

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY IVORY CARPENTER,)
)
) Petitioner,)
)
) v.) No. 16-402
)
) UNITED STATES,)
)
) Respondent.)
)

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TIMOTHY IVORY CARPENTER,)
Petitioner,)
v.) No. 16-402
UNITED STATES,)
Respondent.)

Washington, D.C.

Wednesday, November 29, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

NATHAN F. WESSLER, New York, N.Y.; on behalf of the Petitioner
MICHAEL R. DREEBEN, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent

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1 PROCEEDINGS

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 16-402, Carpenter
5 versus United States. Before we commence,
6 though, I'd like to advise counsel that I'll
7 provide an additional 10 minutes of them to
8 their argument time. I don't think you'll have
9 -- I don't think you'll have trouble filling
10 it.

11 Mr. Wessler.

12 ORAL ARGUMENT OF NATHAN F. WESSLER

13 ON BEHALF OF THE PETITIONER

14 MR. WESSLER: Thank you. Mr. Chief
15 Justice, and may it please the Court:

16 At issue in this case is the
17 government's warrantless collection of 127 days
18 of Petitioner's cell site location information
19 revealing his locations, movements, and
20 associations over a long period.

21 As in Jones, the collection of this
22 information is a search, as it disturbs
23 people's long-standing, practical expectation
24 that their longer-term movements in public and
25 private spaces will remain private.

1 JUSTICE KENNEDY: So what -- what is
2 the rule that you want us to adopt in this
3 case, assuming that we keep Miller -- Miller
4 and Smith versus Maryland on the books?

5 MR. WESSLER: The rule we seek is that
6 longer-term periods or aggregations of cell
7 site location information is a search and
8 requires a warrant. We are not asking the
9 Court to overturn those older cases. We think
10 that the -- the lesson to be drawn from Riley
11 and Jones and Kyllo is that any extension of
12 pre-digital precedents to these kinds of
13 digital data must rest on their own bottom.

14 JUSTICE ALITO: How would you
15 distinguish Miller?

16 MR. WESSLER: Miller involved more
17 limited records, certainly they could reveal
18 some sensitive information, but more limited
19 records and, as this Court held, they were
20 voluntarily conveyed in that they were created
21 by the passing of negotiable instruments into
22 the stream of commerce to transfer funds.

23 What we have here is both more
24 sensitive and less voluntary.

25 JUSTICE ALITO: Why is it more -- why

1 is it more sensitive? Why is cell site
2 location information more sensitive than bank
3 records, which particularly today, when a lot
4 of people don't use cash much, if at all, a
5 bank record will disclose purchases? It will
6 not only disclose -- everything that the person
7 buys, it will not only disclose locations, but
8 it will disclose things that can be very
9 sensitive.

10 MR. WESSLER: I absolutely agree,
11 Justice Alito, that the information in bank
12 records can be quite sensitive, but what it
13 cannot do is chart a minute-by-minute account
14 of a person's locations and movements and
15 associations over a long period regardless of
16 what the person is doing at any given moment.

17 JUSTICE ALITO: Yeah, I understand
18 that. But why is that more sensitive than bank
19 records that show, for example, periodicals to
20 which a person -- to which a person subscribes
21 or hotels where a person has stayed or
22 entertainment establishments -- establishments
23 that a person has visited --

24 JUSTICE KENNEDY: And particularly --

25 JUSTICE ALITO: -- and all sorts of

1 other things.

2 JUSTICE KENNEDY: Particularly because
3 the information in the bank records that
4 Justice Alito referred to are not publicly
5 known. Your whereabouts are publicly known.
6 People can see you. Surveillance officers can
7 follow you. It seems to me that this is much
8 less private than -- than the case that Justice
9 Alito is discussing.

10 MR. WESSLER: Well, I -- I don't
11 agree, Your Honor, for the following reason:
12 When a person is engaged in a financial
13 transaction, passing a -- a check, a negotiable
14 instrument, that's an interpersonal transaction
15 where a person has full knowledge that they are
16 putting something into the stream of commerce
17 to transfer funds directed at their -- their
18 bank.

19 As the five concurring justices made
20 clear in Jones, although we may, when we step
21 outside, have a reasonable expectation that
22 someone may see where we go in a short period,
23 nobody has expected in -- in a free society
24 that our longer-term locations will be
25 aggregated and tracked in the way that they can

1 be here.

2 JUSTICE GINSBURG: You keep
3 emphasizing longer term.

4 JUSTICE KENNEDY: Yes, I was going to
5 ask about that.

6 JUSTICE GINSBURG: Now, suppose what
7 was sought here was the CSLI information for
8 the day of each robbery, just one day, the day
9 of each robbery. Does that qualify as short
10 term in your view that would not violate the
11 Fourth Amendment?

12 MR. WESSLER: So the -- Your Honor,
13 the -- the rule we proposed would be a single
14 24-hour period, contiguous 24-hour period.
15 Now, the only other court to address this
16 question is the --

17 JUSTICE SOTOMAYOR: I'm sorry, which
18 -- in which way are you talking about? What
19 rule?

20 MR. WESSLER: So -- sorry. So we
21 don't think the Court needs to -- to draw a
22 bright line here, to define exactly where the
23 line between short and long term is, but as we
24 -- as we pointed out in our reply brief --

25 JUSTICE SOTOMAYOR: But Justice

1 Ginsburg is not asking you about 24 hours or
2 anything else. She's asking you about a tower
3 dump. A crime happens at a bank, the teller
4 says or doesn't say that the robber -- she saw
5 the robber on the phone at some point.

6 Could the police just get a tower dump
7 of the cell site to see who was in that area at
8 that time?

9 MR. WESSLER: Justice Sotomayor, yes.
10 I -- I think that would not be affected at all
11 by -- by this case. That would be quite short
12 term.

13 JUSTICE SOTOMAYOR: So what's the
14 difference between a tower dump and targeting a
15 particular individual? Let's say an anonymous
16 call came in that said John X or John Doe was
17 at a particular -- was the robber.

18 Could the police then say to the
19 telephone company let me see the records of
20 John Doe for that hour or for that day or
21 whatever the -- the duration of the crime was?

22 MR. WESSLER: Yes. That would be
23 perfectly acceptable.

24 JUSTICE SOTOMAYOR: All right. So
25 differentiate that situation.

1 JUSTICE GINSBURG: Excuse me. Could
2 we go back to my question? You said 24 hours
3 roughly. So, if there were only one robbery,
4 we could get that information, but now there
5 are how many, eight? So we can't get it for
6 eight, but we can get it for the one?

7 MR. WESSLER: So, Your Honor, we've
8 suggested 24 hours. I think that the most
9 administrable line, if the Court wishes to draw
10 a bright line, would be a single 24-hour
11 period.

12 But this Court could -- could craft
13 other reasonable ways to -- to draw that
14 intentional line.

15 JUSTICE GINSBURG: Well, what if it's
16 reasonable for one robbery one day, why
17 wouldn't it be reasonable -- equally reasonable
18 for each other robbery?

19 MR. WESSLER: Well, I -- I think the
20 risk is a risk of circumvention of this Court's
21 rule from Jones and of whatever the durational
22 requirement is. With some types of crimes, it
23 would be quite easy to delineate a certain set,
24 limited set, of days that -- that information
25 might be worth getting. Others would be more

1 difficult.

2 Now, in this case, it doesn't matter
3 to us, actually, where the Court draws that
4 line because 127 days of data --

5 JUSTICE KENNEDY: But the -- the
6 longer term is more corroborative perhaps of
7 innocence. Suppose he's in the area every day
8 for 120 days. That's because of where he shops
9 and so forth. So what difference?

10 MR. WESSLER: Well --

11 JUSTICE KENNEDY: It seems to me that
12 the rule you're proposing might be avoid in --
13 exculpatory information.

14 MR. WESSLER: Well, Your Honor, we
15 would fully expect that if the government
16 obtained a short period of data that was
17 appeared to be inculpatory, that would provide
18 probable cause for a warrant to gather a much
19 wider amount of data if -- if needed, or in the
20 pretrial process, the defendant, him- or
21 herself, could obtain other records from the
22 carrier and use those as exculpatory evidence.

23 Though the concern here is with the
24 privacy invasion, which is quite severe over
25 the long term, over these more than four months

1 of data.

2 JUSTICE KAGAN: It would help me --

3 CHIEF JUSTICE ROBERTS: I want to
4 understand the -- the basis for the 24-hour, or
5 however long you want it to be, exception. It
6 seems to me if there's going to be protection
7 extended to the information, it has to involve
8 some compromise of the third-party doctrine,
9 and if that is altered, I don't see why it
10 wouldn't also apply to, you know, one day of
11 information.

12 MR. WESSLER: So the -- the only other
13 court to address this question is the Supreme
14 Judicial Court of Massachusetts, which drew the
15 line at six hours. We have suggested 24 hours
16 because we --

17 CHIEF JUSTICE ROBERTS: Well, I don't
18 understand. What is the line we're drawing?
19 It seems to me the line is between information
20 to which the authorities have access and
21 information to which they don't. I don't know
22 why we're bothering about a line between six
23 hours, three weeks, whatever.

