In these recent decisions, the Supreme Federal Court has established principles and notions that are essential to the examination of the matter. This includes the premise that privacy**

and the fundamental right to the protection of personal data imposes that the Public Authorities, by processing and authorizing data processing, assumes the burden of presenting a constitutional justification for any intervention that in any way affects informational self-determination. In this respect, the holder's self-determination over the data must always be the rule, only exceptionally removable. The constitutional justification for the intervention must be translated into the legal provision of a clear purpose to the purposes,

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[42] STF, 19 Jun. 2019, Informative 944. Available at: <http://www.stf.jus.br/arquivo/informativo/documento/informativo944.htm>. Accessed on: 12 Sep. 2020. Also STF, j . 11 jun. 2019, HC 168052, vote of Min. Gilmar Mendes. Available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=413786>. Accessed on: 12 Sep. 2020.

[43] STF, j. May 27, 2020, ADI 5527, vote of Min. [2] Rosa Weber, Available at: http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADl5527voto.pdf>. Accessed on: 12 Sep. 2020. Alsoin STF, 05 jun. 2020, Informative 979. Available at: <http://www.stf.jus.br/arquivo/informativo/documento/informativo979.htm>. Accessed on: 13 Sep. 2020.

[44] STF, j. May 28, 2020, ADPF 403, vote of Min. Edson Fachin Available at: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF403voto.pdf>. Accessed on: 13 Sep. 2020.

limited to what is appropriate, necessary and proportionate, and provided that the necessary technical and organizational measures are taken against the risks of leaks and spills.

80. In the type of order discussed in the present appeal, there is nothing of the sort: **never before has there been any thought of distorting the original and legitimate purpose of collecting private, confidential and private data of unsuspecting people to be used as fishing in criminal proceedings - it is an unprecedented determination, made in an improvised way and without adequate justification. The point will be taken up in the next section.**

81. As could not be otherwise, the recent precedent of this Supreme Court is not an isolated understanding. On the contrary, the world trend in recent years has been the approval of legal regimes which regulate the treatment of personal data, including with regard to the conditions under which they may be supplied to state authorities. **In no case is the treatment and delivery of personal data considered indiscriminate.** This was the case in Brazil with the approval of the General Law for the Protection of Personal Data (Law nQ 13.709/18) and also the signal given by the House of Representatives when it created the Jurists' Commission primarily in charge of elaborating a specific bill for data treatment in matters of public security and criminal investigations[45] . **In this context, with all due respect, one cannot conceive of a trivialization of generic breaches of secrecy under the argument that the hypotheses for the supply of the requested data would be less restricted and would allow the incursion into data of a intimate and confidential nature without the due individualization of targets and specific grounds.**

82. We are not aware or aware of any precedent of any other Constitutional Court that has opted for this path of trivialization of the protection of personal data based on generic and *ad terrorem* arguments of public security. On the contrary, even in the context of

criminal investigation, the most prominent Constitutional Courts have honored their vocation of reaffirming rights, placing brakes and indicating guidelines for restrictions to

rights in the face of technological advances - including in their application to

[45] Camara dos Deputados. Diario 27 nov. 2019. Act of the President of 26/11/2019. Available at <https://www2.camara.leg.br/ legislative-activity/committees/groups-of-tra balho/56a-legislature/committee-of-juri stas-personal-data- public-security/know-the-comm ission/creation-and-constitution/act-of-creation>. Accessed on: 17 Sep. 2020.

criminal investigations[46].

83. In this sense, it is the role of this Court to reaffirm both the protection of

electronic data that mirror the private life and intimacy of citizens as well as the prohibition

to new ways of fishing for suspects based on **personal** data in investigations - reestablishing limits to the action of the investigating State. The measure subverts services and legitimate activities, contrary to trust and to the basic idea that the mere act

of seeking information cannot be sufficient to remove the privacy of unsuspecting people, much less for the serious purpose of a criminal investigation without just cause. **Technology services cannot be captured to feed state databases of people's profiles based on random and discretionary criteria, under the penalty of becoming a criminal investigation without just cause.**

trample on the distinctions between the public and private domains, as well as basic institutional separations between state, business, and citizens, supported not only by the right to privacy itself, but also by due process, legality, and the containment of

power.

84. In short: by validating the breach of secrecy generic and that reaches an indiscriminate number of people, the majority of the appealed appellate decision, in addition to diverging from the case law of this Court, violated the art. SQ, X and **XII, of** the Constitution. And this is because it decreed the type of breach of confidentiality generic, fishing for suspects, having left

of (i) proving just cause for the restriction of the privacy of any of the addressees

order and thus (ii) to individualize the targets against whom there could be probable cause for the restriction of their private life and intimacy.