24 MR. WESSLER: Well, Your Honor,
25 certainly we would be perfectly happy with a

1 rule from this Court requiring a warrant as a
2 per se matter. What we are trying to advance
3 is a -- a suggestion to the Court that takes
4 into account the rationale of the concurrences
5 in Jones and that accords with people's
6 reasonable expectation that although police
7 could have gathered a limited set or span of
8 past locations traditionally by canvassing
9 witnesses, for example, never has the
10 government had this kind of a time machine that
11 allows them to aggregate a long period of
12 people's movements over time.

13 CHIEF JUSTICE ROBERTS: Well, another
14 thing the government's never had is the ability
15 to go back even for 24 hours and basically test
16 everybody, everybody in the whole community or
17 anyone who happened to be there.

18 So I don't know why that isn't a
19 consideration that cuts against preserving 24
20 hours two months ago.

21 The government didn't have the
22 capability of tracking a particular individual
23 or every individual, and they find out later
24 that's the one they want, so I -- I don't
25 understand the coherence of your argument on

1 that point.

2 MR. WESSLER: Well, I -- I do think
3 that a different concern would be raised by the
4 -- the tower dump type situation that Justice
5 Sotomayor posited. That might involve concerns
6 about a dragnet search, sweeping in a large
7 number of innocent people.

8 That's not the same concern, I think,
9 directly before the Court here, which involves
10 --

11 JUSTICE SOTOMAYOR: But isn't that the
12 same concern here? And that's why I -- I'm
13 differentiating between incident-related
14 searches and basically dragnet searches when
15 you're looking at what a person is doing over
16 127, 30, 40, even 24 hours, which is it's not
17 related to any legitimate police need to invade
18 the privacy of a person over a 24-hour period,
19 unless there's a suggestion that the crime
20 occurred during that entire 24-hour period.

21 So that's why I asked you is there a
22 difference between saying if police have cause
23 to believe a crime has been committed, can they
24 ask for records related to that individual
25 crime, even if it happened on one day, a second

1 day, a fourth day, a 10th day, so long as
2 they're limiting their search as related to a
3 criminal activity, as opposed to a dragnet
4 sweep of everybody's intimate details?

5 Because, right now we're only talking
6 about the cell sites records, but as I
7 understand it, a cell phone can be pinged in
8 your bedroom. It can be pinged at your
9 doctor's office. It can ping you in the most
10 intimate details of your life. Presumably at
11 some point even in a dressing room as you're
12 undressing.

13 So I am not beyond the belief that
14 someday a provider could turn on my cell phone
15 and listen to my conversations.

16 So I'm not sure where your 24-hour
17 rule comes from. Shouldn't your rule be based
18 on incident-related rather than the essence of
19 your complaint, which is that we're permitting
20 police to do a dragnet search of your life?

21 MR. WESSLER: Your Honor, first,
22 you're absolutely correct that today, in the
23 seven years that have elapsed since the data
24 was gathered in this case, network technology
25 has advanced quite markedly.

1 And today not only is data gathered
2 for phone calls but also text messages and data
3 connections, including when a phone is in a
4 pocket passively and automatically checking for
5 new e-mails or social media messages or weather
6 alerts, and today the government is able to
7 obtain historical cell site location
8 information that can locate a person as
9 precisely as half the size of this courtroom.

10 JUSTICE ALITO: Well, you know, Mr.
11 Wessler, I -- I agree with you, that this new
12 technology is raising very serious privacy
13 concerns, but I need to know how much of
14 existing precedent you want us to overrule or
15 declare obsolete.

16 And if I could, I'd just like to take
17 you back briefly to -- to Miller and ask on
18 what grounds that can be distinguished. You
19 don't say we should overrule it, and you had --
20 you said the information here is more
21 sensitive. We maybe could agree to disagree
22 about that. I don't know.

23 But what else? What -- on what other
24 ground can Miller possibly be distinguished?

25 MR. WESSLER: So both Miller and Smith

1 identified at least two factors to take into
2 account in the reasonable expectation of
3 privacy analysis: the nature of the records or
4 their sensitivity and whether they're
5 voluntarily conveyed.

6 And I think here there is also a great
7 distinction on voluntariness. Unlike a
8 negotiable instrument passed into commerce or,
9 for that matter, a phone number punched into a
10 touch tone phone, people when they make or
11 receive a phone call, receive a text message,
12 and certainly when their phone is automatically
13 making a data connection, do not provide their
14 location information to the carrier.

15 JUSTICE ALITO: Well, I mean, that's a
16 debatable empirical point whether people
17 realize what's -- what's going on, and there's
18 reason to think maybe they do.

19 I mean, people know, there were all
20 these commercials, "can you hear me now," our
21 company has lots of towers everywhere. What do
22 they think that's about?

23 The contract, the standard MetroPCS
24 contract seems to say -- and I guess we don't
25 have the actual contract in the record here --

1 does seem to say that -- advise the customer
2 that we can disclose this information to the --
3 to the government if we get a court order.

4 So I don't know whether that will hold
5 up. And even if it were to hold up today, what
6 will happen in the future if people --
7 everybody begins to realize that this is --
8 this is provided? If you have enough police TV
9 shows where this is shown, then everybody will
10 know about it, just like they know about CSI
11 information.

12 MR. WESSLER: Three points, Your
13 Honor. First, in the empirical scholars'
14 amicus brief at pages 3 through 4, they run
15 through a result of a survey that I think quite
16 strongly shows that a strong majority of
17 Americans do not understand that this
18 information is even accessible to, much less
19 retained by the service providers.

20 Second, I agree that the MetroPCS
21 contract in -- in effect in 2010 and the other
22 company's privacy policies today do disclose
23 that location information can be obtained, but
24 I actually think the disclosures more broadly
25 in those documents accrue to our favor.

1 I'll explain why that is in one
2 moment, although I -- I think I should caution
3 the Court that -- that relying too heavily on
4 those contractual documents in either direction
5 here would, to paraphrase the Court in Smith,
6 threaten to make a crazy quilt of the Fourth
7 Amendment because we may end up with a, you
8 know, hinging constitutional protections on the
9 happenstance of companies' policies. But those
10 -- those contractual documents to a company
11 restate and contractualize the protections of
12 the Telecommunications Act and quite strongly
13 promise people that their information will
14 remain private without consent.

15 And lastly --

16 JUSTICE ALITO: Except as provided by
17 law.

18 JUSTICE GINSBURG: As to -- as to
19 other -- as to other private persons, not as to
20 the government.

21 MR. WESSLER: That's right. There --
22 there's a provision to disclose, as required by
23 law, those four words need to be read in
24 context and in compliance with the
25 Constitution. So if -- if there is a

1 reasonable expectation of privacy in these
2 records, then a warrant is required.

3 But even looking at the statutory
4 framework itself, the government points to the
5 Stored Communications Act as the -- the law
6 requiring disclosure. But when Congress
7 amended that statute in 1994, it provided two
8 mechanisms for access to records: a 2703(d)
9 order, as used here, and a warrant under
10 Section 2703(c)(1)(A).

11 And I think a person looking at that
12 statute would be quite reasonable and right to
13 assume that the reason there's a warrant prong
14 is to deal with records like these in which
15 there's a strong privacy interest.

16 JUSTICE KENNEDY: But your argument,
17 as I understood it from the brief and I'm
18 hearing it today, makes the Stored
19 Communications Act and the 2703(d) order
20 irrelevant. You don't even talk about it.

21 In an area where we're searching for a
22 compromise, where it's difficult to draw a
23 line, why shouldn't we give very significant
24 weight to the Congress's determination that
25 there should be and will be some judicial

1 supervision over this -- over -- over these
2 investigations?

3 MR. WESSLER: Justice Kennedy,
4 Congress enacted the Stored Communications Act
5 in 1986 and amended it in relevant part in
6 1994. Three-tenths of 1 percent of Americans
7 had cell phones in 1986, only 9 percent in
8 1994.

9 There were about 18,000 cell towers in
10 1994. Today there are over 300,000.

11 And --

12 JUSTICE KENNEDY: Well, you mean --
13 you mean the Act was more necessary when there
14 were fewer cell phones?

15 MR. WESSLER: No, not -- not --

16 JUSTICE KENNEDY: It seems to me just
17 the opposite.

18 MR. WESSLER: Not at all, Your Honor.
19 My point is that Congress quite clearly was not
20 thinking about the existence of and certainly
21 not law enforcement interest in historical cell
22 site location information. There is nothing in
23 the historical legislative record for -- for
24 the members of the Court who would look there
25 to indicate any cognizance of these kinds of

1 records. So --

2 JUSTICE KENNEDY: Well, again, my
3 question is, you give zero weight in your
4 arguments to the fact that there is some
5 protection?