[46] Online-Durchsuchung , BVerfGE 120, 274 (2008) - judgment of the Federal Constitutional Court of Germany; Rasterfahndung , BVerfGE 115, 320 (2006) - judgment of the Federal Constitutional Court of Germany Germany; Carpenter v. United States, No. 16-402, 585 U.S._____ (2018) - judgment of the Supreme Court of

the United

United States; United States v. Jones, 565 U.S. 400 (2012) - United States Supreme Court decision.

111.2. V10LAc;.ii.o TO ART. 52, X AND XII AND ART. 93, IX OF THE FEDERAL CONsT1ru1c;.ii.o. INcoNsT1ruc10NALITY OF

SECRECY ORDERS WITH INSUFFICIENT AND UNSPECIFIC GROUNDS IN RELATION TO THE MEASURE GRANTED

85. The violation presented in the previous section is sufficient for t h e reform of the appealed decision. In respect for the right to privacy, the breach of confidentiality can only be an exceptional measure and, therefore, in criminal proceedings, must be justified by the

existence of concrete evidence of illegal activity on the part of the affected individuals. Without this, the constitutional guarantees to privacy and the protection of personal data would be

entirely annulled, allowing t h e undermining of these rights for the convenience of the Public Power. In these terms, it is also true that the legitimacy of secrecy breaches requires the existence of a duly motivated and reasoned judicial decision - including for the link between those affected by the restrictive measure and the investigated crime to be presented.

86. Contrary to this understanding, the v. judgment stated that *"the nature of the measure is not in line with the imposition of prior indication of the authors of the criminal offense under investigation, since this is precisely* the *purpose of the measure, i.e., to discover, through the requisition of records and data, the eventual author or partner of the offense",* thus admitting the unconstitutional fishing exposed in the previous section. Additionally, the decision also considered that the impetted decision would be

duly grounded because *"both the evidence of the crime, as well as the justification for the use of the measure and* the *period to which the records refer were duly exposed by the first degree Magistrate.*

87. As will be shown, these observations are not sufficient to remedy the flaw of origin of the impetted order - the absence of specific grounds to determine the breach of secrecy. This conclusion does not derive from any theoretical or abstract concept of the need to provide reasons for judicial orders, as foreseen in art. 93, IX, of the Constitution. On the contrary, **the violation stems from the very onus of substantiation that is placed on criminal**

authorities to justify measures restricting rights - and, here, a collective measure to break secrecy, which affects an indeterminate number of people outside the criminal investigation. In this aspect, the

The need for a specific justification, taken from the very core of art. 2, X and XII, of the Constitution, in conjunction with the requirements of justification and the failure to follow due legal process in the context of the State's persecutory activity.

88. From the outset, it is important to clarify that it was never a question of wanting to affirm the duty to *"indicate the authors of the violation".* As is well known, the authorship of a crime is only established and consolidated after a penal sentence. It is not under debate, therefore, that the indication of the authors is not required for a secrecy-busting order to be valid. Certainly there are different levels of attribution of people involved in the course of the criminal process: suspects, indicted, accused, defendants, convicts. Each of these categories relates to different procedural stages and authorizes different levels of rights restriction measures. In this sense, and in the terms already demonstrated repeatedly in these proceedings, the thesis sustained is that suspects must be minimally individualized as suspected participants in the crime for the measures to be legitimized.

89. **Since the court admitted fishing for unsuspecting people to try to somehow contribute to the identification of suspects (a needle in a haystack), it is certain that the greater would have to be the argumentative and motivational burden of the decision to justify an order without any precedent.** To begin with, because when it comes to restricting a fundamental right, the State is forbidden to act outside the strict terms of the legal authorization, even when moved by the legitimate interest of investigating crimes. This is an imposition of the principle of legal reserve (CF/88, arts. SQ, II and 37, caput), of special importance in criminal procedure in general and even more so in the present case.

90. From a technical and formal point of view: the measure involves **(i)** the exploitative use of a Google commercial service for **(ii) the** production of reports on private information **(iii)** related to an indeterminate and random set of users, gathered from search profiles, **(iv) in a** manner and scope that do not constitute valid

mechanisms to obtain evidence in criminal proceedings and that **(v)** are far from being banal or little invasive. From this, a corresponding right of the platform to not be compelled to contribute

to this serious form of violation to the privacy of its users, less

still without any specific legal basis. This is an attempt to transform its service into an investigative tool, contrary not only to the basic privacy expectations of its users, but also to the law and the Constitution itself.