6 MR. WESSLER: Your Honor, we
7 acknowledge fully that there is some
8 protection, a touch more than a traditional
9 subpoena because a judge is involved, but we
10 think it is insufficient in the context of
11 records held by a third-party in which the
12 subject of the investigation --

13 JUSTICE GINSBURG: And yet you said, I
14 think you said in your brief, that in most of
15 the cases where you get one of these 2703(d)
16 orders, in the mine run of cases, you said
17 there was probably enough there to get a
18 warrant. So let's take this very case: A
19 confessed robber identifies his collaborators
20 and there are details about the collaborator.
21 Why isn't that enough to get a warrant?

22 MR. WESSLER: In this case, it -- it
23 is quite possible that the government could
24 have. Now, I -- I don't think they stated
25 probable cause on the face of their application

1 for the court order. Mr. Carpenter's name is
2 mentioned only once in a conclusory sentence at
3 the end. They did have a cooperating witness
4 at that point, a cooperating codefendant. And
5 I -- I can't say whether, had they wanted to,
6 they could have made out probable cause. It's
7 entirely possible.

8 I -- I want to return, Justice Alito,
9 to your question because I think it's important
10 to -- to remember that Miller and Smith were
11 decided four decades ago. The Court could not
12 have -- have imagined the technological
13 landscape today. And accepting the
14 government's invitation to -- to, in my view,
15 radically extend those cases would place beyond
16 the protection of the Fourth Amendment not only
17 those locations records --

18 JUSTICE SOTOMAYOR: Are we -- are we
19 radically extending them? From the very
20 beginning, Smith, for example, basically said
21 the disclosure at issue doesn't disclose the
22 content of the conversation. As the dissent
23 pointed out, the provider had access to the --
24 to the content of the conversation.

25 Yet, we drew a line in saying cell

1 phone numbers, telephone numbers are
2 disclosable because everybody knows that the
3 telephone company is keeping track of those
4 numbers. You get it in your phone bill at the
5 end of each month.

6 But we said people don't know or even
7 if they realize that the phone company can
8 listen in to their conversation, that there's a
9 reasonable expectation that the phone company
10 won't, absent some urgent circumstance, a death
11 threat, almost a special needs circumstance.

12 That suggests, as you started to say
13 earlier, that it never was an absolute rule,
14 the third-party doctrine. We limited it
15 when -- in Bond and Ferguson when we said
16 police can't get your medical records without
17 your consent, even though you've disclosed your
18 medical records to doctors at a hospital.

19 They can't touch your bag to feel
20 what's in your bag because an individual may
21 disclose his or her bag to the public. I think
22 one of my colleagues here said you can -- why
23 shouldn't people expect others to touch their
24 bag as well? Well, and the Court said no
25 because you expose what your bag looks like,

1 but you don't have an expectation that people
2 are going to touch your bag.

3 So is it really that far off to say,
4 yes, I can believe that my location at one
5 moment or other moments might be searched by
6 police, but I don't expect them to track me
7 down for 24 hours over 127 days?

8 MR. WESSLER: Absolutely, Your Honor.
9 We agree that the contents of electronic
10 communications should be protected, as I think
11 the government agrees in its -- its brief. But
12 in the digital age, content as a category is
13 both under-inclusive and unadministrable.

14 Certainly, I think that's one lesson
15 from Jones, from the concurrences. That was
16 not the content of communication. It was
17 location over time in public. But it was still
18 protected. And a great many highly sensitive
19 digital records like search queries entered
20 into Google, a person's complete web browsing
21 history showing everything we read on-line,
22 medical information or fertility tracking data
23 from a smartphone would -- would be vulnerable.

24 JUSTICE ALITO: Suppose that in this
25 -- suppose that in this case there was a

1 subpoena for the -- the numbers called from the
2 cell phone. Would there be a problem with that
3 in your opinion?

4 MR. WESSLER: No, Your Honor. I think
5 that would fall squarely within the -- the rule
6 of Smith. It would certainly be more
7 voluntary, and I think -- we can disagree, but
8 I think less sensitive.

9 JUSTICE ALITO: You think the numbers
10 called, the people that somebody is calling is
11 -- is less -- that's less sensitive than the
12 person's location?

13 MR. WESSLER: I certainly --

14 JUSTICE ALITO: How -- how are we
15 going to judge the sensitivity of -- of
16 information like this?

17 MR. WESSLER: Well, I -- I think that
18 the -- the concurring opinions in -- in Jones,
19 Your Honor, already judge the sensitivity of
20 this information. The Court need not address
21 every other context --

22 JUSTICE KENNEDY: Suppose law
23 enforcement officers had followed this person
24 for 127 days. That would be worse than if they
25 followed him for 24 hours?

1 MR. WESSLER: Well, as the
2 concurrences made clear in Jones, that would be
3 a highly unlikely endeavor, but even more
4 unlikely here because this is not real-time.

5 JUSTICE KENNEDY: Well, for the
6 hypothetical, suppose it happened. There --
7 there can be very serious crimes in which law
8 enforcement devotes a tremendous amount of time
9 to surveillance with -- with multiple vehicles,
10 multiple agents. And you say if it lasts for
11 too long, then it's an invasion of privacy?

12 MR. WESSLER: No, I think, you know,
13 people's normal expectation is that that
14 typically won't happen, but if it does, the
15 Fourth Amendment does not protect against that.
16 Now, here --

17 JUSTICE KENNEDY: Well, frankly, if --
18 if we're going to talk about normal
19 expectations and we have to make the judgment,
20 it seems to me there's a much more normal
21 expectation that businesses have your cell
22 phone data. I think everybody, almost
23 everybody, knows that. If I know it, everybody
24 does.

25 (Laughter.)

1 JUSTICE KENNEDY: But I -- I don't
2 think there's an expectation that people are
3 following you for 127 days.

4 MR. WESSLER: Well, I -- I agree, but
5 there's --

6 JUSTICE KENNEDY: Which is my
7 hypothetical.

8 MR. WESSLER: Well, I agree, Your
9 Honor, but I think that the -- the concurrences
10 in Jones laid out a -- an analysis of why
11 there's a difference between using technology
12 to make that trailing -- tailing possible in
13 every case as opposed to the very rare
14 circumstance where it might happen. But here,
15 it's even a step more removed. Here, never
16 could police have decided today to track me 24
17 hours a day, seven days a week, five months
18 ago.

19 That is a categorically new power that
20 is made possible by these perfect tracking
21 devices that 95 percent of Americans carry in
22 their pockets.

23 JUSTICE KAGAN: Mr. Wessler, can I ask
24 you about your understanding of the state of
25 the technology now? Because the government

1 represents in -- in its briefs, and it has
2 those pictures in its briefs, suggesting that
3 you -- you -- that the information that's
4 gleaned from this is -- is very -- it's sort of
5 general, it's vague, it doesn't pinpoint
6 exactly where you are, and in order to make
7 effective use of it, it has to be combined with
8 many other pieces of information.

9 And, you know -- you know, A, do you
10 agree with that, but, B, what is your view of
11 -- of the relevance of the fact that
12 information may not be useful in itself but may
13 be useful in combination with other
14 information? Does that make a difference?

15 MR. WESSLER: Justice Kagan, so on the
16 first point, we agree that, as of 2010 and 2011
17 where the records in this case come from, they
18 were generally less precise than the GPS data
19 in Jones, but we don't think that that makes a
20 difference for the Fourth Amendment rule for a
21 few reasons.

22 First, to go to the second part of
23 your -- your question, even in Jones, the data
24 lacked precision. It was accurate only to
25 within 50 to 100 feet and only tracked where a

1 car went. So, if a person parks in a parking
2 lot or on a street, that GPS data by itself
3 can't tell if they go to a jewelry store for a
4 stick-up or a medical clinic for a checkup or a
5 cafe to meet with a friend. Some other amount
6 of evidence or inference was required. That
7 makes it no less a search in that the same is
8 true here.

9 Now, in the intervening seven years,
10 the data has become markedly more precise. The
11 proliferation of small cells which can have a
12 broadcast radius as small as 10 meters, about
13 half the size of this -- this courtroom, the
14 ability now of providers to estimate the actual
15 location of the phone based on the time and
16 angle that the signal from the phone reaches
17 the towers, and the just skyrocketing amount of
18 data usage by normal smartphone users means
19 that even the large traditional cell towers are
20 much closer together in urban and dense
21 suburban areas, so the distance between them is
22 less, so they are significantly -- the location
23 information is more precise.

24 It's also more voluminous because now
25 data connections create location information.

1 And so the -- the 101 data points per day on
2 average in this case pale in comparison to what
3 --

4 JUSTICE GORSUCH: Just, Mr. Wessler,
5 along those lines, one more kind of technical
6 question. There was a suggestion in the briefs
7 that some of this information is required to be
8 kept by governmental regulation, the E911
9 program. Do you have any insight on that for
10 us?

11 MR. WESSLER: Yeah, there's no --
12 there's no direct requirement that these
13 location records be kept. Now, what is true is
14 that the -- the capability of the cell
15 companies to track cell phones in real-time is
16 a government mandate as part of the E911
17 system.