91. In consonance with these premises, the relevance of the containment of the State's power over the private sphere of individuals is expressly mentioned in the case law of the Supreme Federal Court. Check this out:

"This requirement is of meridian justification, likely to be understood by everyone, for the obvious reason that one cannot sacrifice the fundamental right protected by the Constitution - the *right to privacy - through the use of the drastic measure and of the breach of secrecy, when the existence of the Jet au Jatos under investigation can be achieved* with *recourse to ordinary means of proof. Absolute restrictions on constitutional rights are only justified in situations of absolute exceptionality"* .[47]

"THE CONSTITUTIONAL GUARANTEE OF PRIVACY, ALTHOUGH NOT ABSOLUTE, CANNOT BE ARBITRARILY DISREGARDED BY THE PUBLIC.

- The right to privacy - which represents an important manifestation of the rights of personality - is qualified as an expressive prerogative of legal order that consists in recognizing, in favor of the person, the existence of an indefeasible space designed to protect her against undue interference by third parties in the sphere of her private life. ***The arbitrary transposition to the public domain, of merely personal matters, without any reflection on the piano of social interests, has the a serious transgression of the constitutional principle that protects the right intimacy, because this, in the scope of its reach, represents the 'right to exclude from the knowledge of third parties that which concerns the way of being of the private life'*** *{HANNAH ARENDT}.*

THE *RIGHT TO THE BANKING SIG/LE - WHICH ALSO DOES NOT HAVE AN ABSOLUTE CHARACTER* - IS *IS AN EXPRESSION OF THE GUARANTEE OF PRIVACY.*

- Bank secrecy reflects an expressive projection of the fundamental guarantee of people's intimacy, not being exposed, consequently, as the constitutional value it is, to interventions by third parties or intrusions by public authorities that are devoid of probable cause or devoid of an adequate legal basis" .[48]

"This jurisprudential guideline [of requiring adequate justification for secrecy-busting decisions] (...) *recognizes that* the *right to privacy - which represents the right to privacy* - is a fundamental *right. an important manifestation of the rights of personality - is qualified as an expressive prerogative of legal order that consists in guaranteeing, in favor of the person, of any person, in the sphere of his private life, the existence of an undevi 6able space destined to protect him against undue interference from third parties, especially t h a t of the Public Power. Hence the correct warning made by Carlos Alberto Di Franco, for whom 'one of the great malfunctions of modern society is the preservation of the of the right to privacy. No man can be considered truly free, if he does not have a guarantee of inviolability of the sphere of privacy that* the

[47] STF, *DJ* 23 feb. 2006, MS 25812 MC, Rel. Min. Cezar Peluso.

[48] STF, *DJ* 14 feb. 2001, MS 23669, Rel. Min. Celso de Mello.

fence" .[49]

92. See that **the precedents impose caution even in relation to people who are already effectively investigated. And, symptomatically, they do not even consider restrictive measures on non-individualized persons.** For this very reason, with even greater reason, the observations apply in a very evident manner to the case under examination: the investigation of crimes is an activity of immense social relevance and, therefore, may justify restrictions on the sphere of rights of citizens when there is evidence of involvement in illegal conduct. It does not authorize, however, any type of restrictive measure that may be considered by the authorities, under penalty of creating a police state. The warning becomes even more relevant in the current context, marked by the advance of technology and the possibilities of invasion of privacy.

93. Having made these observations, four brief remarks are sufficient to demonstrate the absence of adequate and sufficient grounds for the order to validate the measure upheld by the appealed decision.

94. ***In the first place,*** and contrary to what the v. judgment considered appealed, the mere indication of evidence of a crime could never satisfy the constitutional requirement. As is well known, the existence of evidence of a crime consists in the in the factual support relative to the possibility of opening police inquiries. In this sense, **this element** is **not and cannot, in itself, be sufficient to justify that an indeterminate group of unsuspecting people be subjected to measures restricting their rights which inevitably must be based on just cause, given the due standard of proof, as seen.**

95. Note that the order does not even point to any connection between the command issued and the investigation underway - at least, not one that would link the case to the use of the search platform in the four days prior to the crime. In the opposite direction, the admitted exercise was so exploratory that the appealed decision dispensed even with the enunciation of reasons why one might believe that there was a needle in the massive

[49] STF, *DJ* 16 jun. 2006, HC 84758, Reporting Justice Celso de Mello (Full Court).

haystack of requested data. In other words: it was content with the general mention that the measure could be useful - a statement that could justify any breach of secrecy in any case.

96. ***Secondly,*** the justification for using the measure cannot be satisfied in **the mere allegation that it would be "indispensable", as the impetted order did** - **at the point highlighted by the appealed v. judgment. Having been granted together with several other measures (more than 40 orders), it is worth noting that all of them were indiscriminately considered indispensable, without any specific justification. Be that as it may, t h e fact that the order stated that the measure "is indispensable" cannot be enough to suppress the invalidity of the generic item** - **materially distinct from all the others. Otherwise, also on this point, any judicial measure could be validated by the mere allegation of indispensability, emptying the force of constitutional guarantees.**

97. ***Thirdly,*** the indication of the period to which the records refer is useless if the decision itself does not justify why the period would be pertinent - and not to a greater or lesser extent. Surprisingly, however, the appealed appellate decision confers wide discretion to such definitions. For no other reason, the dissenting vote of Minister Sebastiao Reis Junior noted precisely the absence of demonstration of the need for such a broad measure. See excerpt from the mentioned vote:

"(...) I believe that the amplitude of what was determined makes the decision illegal. This is because ***the decision does not present, at any time, sufficient justification as to the extent of the information requested.*** *The judicial determination*
takes care of a period of four days (why not three to five, six, ten?) and ***reaches an unidentified number of people without any justification for doing so.***

98. Finally, and ***in fourth place,*** the above-mentioned defects of reasoning could not be overcome with the mere reference of the appealed decision that the measure would be validated by art. 22 of the Marco Civil da Internet. In fact, in the complete absence of legal

provision of a measure authorizing the collective and generic provision of unsuspected persons for exploratory analysis in a criminal proceeding, the v . appealed decision

could not be suppressed by the mere reference of the appealed decision.

the aforementioned provision of the Marco Civil da Internet in an extensive and decontextualized way. In effect, the device only deals with the provision of access records to applications by users involved in illegal practices on the Internet, precisely so that the person responsible for a specific content that is pointed out as illegal can be identified. Confirming this finding, the regulatory decree of the Marco Civil textually forbids general secrecy breaking determinations, requiring the indication of the affected targets (art. 11, § 3Q)_.

99. In this scenario, **the violation of art. 2, X and XII, of the Federal Constitution is also umbilically linked to a violation of the principle of the foundation of the judicial decisions - also linked to the very concept of due legal process, which is not consistent with the granting of exploitative orders, much less without specific grounds.** As the jurisprudence of the Supreme Federal Court has always reiterated,[50] , the constitutional duty of motivation and justification of judicial decisions has as its objective

(i) ensure the consistency of the decision with the legal system, presenting the reasons
(ii) to guarantee a fair process - free of arbitrariness and susceptible to mechanisms of judicial control legality and constitutionality[51] .

[50] STF, 22nd Panel, DJe 07 May 2012, HC 96056, Rel. Min Gilmar Mendes: "Habeas Corpus. 2. Lifting of bank and telephone secrecy. Allegation that the decisions rendered by the magistrate of first degree were not properly motivated, for having presented me re mention to the reasons exposed by the Public Prosecutor. 3. absence of a decision with suitable grounds for giving way to an exceptional situation of restriction of a right or constitutional guarantee. 4. illicit evidence, without legal effect. Unbin ding of the records. 5. habeas corpus partially known and, in this part, granted". Still: "Daf because it is imperative to conclude that the me re allusion to the "request" of the Public Prosecutor and/or the police authority is not enough to legitimize the breaking of th e telephone and bank secrecy of the patients. **The reference - argument of authority - does not pass through the sieve of proportionality, insofar as it does not present adequate motivation to give way to this exceptional situation of rupture of the sphere of intimacy of whoever is under investigation".**

[51] Gilmar Ferreira Mendes and Paulo Gonet Branco, *Curso de Direito Constitucional,* 2020, p. 1089-91: "Thus, when the constitutional text determines in subsection IX of art 93 that "all decisions must be grounded", is the same as saying that the judge must explain the reasons for which he or she pronounced a certain decision.
This is a true right to *accountability as* opposed to the respective *duty (has a duty)* to be accountable. In other words, this constitutional determination is transformed into a true duty of accountability.
...) An important question, still in this sense, concerns the fact that it is from the
of decisions that we conquer a space to access the contents of the determinants for the construction of the integrity and coherence of the Law (Ronald Dworkin). It should be noted that, in a democracy, it is important to understand that
It is extremely necessary that the decisions handed down by the Judi ciary can demonstrate a mutual commitment to repeat the successes of the past and correct, in a reasoned manner, its errors. This means that the reasoning has the onus of placing th e decision handed down in the particularity in the broader field of the chain of decisions previously made (one can say, with some caution, precedents). It should be noted that this (re)composition of the chain of previous decisions must respect a