18 That is -- that capability is related
19 to the -- the capability that is relatively
20 newer to estimate the actual location of the
21 phone based on time and angle of the signal,
22 historically, coming in.

23 But there's -- there's no data
24 retention mandate for these historical cell
25 phone location records.

1 JUSTICE BREYER: Are --

2 CHIEF JUSTICE ROBERTS: Counsel, you
3 avoid taking a position on the question in your
4 brief, but I'd like you to do -- take one
5 today. Is there any reason to treat grand jury
6 subpoenas differently than you would treat
7 subpoenas under other -- under legislation?

8 MR. WESSLER: No, I -- I don't think
9 there is any reason. This Court's Fourth
10 Amendment decisions involving grand jury
11 subpoenas has held on to the same Fourth
12 Amendment standard as any other subpoena.

13 Now, a grand jury subpoena is not at
14 issue here, but - but we think it would be held
15 to the same standard as any other subpoena or
16 subpoena-like request for these highly
17 sensitive records.

18 JUSTICE BREYER: Since I'm seeing your
19 argument, it -- it -- it starts with a place
20 where I completely agree. The village snoop
21 had a fallible memory and didn't follow people
22 for 127 days.

23 The electronic information is
24 infallible. You can follow them forever.
25 That's a big change. So, I agree that that

1 change is there. It's there in many aspects of
2 life, not just location.

3 Now, on the other side of it is that
4 probably, I'm not sure, but probably police and
5 FBI and others, when they get word of white
6 collar crime, money laundering, drugs,
7 financing terrorism, we can go through the
8 list, large numbers of cases, of important
9 criminal cases, they don't have probable cause.
10 They do have reasonable ground to think. And
11 they start with bank records, with all kinds of
12 financial information, purchases.

13 So, if I accept your line, there's no
14 such thing in the law as location. There is,
15 but, I mean, people immediately say and why?
16 And then, when they say why, we're going to
17 have to say something like: X days, at least
18 arbitrary, but X days, are very personal. It
19 was given under circumstances where they didn't
20 know they were giving it or they certainly
21 didn't consent to it.

22 And that is basically the reason.
23 Maybe we throw a few other things in there to
24 get an exception from Miller. That will be
25 taken immediately to the lower courts, and

1 eventually here, and people will say: Well,
2 what about financial information, i.e., credit
3 card purchases where the most intimate credit
4 card purchases, wherever they are, are
5 immediately records, and what about -- and
6 they'll think of five others -- I can only
7 think of one or two, but, believe me, the legal
8 profession and those interested in this
9 understand it very well.

10 So where are we going? Is this the
11 right line? How do we, in fact, write it?
12 Not, you see, for location. I have less
13 trouble with that. But where is it going? Can
14 you say -- it's a very open question, but I'm
15 very interested in your reactions.

16 MR. WESSLER: Justice Breyer, I think
17 in -- in future cases in the lower courts and
18 perhaps back before Your Honors, it would be
19 relatively straightforward to define discrete
20 categories of information that may be
21 protected.

22 I think perhaps certain other types of
23 location records, information about the state
24 of the body, like heart rate data from a smart
25 watch, or fertility tracking data from a

1 smartphone app, information about the interior
2 of a home, for example, from a smart thermostat
3 that knows when the homeowner is at home and
4 perhaps what room they're in, communicative
5 contents, not only the contents of e-mails but
6 I think search queries to Google, not every
7 record will or should be protected, and I think
8 it is totally consistent with the role of the
9 lower courts to take an interpretive principle
10 from this Court and begin to apply it and over
11 time --

12 CHIEF JUSTICE ROBERTS: One --

13 MR. WESSLER: -- clarity will emerge.

14 JUSTICE BREYER: You want to add one
15 --

16 CHIEF JUSTICE ROBERTS: One thing --
17 I'm sorry. Please.

18 JUSTICE BREYER: Maybe you want to add
19 one thing, because I suspect you'll hear in a
20 minute that all the imperfections of Miller,
21 given your answer, and I'm thinking, too, I
22 quite agree with you, this is an open box. We
23 know not where we go. Unadministrable, et
24 cetera.

25 Anything else you want to add?

1 MR. WESSLER: Well, Your Honor, lower
2 courts have been struggling mightily to apply
3 Miller and Smith to highly sensitive digital
4 age records.

5 And as to these historical location
6 records, the five courts of appeals to address
7 this have generated 20 majority concurring and
8 dissenting opinions, many of them virtually
9 begging this Court to provide guidance for how
10 to protect these sensitive digital records that
11 the Court simply could not have imagined four
12 decades ago.

13 CHIEF JUSTICE ROBERTS: A lot of what
14 you're talking about and a lot of what the
15 questions concern, I think, is addressed under
16 the question whether a warrant should issue as
17 opposed to whether a warrant is required.

18 Under current practice, when you're
19 getting a warrant, it makes a difference if you
20 go in and say I want to search the entire house
21 for anything I can find and if you say I want
22 to search the drawers for business records that
23 we think are related to blah, blah, blah.

24 And so it's the same thing here. Yes,
25 the technology affects every aspect of -- of

1 life. That doesn't mean that the warrant has
2 to. And in terms of reasonableness, if you can
3 focus on, you know, we want to talk about
4 simply whatever it is, purchases, because we
5 have reason to believe he's purchasing the
6 stuff that goes in to make, you know,
7 methamphetamine, but that doesn't mean we're
8 going to go look at location information.

9 MR. WESSLER: Your Honor, we certainly
10 think that the -- the probable cause and
11 particularity requirements of a warrant will --
12 will do a lot of work to -- to focus
13 investigations.

14 In an investigation like this, perhaps
15 127 days or 152, as the original request was,
16 would not all be appropriate. Maybe under a
17 warrant a two or three-day span around each of
18 the robberies would actually be particularly
19 relevant to the probable cause determination.

20 But -- but our basic submission is
21 that a warrant is required in this context
22 because it's unlike the other subpoena cases
23 that the government has identified. In the
24 normal subpoena case, this Court has identified
25 two factors that weigh on -- on the

1 reasonableness categorically of subpoenas:
2 first that the recipient complies with it, they
3 -- they select the responsive records and
4 provide them to the government, which is --
5 poses less of a risk of -- of abuse, and,
6 second, that there is notice and an opportunity
7 for pre-compliance review.

8 Neither of those obtained here, where
9 the subpoena goes to a third-party, but the
10 subject of the investigation receives no notice
11 and has no opportunity to --

12 JUSTICE GINSBURG: Can you tell me
13 what is the difference between the 2703(d)
14 order and warrant? What are situations where
15 you could get the order but not a warrant?

16 MR. WESSLER: So the -- the standard
17 for issuance of the order is lower. Some lower
18 courts have likened it to a reasonable
19 suspicion standard. I think it's probably a
20 touch above pure reasonableness, but it's
21 certainly short of probable cause.

22 It also lacks a requirement for a
23 sworn statement. There's no affidavit. It's
24 -- it's placed before a magistrate judge by a
25 prosecutor.

1 And it lacks a particularity
2 requirement, which has led in -- in cases to
3 extraordinarily broad requests. We identify in
4 our reply brief one case where the government
5 obtained 454 days of historical location data
6 for one defendant, 388 for another.

7 You have 127 days here, 221 days in
8 Graham from the Fourth Circuit, with a cert
9 petition currently pending. That is a quite
10 extraordinary amount of time.

11 If I could, I'd like to reserve the
12 balance of my time.

13 JUSTICE GORSUCH: Mr. Wessler, I'm
14 sorry, one quick question. Focusing on the
15 property-based approach, putting aside
16 reasonable expectation for just a moment, what
17 do we know about what state law would say about
18 this information?

19 So say -- say a thief broke into T
20 Mobile, stole this information and sought to
21 make economic value of it. Would you have a
22 conversion -- would your client have a
23 conversion claim, for example, under state law?
24 Have you explored that at all?

25 MR. WESSLER: So I -- I think it's

1 possible. And I think conversion is the -- the
2 closest --

3 JUSTICE GORSUCH: Uh-huh.

4 MR. WESSLER: -- sort of tort analog
5 to what we have here. But we -- we placed the
6 source of the property right here in federal
7 law, not state law.

8 JUSTICE GORSUCH: No, I understand
9 222. I've got that argument. I am just
10 wondering have you -- have state courts
11 developed this at all?

12 MR. WESSLER: State -- state courts
13 have not, to my knowledge. I think in roughly
14 analogous contexts, like trade secrets --

15 JUSTICE GORSUCH: Right.

16 MR. WESSLER: -- certainly conversion
17 applies --

18 JUSTICE GORSUCH: Right.

19 MR. WESSLER: -- but not directly
20 here.

21 JUSTICE GORSUCH: Okay. Thank you.

22 MR. WESSLER: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Dreeben.

1 ORAL ARGUMENT OF MICHAEL R. DREEBEN

2 ON BEHALF OF THE RESPONDENT

3 MR. DREEBEN: Mr. Chief Justice, and
4 may it please the Court:

5 The technology here is new, but the
6 legal principles that this Court has
7 articulated under the Fourth Amendment are not.