100. **In the type of order under examination, neither of the two purposes was or could be achieved. The judgment violated art. 52, X and XII c/c art. 93, incise IX, of the Constitution,** as it (i) dispensed with the requirement of provable cause relative to the subjects affected for breaches of secrecy which seriously interfere with their intimacy and private life; (ii) endorsed the insufficient and general grounds indicated in the decision containing the item (ii) reduced the duty to motivate orders for breaches of secrecy to a non-impugnable letter of good intentions. This reason also leads, inevitably, to the need to reform the appealed decision and cancel the contested order.

111.3. ART. 52, **X** AND XII, OF THE FEDERAL CONSTITUTION AND THE PRINCIPLE OF PROPORTIONALITY, IN ITS THREE ASPECTS.

MEASURE THAT DISNACTS INTERNET SEARCH SERVICES TO BE A RESEARCH TOOL FOR THE PURPOSE OF CREATING CRIMINAL EVIDENCE

101. The serious violations detailed above are sufficient for the granting of the extraordinary appeal. In any case, there is still another constitutional subthesis that is asked to be examined by this Supreme Court. In effect, the appealed appellate decision decided to maintain the impetted order with the following considerations about its proportionality: *"It* is *adequate, insofar as it serves as an auxiliary means to elucidation of the crimes, whose investigation has been dragging on for about two and a half years, without a definitive conclusion. It is necessary, given the gravity and complexity of the case and the inexistence of other less burdensome means to achieve the legitimate investigative ends. And, finally, it is proportional in the strict sense, because the restriction of fundamental rights that result from it does not cause harm to the affected persons, who are not will have their confidentiality of registered data published, it is also certain that, if it is not verified that they are connected to the* Jet *under investigation, such registers will be discarded".*

102. In these circumstances, **what the v. judgment did was a quick and purely abstract exercise of balancing privacy and public safety to conclude that the order was proportional.** With

all due respect, the reasoning could

internal coherence, not simply in a logical sense (application of the principle of non-contradiction), but also respecting a dimension of fairness in the terms defended by Ronald Dworkin".

serve to authorize any breach of secrecy in the context of criminal investigations and be replicated in absolutely any analysis on the matter, since it was not considered any specific aspect of inadequacy brought in the records, nor the absence of demonstration of necessity or disproportionality in the strict sense. Therefore, the eloquent image extracted from the jurisprudence of the Supreme Federal Court applies: **the justification that serves for any decision, in truth, does not serve for any**[52]. An examination that

is not merely theoretical, from the incontrovertible factual elements of the records, leads unequivocally to the

opposite decision.

> 103. To be valid, the restriction to a fundamental right must be capable, in theory, of satisfying the purpose for which it is intended. In this case, the measure is patently ***inadequate.*** **Even if it were compatible with the constitutional system, the measure does not offer any guarantee that it will lead to the author or authors of the investigated crime.**
>
> 104. In this aspect, it should be noted that the Search History service, in which searches made by Google users are registered, is available at the users' mere convenience: it depends on activation in an active account and can be subject to deletion or editing. To make any sense, the measure needs to engage in the assumption that criminals - the masterminds of such sophisticated and complex crimes - would be logged into a Google account, would have left behind traces of such searches

- in the exact terms listed in the order - and would not have erased his search history. With all due respect, if the assumption is improbable for criminal agents in general, either

[52] STF, *DJ* 18 Aug. 2015, MC in MS 33.663/DF, Reporting Justice Celso de Mello (monocratic decision): "This means, by

for example, that **any measure restricting rights, because it is exceptional, will always depend, in order to be considered valid and legitimate, on the necessary justification, because, without it, such an act** - similarly to what happens with the judicial decisions (CF, art. 93, IX) - **will be considered cold and devoid of legal effect** (RTJ 140/514, Reporting Justice CELSO DE MELLO, v.g.). In the case under examination, and in a strictly cognizant judgment, the CPI/PETROBRAS appears to have ordered the measure object of the opposition in the present writ of mandamus, without having **justified,** however, in a **concrete manner, by indicating probable cause and supported by legally sound reasons, the need for its adoption,** thereby failing to comply with an absolutely essential and unassailable constitutional determination, consisting of the requirement to substantiate state resolutions."; STF, DJ 11 nov. 2005, HC 86.094/PE, Rel. Min. Marco Aurelio: "Contrary to what was stated in the judgment **the** Superior Court of Justice, the **judicial decision is not sufficiently reasoned, unless the constitutional requirement is attached not the principle of reality but a principle aimed at**

presuming what normally occurred, i.e., that the reason for the act was present "for the purposes of criminal investigation or

criminal procedural instruction", which is even 6 obvious. **The constitutional legal order in effect demands more. It requires that the grounds for the construction act be revealed, considered for meters of the concrete case, and this, clearly, did not occur in the present case".**

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plus the and to the principals of the investigated crime.