8 The cell phone companies in this case
9 function essentially as witnesses being asked
10 to produce business records of their own
11 transactions with customers.

12 The cell systems cannot function
13 without information about where the phones are
14 located. Anyone who subscribes to a cell phone
15 service will communicate that information to
16 towers in order to receive calls. The cell
17 phone companies get that information to operate
18 the cell network. They choose to make their
19 own business records of that information. It's
20 not a government mandate.

21 They make decisions based on their own
22 business needs about what they're going to
23 retain. And when the government comes and asks
24 them to produce it, it is doing the same thing
25 that it did in Smith. It is doing the same

1 thing that it did in Miller. It is asking a
2 business to provide information about the
3 business's own transactions with a customer.

4 And under the third-party doctrine,
5 that does not implicate the Fourth Amendment
6 rights of the customer.

7 JUSTICE SOTOMAYOR: But asking --

8 CHIEF JUSTICE ROBERTS: This is not
9 simply created by the company, though. It's a
10 joint venture with the individual carrying the
11 phone. That person helps the company create
12 the record by being there and sending out the
13 pings or whatever.

14 MR. DREEBEN: Well, that's certainly
15 true, but it's no less true in Smith and
16 Miller. In order for the phone company to have
17 a record of who a person called, the person has
18 to make the call. The information goes to the
19 phone company. The phone company uses that
20 information to route the call.

21 Here, the cell phone provider gets
22 information from the phone about where the
23 phone is so that it can route calls to the
24 phone and that it can route calls from the
25 phone.

1 That's just the basic technological
2 nature of cell phones, but it doesn't differ in
3 principle from what was going on in Smith. And
4 you could say the same thing about Miller.

5 Somebody has to engage in banking
6 transactions through a bank. They write a
7 check. They give the check to the bank. The
8 bank uses it to carry out the bank's business.

9 JUSTICE SOTOMAYOR: No, they don't
10 give it to the bank. They give it to a person,
11 who gives it to the bank. It's a big
12 difference.

13 MR. DREEBEN: Well, Justice Sotomayor,
14 I think that there are a zillion different ways
15 to carry out financial transactions, including
16 some that involve giving a check to a person.
17 Many involve going to the bank directly and
18 having the bank conduct the financial
19 transaction.

20 Anybody who writes a check understands
21 that the check will be submitted to the bank so
22 that the bank can pay.

23 JUSTICE SOTOMAYOR: Mr. Dreeben, why
24 is it not okay, in the way we said about
25 beepers, to plant a beeper in somebody's

1 bedroom, but it's okay to get the cell phone
2 records of someone who I -- I don't, but I know
3 that most young people have the phones in the
4 bed with them.

5 (Laughter.)

6 JUSTICE SOTOMAYOR: All right? I know
7 people who take phones into public restrooms.
8 They take them with them everywhere. It's an
9 appendage now for some people.

10 If it's not okay to put a beeper into
11 someone's bedroom, why is it okay to use the
12 signals that phone is using from that person's
13 bedroom, made accessible to law enforcement
14 without probable cause?

15 MR. DREEBEN: So, Justice Sotomayor, I
16 will answer the question about cell phone
17 location in a house, but I think it's important
18 that the Court understand that this case
19 involves very generalized cell sector
20 information --

21 JUSTICE SOTOMAYOR: That's today, Mr.
22 Dreeben, but we need to look at this with
23 respect to how the technology is developing.

24 MR. DREEBEN: Well, I think Justice
25 Sotomayor --

1 JUSTICE SOTOMAYOR: We can leave
2 phones in a bedroom now.

3 MR. DREEBEN: You -- you -- well,
4 there's a distinction between acquiring GPS
5 information from a phone and acquiring cell
6 site information from a business. This case
7 involves acquiring cell site information from a
8 business. It's a wide area. Our brief
9 attempted to illustrate how in Detroit --

10 JUSTICE SOTOMAYOR: Well, this is no
11 different than a telephone company having
12 access to your telephone conversations. But we
13 protected those in Smith.

14 MR. DREEBEN: No, I think it's -- it's
15 very different from it. The expectations of
16 privacy about the contents of a one-to-one
17 communication or a one-to-many communication
18 are quite different. They grow out of the
19 bedrock understanding that a letter mailed
20 through the mail, the routing information is
21 available to the government, the address of
22 where it's going --

23 JUSTICE SOTOMAYOR: Yeah, but -- but
24 an -- in an envelope, you seal the envelope.
25 You can -- you can yourself control the public

1 disclosure.

2 But with telephones, the telephone
3 company could have plugged in and listened to
4 your conversation just as easily as these
5 telecommunications companies can read your
6 e-mails if they choose. Yet, we've said we
7 would protect e-mail content.

8 MR. DREEBEN: That is true. And I
9 think that that is because there is a
10 difference between content and routing
11 information that the Court recognized in Smith
12 itself.

13 We're dealing here with routing
14 information. We're not dealing with the
15 contents of communications. I agree with you
16 that Katz makes clear that incidental access of
17 a provider to the contents of a communication
18 when the -- when the provider is functioning as
19 an intermediary doesn't vitiate Fourth
20 Amendment protection.

21 We're not here to argue that it does.
22 We're here to argue that routing information of
23 the sort that was available in Smith and the
24 sort that's available here functions as a
25 business record because the business is using

1 it in its transaction with the customer to
2 route the calls.

3 The content information is being
4 provided through a provider as an intermediary
5 so that somebody can communicate with another
6 person. And --

7 JUSTICE KAGAN: Mr. Dreeben, how is
8 this different from Jones? You know, in Jones,
9 there were a couple of different opinions, but
10 five justices, as -- as I count it, said
11 this -- this is from Justice Alito's opinion:
12 "Society's expectation has been that law
13 enforcement and others would not, and indeed in
14 the main simply cannot, monitor and catalogue
15 every single movement of an individual's" --
16 there it was a car -- "for a long period."

17 So how is it different from that?

18 MR. DREEBEN: I think it's
19 fundamentally different, Justice Kagan, because
20 this involves acquiring the business records of
21 a provider which has determined to keep these
22 records of the cell site information.

23 Jones involved government
24 surveillance. It involved attaching a GPS
25 device to the car. Five members of the Court

1 regarded that as a trespassory search. Five
2 other members of the Court were prepared to
3 analyze that under reasonable expectations of
4 privacy. But in both cases, it was direct
5 surveillance of the suspect in the crime.

6 JUSTICE KAGAN: So the question is why
7 that should make more of a difference than the
8 obvious similarity between this case and Jones?
9 And the obvious similarity is that, in both
10 cases, you have reliance on a new technology
11 that allows for 24/7 tracking.

12 Now, you're exactly right, there were
13 different means, but in both cases, you have a
14 new technology that allows for 24/7 tracking
15 and a conclusion by a number of justices in
16 Jones that that was an altogether new and
17 different thing that did intrude on people's
18 expectations of who would be watching them
19 when.

20 MR. DREEBEN: So the -- the people who
21 are watching in this case are the phone
22 companies because people have decided to sign
23 up for cellular service in which it is a
24 necessity of the service that your phone
25 communicate with a tower and a business record

1 is generated.

2 People who dial phone numbers on calls
3 know that they're being routed through a cell
4 phone or a landline provider. Those records
5 can be made available to the government. They
6 could be made available for quite extensive
7 periods of time.

8 I think in many ways it's far more
9 revealing to know who a person is calling than
10 to know the generalized cell sector where their
11 phone is located. The cell site information
12 doesn't tell you the person was with the phone;
13 it doesn't tell you --

14 JUSTICE SOTOMAYOR: Mr. Dreeben, what
15 do you do with the survey mentioned by your
16 opposing colleague that says that most
17 Americans, I still think, want to avoid Big
18 Brother. They want to avoid the concept that
19 government will be able to see and locate you
20 anywhere you are at any point in time.

21 Is it -- do you really believe that
22 people expect that the government will be able
23 to do that without probable cause and a
24 warrant?

25 MR. DREEBEN: I don't --

1 JUSTICE SOTOMAYOR: The -- the
2 Constitution protects the rights of people to
3 be secure. Isn't it a fundamental concept,
4 don't you think, that that would include the
5 government searching for information about your
6 location every second of the day --

7 MR. DREEBEN: So in instances like
8 this, Justice Sotomayor --

9 JUSTICE SOTOMAYOR: -- for months and
10 months at a time?

11 MR. DREEBEN: -- involving rapidly
12 changing technology and privacy expectations
13 that are being measured here by surveys, the
14 proper body to address that is Congress.

15 And Congress has been active in this
16 area. This is not an instance of political
17 failure --

18 JUSTICE SOTOMAYOR: Well, the question
19 is, was it -- the fact that Congress recognized
20 how sensitive this information is, is quite
21 laudatory, but did it understand the measure of
22 the constitutional requirement of what
23 protections should be given to that?

24 I mean, I -- I can defer to Congress's
25 understanding of the privacy needs, but does

1 that create an obligation for me to defer to
2 their judgment of what protections the
3 Constitution requires?

4 The Constitution has always said
5 government can't intrude, except in some
6 carefully defined situation, special needs
7 being foremost among them -- can't intrude on
8 those privacy interests without a warrant.
9 We're not saying they can't ever. They've just
10 got to have articulable facts based on reliable
11 information, sworn to in an affidavit, that can
12 provide probable cause to believe that this
13 individual is involved in criminal activity.

14 That's not a new standard. That's an
15 old standard.

16 MR. DREEBEN: But the new standard
17 here would be saying that the business records
18 of a third party, when acquired by the
19 government, constitute a --

20 JUSTICE SOTOMAYOR: But we have --

21 MR. DREEBEN: -- search of --

22 JUSTICE SOTOMAYOR: -- we have said --
23 you know, we have made exceptions all the time,
24 Ferguson, Bond, even in creating Smith and
25 Miller, we created an exception. People

1 disclose the content of telephone calls to
2 third parties. But we said the government
3 can't intrude without a warrant in that
4 situation.

5 MR. DREEBEN: I think there was a
6 well-developed framework at the time of Smith
7 and Miller that the Court applied to Smith and
8 Miller. And it basically says, in our society,
9 if you communicate information to a third
10 person, the public has an interest in that
11 person's witnessing of what they heard or what
12 they said, and it can acquire it through means
13 short of a warrant.

14 That was the basic framework that led
15 the Court in Katz to conclude that what you
16 maintain privately in your house or in the
17 content of your phone calls requires special
18 process.

19 JUSTICE GORSUCH: Mr. Dreeben, I'd
20 like to -- I'd like to drill down on that and
21 return to Justice Kagan's question. You know,
22 the facts here wind up looking a lot like
23 Jones.

24 One thing Jones taught us is -- and
25 reminded us, really, is that the property-based

1 approach to privacy also has to be considered,
2 not just the reasonable expectation approach.

3 So, if we put aside the reasonable
4 expectation approach for just a moment, Katz,
5 Miller, Smith, and ask what is the property
6 right here, let's say there is a property
7 right. Let's say I have a property right in
8 the conversion case I posited with your
9 colleague.

10 so that if someone were to steal my
11 location information from T-Mobile I'd have a
12 conversion claim, for example, against them for
13 the economic value that was stolen.

14 Wouldn't that, therefore, be a search
15 of my paper or effect under the property-based
16 approach approved and reminded us in Jones?

17 MR. DREEBEN: I suppose that if you
18 are insisting that I acknowledge that it's a
19 property right, some consequences are going to
20 follow --

21 JUSTICE GORSUCH: Right.

22 MR. DREEBEN: -- from that.

23 JUSTICE GORSUCH: Okay.

24 MR. DREEBEN: I don't think you can --

25 JUSTICE GORSUCH: But let's just --

1 let's --

2 MR. DREEBEN: I don't think you can
3 make that assumption.

4 JUSTICE GORSUCH: -- let's stick with
5 my hypothetical, counsel, okay? I know you
6 don't like it. I got that.

7 (Laughter.)

8 JUSTICE GORSUCH: But let's say that,
9 in fact, I've got positive law that indicates
10 it is a property right. Would you there,
11 therefore, agree that that's a search of my
12 paper and effect?

13 MR. DREEBEN: I wouldn't, and I --

14 JUSTICE GORSUCH: But why not?

15 MR. DREEBEN: Because it's not your
16 paper or your effect.

17 JUSTICE GORSUCH: If property law says
18 it is.

19 MR. DREEBEN: Well, I don't think
20 property law does say that it is. And I
21 think that --

22 JUSTICE GORSUCH: Well, that's
23 fighting the hypothetical, counsel. And I know
24 I -- I didn't like hypotheticals, too, when I
25 was a lawyer sometimes, but I'm asking you to

1 stick with my hypothetical.

2 MR. DREEBEN: Justice Gorsuch, I think
3 that the problem with the hypothetical is that
4 it creates a property interest out of transfers
5 of information.

6 JUSTICE GORSUCH: Please -- please,
7 could you stick with my hypothetical and then
8 you can tell me why it's wrong.

9 MR. DREEBEN: All right.

10 JUSTICE GORSUCH: Under my
11 hypothetical, you have a property right in this
12 information.

13 Would it be a search of my paper and
14 effect? Yes or no.

15 MR. DREEBEN: I am not sure. And the
16 reason that I am not sure is there has never
17 been a property right recognized in information
18 that's conveyed to a business of this
19 character.

20 If we were talking about e-mail, as
21 Your Honor's opinion in Ackerman sought to
22 analogize to property, I think we would have a
23 more complex discussion about it. I'm not sure
24 that it would achieve any different result.

25 JUSTICE GORSUCH: You're not here to

1 deny that there might be a property interest
2 and, therefore, a search?

3 MR. DREEBEN: No, I am -- I'm here to
4 deny there's a property interest in cell site
5 information about e-mail --

6 JUSTICE GORSUCH: In my -- in my
7 hypothetical, if there were a property
8 interest, you're not here to deny that that
9 would be a search of my paper and effect?

10 MR. DREEBEN: I'm not here to concede
11 it either.

12 JUSTICE GORSUCH: Okay.

13 MR. DREEBEN: And the reason that --
14 (Laughter.)

15 JUSTICE GORSUCH: Okay.

16 MR. DREEBEN: The reason that I can't
17 concede it is it's a property right that
18 resembles no property right that's existed.

19 JUSTICE GORSUCH: I think you --

20 JUSTICE ALITO: Yeah, Mr. Dreeben,
21 along those lines, I was trying to think of an
22 example of a situation in which a person would
23 have a property right in information that the
24 person doesn't ask a third-party to create, the
25 person can't force the third-party to create it

1 or to gather it. The person can't prevent the
2 company from gathering it. The person can't
3 force the company to destroy it. The person
4 can't prevent the company from destroying it.

5 And according to Petitioner, the
6 customer doesn't even have a right to get the
7 information.

8 MR. DREEBEN: So, Justice Alito, those
9 are a lot of good reasons on why this should
10 not be recognized as a property interest. I
11 can't think of anything that would be
12 characterized as a property interest with those
13 traits. And it would be a -- really a
14 watershed change in the law to treat
15 transferred information as property.

16 JUSTICE GORSUCH: Well, what does
17 Section 222 do, other than declare this
18 customer proprietary network information --

19 MR. DREEBEN: So that --

20 JUSTICE GORSUCH: -- that the carrier
21 cannot disclose?

22 MR. DREEBEN: It -- it does that in
23 conjunction with a provision that it shall be
24 disclosed as required by law.

25 JUSTICE GORSUCH: So -- so, let me ask

1 you that. So -- so the government can
2 acknowledge a property right but then strip it
3 of any Fourth Amendment protection. Is that
4 the government's position?

5 MR. DREEBEN: No, no, but I think that
6 the --

7 JUSTICE GORSUCH: And so -- so could
8 we also say maybe that they also get this
9 property right subject to having a non-Article
10 III judge decide the case, or quartering of
11 troops in your home? Could we strip your
12 property interests of all constitutional
13 protection?

14 MR. DREEBEN: Well, those are pretty
15 far afield. I -- I think what's going on
16 here --

17 JUSTICE GORSUCH: Are they?

18 MR. DREEBEN: -- is that Congress has
19 set up a regime to protect privacy interests in
20 information. I think this is also an
21 illustration of why this Court does not have to
22 leap ahead with the Fourth Amendment to
23 constitutionalize interests in property.

24 And Congress has calibrated under what
25 circumstances that privacy interest shall be

1 protected. It yields in the face of legal
2 statutes that Congress has also passed --

3 JUSTICE GORSUCH: But does Congress's
4 determination also yield in the face of the
5 Fourth Amendment, Mr. Dreeben?

6 MR. DREEBEN: It does not.

7 JUSTICE GORSUCH: It does not. The
8 Fourth Amendment is trumped by this statute?

9 MR. DREEBEN: But what interests the
10 statute --

11 JUSTICE GORSUCH: In the government's
12 -- in the government's view. Is that -- is
13 that right? The statute trumps the Fourth
14 Amendment?

15 MR. DREEBEN: I think I said the
16 opposite.

17 JUSTICE GORSUCH: Oh, good. All
18 right. I hoped so.

19 MR. DREEBEN: So I think we're on
20 common ground that the Fourth --

21 JUSTICE GORSUCH: So the Fourth
22 Amendment controls, not -- not what the statute
23 says --

24 MR. DREEBEN: Well --

25 JUSTICE GORSUCH: -- with respect to

1 the disclosure of the information?

2 MR. DREEBEN: -- the Fourth Amendment
3 applies once the Court has identified what
4 interest the statute creates.

5 JUSTICE GORSUCH: Right. The statute
6 creates customer proprietary information --

7 MR. DREEBEN: Well, it --

8 JUSTICE GORSUCH: -- in Section 222
9 and then the Fourth Amendment will determine
10 when it can be revealed. Right?

11 MR. DREEBEN: No. The statute
12 actually creates --

13 JUSTICE GORSUCH: Why does the statute
14 control the Constitution? I think you are
15 saying the statute controls the Constitution.