105. **As highlighted from the outset, the breakdown refers to research by any of the indicated terms, generic and associated to people, projects and places of public relevance. The time lapse, in turn, is very long considering the amount of daily searches. In this sense, the measure carries a very high probability of affecting a large number of individuals and producing a volume of material that is truly for nothing.** Despite this, the appealed decision limited itself to considering that the order "serves as an auxiliary means" to the investigation.

106. With all due respects, the generation of all this sensitive random material, without even the assurance that the perpetrators would be covered by the collection, could hardly be considered an adequate and effective form of criminal investigation. On the contrary, there is the objective risk of dispersing the investigative resources in multiple directions, most of which are necessarily mistake n. Even if this were not so, the configuration characteristics and editing and deletion capabilities of the Search History[53] are sufficient to verify that it does not constitute an enabling means to the intended end.

107. Nor does the order pass the ***necessity*** test. As we know, the logic of this demonstration is taken directly from the Federal Constitution and the notion of due legal process, by which state action that intervenes unnecessarily in freedom is not justifiable. This is a basic requirement so that there is no gratuitous restriction of fundamental rights or abuse of power.

108. Note that this requirement applies in relation to individualized targets and on which there is evidence of a criminal offense. With **much more reason, therefore, it would have to be observed in the event of understanding possible the generic break based on keywords searched in Google's search engine.** In this case, however, the impetted order only claims that the contested

breach of confidentiality - along with the other determinations - *"are measures that are necessary, because they are*

indispensable to reach the

[53] https://support.google.com/websearch/answer/465?co=GENIE.Platform%3DAndroid&hl=pt-BR.

all those who, in some way, may have participated in the crime being investigated, as well as the circumstances in which the *criminal Jet was developed".* And further: *"after taking statements from friends and family of the victims, it was not possible to delineate the alleged criminal authorship".* The appealed appellate decision, in turn, limited itself to registering that the measure would be necessary *"in view of the gravity and complexity of the case and the nonexistence of other less burdensome means'".*

109. Now, as already observed, **the general statement that the measure is necessary to enable investigations is not enough - which would transform the legal safeguards of motivation and justification of judicial orders and proportionality control into a mere ritual formula. It is necessary to demonstrate the failure of alternative measures less onerous to fundamental rights - including the various individualized and less onerous measures that have been ordered, including multiple breaches of secrecy that have been carried out by the appellants.**

110. Also because of this, **it is objectively impossible to suppose that there would not be less serious measures:** according to what has been widely reported b y the press, two people accused of being responsible for the execution of the crime have already been charged and other suspects have been denounced for their involvement in the investigated facts. That is : using other elements of proof and investigative means - including the breaking of secrecy against certain targets, the police authorities were able to identify and locate suspects of the serious crimes. There were, therefore, other measures and ways, authorized by the legislation, that allowed the authorities to achieve the same purpose without having to resort to such a serious, comprehensive and random - as well as illegal, as seen - measure of secrecy breaking. All this proves that the order, at the time it was issued, was not necessary. And, furthermore, that it became even less necessary with the evolution of the investigations.

111. Finally, in addition to failing to comply with both of the

above requirements, contrary to what the appealed decision considered, the order is **disproportionate in the strict sense.** Even though the crime is serious, the threat to fundamental rights here in question is even greater. It is worth repeating the scale of what is at stake: **the order seeks to**

transform the legitimate and public interest service of a technology company into a service of public interest.

tool of investigation and promote a lottery of suspects by breaking the secrecy of private data of an indeterminate set of people, to be profiled in a directory on the basis of searches for sensitive information. With all due respect, the order

the constitutional protection of public security, foreseen in art. 144 of the Constitution

Federal Constitution, does not attribute a general prerogative so that the State's persecutory activity can justify the disregard of individual and institutional basic guarantees, typical of collective and discretionary measures such as the one discussed here. Although this conclusion derives by itself from the Federal Constitution, it is also drawn from a judgment of proportionality in the strict sense of the measure.