16 MR. DREEBEN: No, I think that the
17 interests that the statute creates have to be
18 looked at as a whole. And this Court has been
19 very careful to --

20 JUSTICE GORSUCH: So the bitter -- the
21 bitter with the sweet.

22 MR. DREEBEN: Yeah, I know the Court
23 has rejected that in the due process context,
24 but here we are looking at what interests
25 Congress has sought to protect and --

1 JUSTICE GORSUCH: So why -- why -- why
2 couldn't Congress also say you don't get an
3 Article III judge to determine this issue?

4 MR. DREEBEN: That seems so
5 non-germane to what Congress was trying to do.
6 In Section 222, what Congress was trying to do
7 was to say, look, the -- the companies are
8 collecting a large amount of information.

9 We recognize that there are privacy
10 interests in this. We want to give recognition
11 to those privacy interests. We do not want to
12 hamper legitimate law enforcement. So the
13 interests --

14 JUSTICE ALITO: Yeah, Mr. Dreeben, I
15 would read the -- the -- the phrase "customer
16 proprietary information" to mean that it is
17 proprietary to the cell phone company and,
18 therefore, not to the customer. It's customer
19 information, but it's proprietary information
20 about the cell phone company because, if you
21 got that information in the aggregate, you
22 could tell a lot about the company's operation.

23 I assume that -- that that kind of
24 information would be available to the FCC. And
25 so, if the FCC obtained it, they would have to

1 treat it as proprietary information of the
2 company.

3 MR. DREEBEN: Justice Alito --

4 JUSTICE ALITO: Am I wrong in that?

5 MR. DREEBEN: I am not sure that that
6 is the way that Congress intended it, but I
7 think that what is significant is not the label
8 but what actual underlying rights were created.

9 JUSTICE ALITO: Well, if it were
10 proprietary to the customer, in what sense is
11 it proprietary to the customer, since it has
12 all of those attributes that I mentioned?

13 MR. DREEBEN: That's precisely my
14 point. As a label to indicate that Congress
15 wanted to show some respect for privacy
16 interests, when people interact with
17 telecommunications companies, it provided
18 certain nondisclosure rules.

19 It also made clear that it --

20 JUSTICE SOTOMAYOR: Could the
21 government say to telecommunications providers
22 you cannot use this kind of information, you
23 can't keep it?

24 MR. DREEBEN: Yes, I'm sure that in
25 regulating that telephone companies are given a

1 broad range.

2 JUSTICE SOTOMAYOR: So what's the
3 difference between that and saying, if you want
4 to create this information, you are taking this
5 information from customers and it's the
6 customer's information? You can't disclose it
7 without the customer saying yeah or nay.

8 MR. DREEBEN: Congress --

9 JUSTICE SOTOMAYOR: Isn't what that
10 Congress did?

11 MR. DREEBEN: No, because Congress
12 provided that it shall be disclosed as required
13 by law. And the same Congress has passed --

14 JUSTICE SOTOMAYOR: Well, but then we
15 -- then you're begging the question, which is
16 Justice Gorsuch's question, which is what's the
17 -- what does the law, the Fourth Amendment,
18 require in those circumstances?

19 MR. DREEBEN: So this Court has been
20 --

21 JUSTICE SOTOMAYOR: You're saying
22 Congress can set the level of what the
23 Constitution requires, but I don't know that
24 that's true.

25 MR. DREEBEN: Well, I think it's

1 definitely not true. This Court is the arbiter
2 of the Fourth Amendment, but it has already
3 decided that question.

4 It has decided two things: One, under
5 the third-party doctrine, business information
6 that is obtained from a company in the ordinary
7 course of its business is not a search of the
8 customer.

9 JUSTICE SOTOMAYOR: But that's begging
10 the question. Is it the third-party's
11 information when Congress says it's customer
12 information?

13 MR. DREEBEN: Well, Congress can say a
14 lot of things, and I think that the important
15 thing that this Court has said as a corollary
16 to my point about what the third-party doctrine
17 is, is the Court has made clear that state laws
18 that provide additional enhanced privacy
19 protection do not alter Fourth Amendment
20 baselines.

21 It said that in Greenwood. It said
22 that in Moore. It said it most recently in
23 Quon, where it confronted a claim that the
24 Stored Communications Act, the same law that's
25 at issue here, created some sort of an

1 expectation of privacy above and beyond what
2 the Fourth Amendment required, and the Court
3 said: We don't measure Fourth Amendment rules
4 about privacy expectations in text messaging by
5 what Congress has provided in the context of
6 the Stored Communications Act.

7 And I think it, in fact, illustrates
8 that Congress's efforts to provide enhanced
9 protection above and beyond what the Fourth
10 Amendment requires do not alter the content of
11 the Fourth Amendment.

12 JUSTICE KAGAN: Mr. -- Mr. Dreeben,
13 can I --

14 CHIEF JUSTICE ROBERTS: Justice --
15 Justice Breyer.

16 JUSTICE BREYER: I just want your
17 reaction to what I asked the other side. I
18 agree with you that the law is at the moment
19 third-party information is third-party, with a
20 few exceptions, but it may.

21 JUSTICE ALITO: Now, yeah, Mr.
22 Dreeben, in order to understand the issue here
23 and to see the difference between this case and
24 Jones, isn't it necessary to go back to old
25 Supreme Court cases that describe -- that

1 explain how the Fourth Amendment applies to a
2 subpoena?

3 Asking another -- asking a party or
4 ordering a party to produce documents is not a
5 search in the literal sense of the word, nor is
6 it a seizure in the literal sense of the word,
7 but cases going back to Boyd, and Hale versus
8 Henkel, old cases say that it's a -- it's a
9 constructive search, but in the situation where
10 there's this constructive search, then the
11 Fourth Amendment standards that apply to a
12 literal search, what the Court called an actual
13 search, are different. Isn't that -- so it's a
14 fundamentally --

15 MR. DREEBEN: Yes.

16 JUSTICE ALITO: -- different
17 framework.

18 MR. DREEBEN: It is a completely
19 different framework because of both a lesser
20 degree of intrusion, because the government is
21 not going in itself and conducting search
22 activity, and because there's an opportunity
23 for pre-compliance judicial review.

24 JUSTICE BREYER: Right. And maybe
25 you've got the answer to -- right there. You

1 say how do we distinguish this case from all
2 the cases where you wanted to get the
3 commercial information.

4 In respect to the commercial
5 information, banking and, you know, all the
6 things for white-collar crime, it's commercial
7 information. And you have the subpoenas and
8 you can perhaps have the protections there that
9 -- that you were talking about here, but this
10 is highly personal information on a -- on a
11 line, you say, it's somewhat closer to the
12 diagnostic testing than it is to purely
13 commercial information.

14 Now, I could imagine writing a
15 paragraph like that and saying leaving the
16 other for the future. Does that work or does
17 --

18 MR. DREEBEN: No. It --

19 JUSTICE BREYER: Now, I know you'd say
20 no --

21 MR. DREEBEN: It doesn't -- doesn't
22 work.

23 JUSTICE BREYER: -- but I need to know
24 the reason.

25 MR. DREEBEN: Well, let me -- the

1 basic principle here in the Fourth Amendment is
2 how the government acquires information
3 matters, not the sensitivity of the
4 information.

5 I have to disagree, Justice Breyer,
6 that medical information is given heightened
7 protection under the Fourth Amendment. This --

8 JUSTICE BREYER: But the diagnostic --
9 the diagnostic test to the hospital.

10 MR. DREEBEN: Well, no. The Ferguson
11 case, which I think --

12 JUSTICE BREYER: Yeah.

13 MR. DREEBEN: -- you're referring
14 to --

15 JUSTICE BREYER: Yeah, I am.

16 MR. DREEBEN: -- involved a compelled
17 search by the government, a urine test that the
18 Court assumed was given without informed
19 consent, so it was a government search by
20 government hospital personnel that acquired the
21 urine --

22 JUSTICE BREYER: All right.

23 MR. DREEBEN: -- for law enforcement
24 purposes. That's the government search. I
25 think this also answers Justice Sotomayor's

1 question about acquiring GPS information under
2 E911 from a handset. The government reaches
3 into the phone, pulls out information. That, I
4 would concede, is a search.

5 What we're doing here is not going to
6 the individual and extracting information from
7 him. We're getting information from a
8 third-party provider, relying on the line of
9 cases that Justice Alito alluded to, that allow
10 us to use subpoenas.

11 JUSTICE KAGAN: But -- but, Mr.
12 Dreeben, that line of cases was developed in a
13 period in which third parties did not have this
14 kind of information, valid --

15 MR. DREEBEN: Not this kind
16 specifically, Justice Kagan, but in the
17 dissenting opinion in Smith, Justice Stewart
18 warned that you're getting incredibly intimate
19 information when you get the phone numbers of
20 people who you have called.