112. As seen, **considering the nature of the indicated terms, which generate search results with information about Rio de Janeiro's councilwoman, a social project aimed a t black women and a busy address in the city center, the**

identification of users from search terms would lead to the breach of confidentiality of

It would also serve to dangerously profile activists, journalists, and students interested in the work of the country. It would also serve to **dangerously profile activists, journalists, and students interested in the work of**

public authority - based on sensible data of political opinion.

113. The appealed decision, in turn, did not attribute any relevance to these considerations - having only mentioned generically that there would be no disproportionate burden because the data will not be published and, whoever is innocent, will have their data discarded. With all due respects, here too a mere letter of good intentions was endorsed. If this logic prevails, any and all breaches of secrecy will be automatically legitimized, and it will be enough to trust that the authorities will discard what is

be considered impertinent. Always with all due respect, this type of trivialization corresponds to the antithesis of fundamental guarantees, replaced by the blind confidence that the Public Power would be incapable of errors or abuses.

114. As seen, the right to privacy is an individual prerogative of control over who can have access to private and intimate information. The violation of privacy occurs, therefore, with the

disrespect to this prerogative - not being overcome

by a unilateral promise that the secrecy will be maintained by the interfering party. In criminal proceedings, where a violation i s exceptionally justified, it is a clear duty of the investigating authorities to maintain the secrecy of the information provided. It does not follow, however, that invasive measures are automatically justified.

The objective damage stems directly from the access to private information. When general orders are in question, disconnected from any probable cause regarding those affected, the disrespect t o this fundamental freedom is even greater.

> 115. The assault on the rule of law would be evident even if such power were used only for the purposes originally intended, without distortions and illegal leaks. **In the real world, the potential damage to liberties is incalculable. In** fact, as it is widely known, there are many cases of leaking evidence of criminal processes - including selectively and maliciously. Nor are

There are few cases in which this exposure leads to virtual lynchings, when not risking one'S life.

> 116. Attentive to these issues, this Supreme Court has recognized the subjective dimension of the protection of personal data - **aimed at protecting the individual against the risks that**

their personality in face of the collection, processing, use and circulation of personal data [54] - **In a specific way, as we have seen, this Court has established the relevance of the Public Authorities contem plating risks linked to data treatment measures, respecting the basic principles of adequacy, necessity and proportionality, in addition to adopting security measures against leaks and abuses.** Check it out:

"In this order of ideas, there does not emerge from the Provisional Measure n. 954/2020, in the motions in which it is put together, a legitimate public interest in sharing the personal data of telephone service users, considering the need, adequac y and proportionality of the measure. This duty was incumbent upon the Executive Branch when it published it. Along these lines, by not properly defining how and for what purpose t h e collected data will be used, PM 954/2020 does not offer conditions for the evaluation of its adequacy and necessity, thus understood as the compatibility of the treatment with *the purposes informed and its limitation to the minimum necessary to reach its purposes. It thus fails to comply with the guarantee of due legal pr ocess (art.* SQ, *LIV, of the Major Law), in its substantive dimension.*

[54] STF, Apr. 24, 2020, MC in ADI 6387, ratified by the Plenary on May 7, 2020, Reporting Justice Rosa Weber; STF, Aug. 13, 2020, MC in ADI 6529, Reporting Justice Carmen Lucia; STF, DJe Jun. 25, 2020,

On the other hand, article 3Q, I and II, of *PM 954/2020 states that the shared data "will be confidential" and "will be used exclusively for the purpose provided in § lg of art.* 2Q'; *and article 3Q, § lQ, prohibits IBGE from sharing the data made available* with *other entities, public or private. Nevertheless, the MP n. 954/2020 does not present a technical or administrative mechanism capable of protecting personal data from unauthorized access, accidental leaks or misuse, either in their transmission or in their treatment. It limits itself to delegating to an act of the President of the Foundation to the IBGE* the *procedure for sharing the data, without offering sufficient protection to the relevant fundamental rights at stake. I emphasize: by not foreseeing any requirement in relation to mechanisms and procedures to assure* the *secrecy, the hygiene and, when* the *case,* the *anonymity of the data MP 954/2020 does not satisfy the requirements that emerge from the constitutional text regarding the effective protection of the fundamental rights of Brazilians"*[55] .

117. **In the present case, in which the order intends the creation and transmission of a database of individuals profiled on the basis of information and interests, distorting the original purpose of the collection in a completely opposite way a n d incompatible with the expectations of the data subject, the scenario could not be more paradigmatically problematic. There is no control mechanism present here: data processing by state authorities in the scope of criminal investigations does not allow the data to be used for any other purpose.**

are subject to the General Law of Data Protection (art. 42, lll} **nor is there chain of custody for digital evidence provided for in criminal law, so the risk is even higher. This is not because of any specific suspicion against the authorities, but because of the massive flow of sensitive data at issue here.**

118. **As we know, this is not a purely abstract or unreasonable concern in the context of criminal investigations, in Brazil or anywhere in the world. The constitutional guarantees serve precisely to center the risks of error and error in the investigation.**

abuse, especially in politically difficult contexts. By way of illustration, the very investigation that gave rise to the order was also the target, on more than one occasion, of investigations of its own regarding alleged leaks of information and possible distortion of the investigation, according to information widely reported in the press[56] **. There is no need to endorse any criticism or suspicion to reinforce that**

[55] STF, j. May 7, 2020, Referral of MC in ADI 6387, Reporting Justice Rosa Weber.

[56] Cf. **"PF suspects that milfcia has infiltrated in police station of case Marielle"** (https://noticias.uol.com.br/cotidiano/ultimas-noticias/2019/03/14/pf-suspeita-que-milicia-tenha-infiltrados-em-delegacia-do-caso-marielle.amp.htm); "Raquel **Dodge calls for new investigation into Marielle Franco's murder"** (https://noticias.uol.com.br/cotidiano/ultimas-

noticias/2019/03/14/pf-suspeita-que-milicia-tenha-infiltrados-em-delegacia-do-caso-marielle.amp.htm); "Raquel **Dodge calls for new investigation into Marielle Franco's murder**

(https://noticias.uol.com.br/u lti mas-notici as/afp/2019/09/17/raquel-dodge-pede-new-investigation-over-hom icide-of-marielle- franco.htm); **"Polfcia Civil tentou comprar confessao de miliciano em caso Marielle, diz**

guarantees serve, precisely, to immunize the Rule of Law against these risks. And, for this very reason, they cannot be flexibilized by purely pragmatic considerations.
associated with the seriousness of a particular crime.

119. That said, the appellants reiterate that they consider the public interest in solving the crime under investigation to be of the utmost importance. But this is not a one-way balance: in calculating the proportionality in the strict sense of the measure, one must consider the enormous interference in basic fundamental freedoms of unsuspecting people, as well as the dangerous legacy of compromise with fundamental rights that such a precedent would leave. **It is worth repeating the dimension of what is in question: the determination herein objected to does not require the verification of *a* search history *based on a concrete suspicion regarding specific individuals,* in order to produce information that confirms evidence of authorship or participation in the crime - which was even done in relation to the suspects in the present investigation.**

120. **Instead, the order upheld by the appealed v. judgment seeks the breaking of the confidentiality of the private data of an indeterminate number of persons, who merely performed Internet searches on information of public relevance, for the creation of a dossier of persons profiled on the basis of thoughts, interests, and political opinions.** The determination accepts the **certain and known *collateral damage of*** breaking the secrecy of innocent people and exposing them to risks and embarrassment, assuming that the extreme measure would be justified by the ***eventual*** and effectively ***lottery*** possibility of obtaining some clue of the crime, as well as the general promise that there will not be any abuse.

121. Under this perspective, it is clear that the breaking of telemetric secrecy, as authorized and maintained by the appealed

appellate decision, also violates art. SQ, Xe **XII, of the** Federal

Constitution, under the

standpoint of proportionality: the measure determined is inadequate, unnecessary, and disproportionate in the strict sense. As it is known, this Egyptian Supreme Court

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Dodge" (https://brasil.elpais.com/brasil/2019/10/30/politica/1572470468_218781.html); **"AGU will investigate leaks from information about case Marielle"** (https://agenciabrasil.ebc.com.br/politica/noticia/2019 -10/agu-vai-apurar-vaza mento-de-informacoes-sobre-ca so-marielle).

has widely applied this same test of proportionality when exercising constitutionality judgment on measures restricting fundamental rights - including and especially in the context of breach of confidentiality that affect innocent people and for the protection of personal data against state persecution. What is requested in the present appeal is that this same jury be held to recognize the invalidity of the breach of secrecy questioned here. Also for this reason, therefore, the case is to reform the appealed decision.

IV. CoNcLus.ii.o

122. For all the above reasons, the appellants request that the extraordinary appeal be heard and provided in order to reform the appealed decision, granting the order to

To annul the impetted act, eliminating the risk that the appellants' services will be transformed into a mechanism for irreversibly violating the privacy of indeterminate people against whom there is no charge of a criminal offense or even an illegal act.

On these terms, they request that the case be granted. Brasilia, September 22, 2020.

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