21 And I would submit that if the Court
22 thinks about it, the information you get if you
23 know who you are calling and the inferences you
24 can draw about what kinds of conversations
25 people are having are extremely sensitive with

1 --

2 JUSTICE KAGAN: Yeah, but if --

3 MR. DREEBEN: -- dialed phone numbers.

4 JUSTICE KAGAN: -- I understand what
5 you're saying, you're basically saying, well,
6 because the government is going to a
7 third-party here and doing it by subpoena, it
8 doesn't matter how sensitive the information
9 is. It doesn't matter whether there's really a
10 lack of voluntariness on the individual's part
11 in terms of conveying that information to the
12 third-party.

13 And we could go on and we could give,
14 you know, other factors that you might think in
15 a sensible world would matter to this question.
16 And you're saying that all of that is trumped
17 by the fact that the government is doing this
18 by subpoena, rather than by setting up its own
19 cell towers.

20 MR. DREEBEN: I don't think I did say
21 that, Justice Kagan, because there is an
22 element here of voluntariness in deciding to
23 contract with a cell company, just like there's
24 an element of voluntariness in getting a
25 landline phone and making calls, and there's an

1 element of voluntariness in signing up for a
2 bank account and using a debit card to purchase
3 --

4 CHIEF JUSTICE ROBERTS: That --

5 MR. DREEBEN: -- everything in your
6 life.

7 CHIEF JUSTICE ROBERTS: -- that sounds
8 inconsistent with our decision in Riley,
9 though, which emphasized that you really don't
10 have a choice these days if you want to have a
11 cell phone.

12 MR. DREEBEN: Well, and not -- not in
13 a practical sense, I agree with you, Chief
14 Justice Roberts, that Riley did point out that
15 cell phones were necessities. The dissents in
16 Smith and Miller pointed out that a private
17 telephone has become a necessity of business
18 and personal life, and a bank account is a
19 necessity of carrying out financial
20 transactions.

21 JUSTICE GINSBURG: Mr. Dreeben --

22 MR. DREEBEN: The fact that --

23 JUSTICE GINSBURG: -- what you do in
24 bringing up Riley with the distinction you made
25 between -- you say it's the means that the

1 government is using -- -

2 MR. DREEBEN: Uh-huh.

3 JUSTICE GINSBURG: -- we must be
4 concerned about, not the information it
5 obtains. But in Riley, it was the most
6 traditional means. It was a search into an
7 arrest.

8 MR. DREEBEN: Yes, it was a search.
9 And I think that that's the key point. The
10 Court in footnote 1 of Riley actually reserved
11 whether acquiring aggregated information
12 through other means would be subject to a
13 different Fourth Amendment analysis.

14 JUSTICE GORSUCH: Mr. Dreeben, it
15 seems like your whole argument boils down to if
16 we get it from a third-party we're okay,
17 regardless of property interest, regardless of
18 anything else. But how does that fit with the
19 original understanding of the Constitution and
20 writs of assistance?

21 You know, John Adams said one of the
22 reasons for the war was the use by the
23 government of third parties to obtain
24 information forced them to help as their
25 snitches and snoops. Why -- why isn't this

1 argument exactly what the framers were
2 concerned about?

3 MR. DREEBEN: Well, I think that those
4 -- those were writs that allowed people acting
5 under governmental power to enter any place
6 they wanted to search for anything that they
7 wanted.

8 JUSTICE GORSUCH: Isn't that exactly
9 your argument here, that so long as a third
10 party's involved, we can get anything we want?

11 MR. DREEBEN: Well, I think the search
12 is being carried out under a writ of assistance
13 by a government agent, operating under
14 government authority; whereas here, we -- the
15 -- if there's a search in the acquisition of
16 cell site information, then it's the cell site
17 company that is acquiring that information
18 without governmental instigation, without --

19 JUSTICE GORSUCH: The subpoena --

20 MR. DREEBEN: -- governmental
21 agency --

22 JUSTICE GORSUCH: -- being, though,
23 the equivalent of a writ of assistance?

24 MR. DREEBEN: Oh, I don't think a
25 subpoena is an equivalent of a writ of

1 assistance. A writ of assistance allowed the
2 agent to go into any house, to rip open
3 anything looking for contraband, no
4 limitations.

5 JUSTICE GORSUCH: Yeah. And you can
6 subpoena anything that any company has anywhere
7 in the globe regardless of any property rights,
8 regardless of any privacy interests, simply
9 because it's a third-party?

10 MR. DREEBEN: So I -- I think that, as
11 Justice Alito was explaining, there is a
12 traditional understanding that dates back to
13 the time of the founding that subpoenas stand
14 on a different footing from search warrants.
15 And they do that because they are less
16 intrusive, since they do not require the
17 government going into private property and
18 searching itself.

19 CHIEF JUSTICE ROBERTS: Why does that
20 --

21 MR. DREEBEN: And --

22 CHIEF JUSTICE ROBERTS: -- why does
23 that make a difference? The subpoena tells the
24 person who gets it: this is what you have to
25 do.

1 MR. DREEBEN: Well, I think that most
2 --

3 CHIEF JUSTICE ROBERTS: Why is that
4 less intrusive? The whole question is whether
5 the information is accessible to the
6 government.

7 MR. DREEBEN: So I -- I think most
8 basically it makes a difference because this
9 Court's cases have said so from time
10 immemorial. And the reason why it has said so
11 is that if I go into your house to search, I
12 will expose a great deal of additional
13 information to government view beyond what is
14 sought by the terms of an authorization.

15 And so, if I could just complete the
16 answer.

17 CHIEF JUSTICE ROBERTS: Sure.

18 MR. DREEBEN: The -- the difference
19 here is that the government is operating under
20 court supervision with an order that provides
21 particularity. It provides the interposition
22 of a neutral magistrate between the government
23 and the acquisition of information. And it
24 does require a showing that is less than
25 probable cause but is above what a traditional

1 subpoena requires.

2 So even if the Court does think that
3 there is a search here, Congress has properly,
4 in our view, calibrated the balancing of
5 interests, and the Court should affirm it as a
6 constitutionally reasonable order.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Four minutes, Mr. Wessler.

10 REBUTTAL ARGUMENT OF NATHAN F. WESSLER
11 ON BEHALF OF PETITIONER

12 MR. WESSLER: Thank you, Mr. Chief
13 Justice.

14 If I could begin, I have several
15 points, but to begin on that subpoena point.
16 And, Justice Alito, to your question about the
17 historical pedigree of the subpoena doctrine, I
18 think this Court made absolutely clear in Riley
19 that the historical pedigree of older Fourth
20 Amendment doctrines does not automatically
21 determine the outcome in the digital age.

22 And as you yourself, Your Honor
23 recognized in your concurrence there, the
24 search incident to arrest doctrine had its
25 origins at least a century before the -- the

1 framing of the Fourth Amendment, and yet it
2 yielded to a new understanding.

3 And I think that --

4 JUSTICE ALITO: That's certainly true,
5 but you'd want to -- so this is -- this would
6 be revolutionary, to fundamentally change the
7 understanding of the application of the Fourth
8 Amendment to subpoenas. Do you want us to do
9 that?

10 MR. WESSLER: Well, I -- I don't think
11 it's revolutionary at all. And I think the
12 reason that is is the government's concession,
13 as I hear it, that the contents of electronic
14 communications should be protected.

15 Once we recognized that there is an
16 exception for the contents of e-mails, we've
17 already acknowledged that the subpoena doctrine
18 can't stand in its most severe form. And if --
19 if the contents of e-mails are to be protected,
20 it's not because they are sealed in transit,
21 as, Justice Sotomayor, you pointed out.

22 They're unlike in a fundamental way
23 the paper letters at issue in 1877 in Ex Parte
24 Jackson. They are actually accessible to and
25 accessed by the service providers, as the

1 government has argued in other cases, including
2 the Microsoft case to be heard later this --
3 this term.

4 So, if they're to be protected, it's
5 because of their sensitivity and because of
6 people's long-standing expectation that their
7 communications are highly sensitive and would
8 remain private.

9 And as the concurrences at least
10 recognized in Jones, also highly private and
11 sensitive are these kinds of longer-term
12 location records.

13 Second, I just want to highlight that
14 the -- the government, Mr. Dreeben, as I heard
15 him, conceded that the precision of these
16 records doesn't matter at all to the
17 government's theory here.

18 They could be precise, I take it, to
19 within a single inch. And the fact that a
20 third party has custody of them would, in the
21 government's view, vitiate any expectation of
22 privacy; which we think would be a very
23 destructive rule.

24 Third, this is not an area where the
25 Court should pause and wait for Congress to --

1 to act. My -- my colleague intimated that in
2 an area of -- of rapidly changing technology,
3 it's appropriate to -- to perhaps abstain and
4 let Congress step in. We -- we are well over
5 two decades into the cell phone age. This is
6 an area where, as the Court recognized in
7 Riley, people's use of this technology is well
8 settled and only becoming more pervasive over
9 time. We know the -- the direction, the cases
10 before the Court now, and -- and it is crucial
11 that the Court act.

12 And, finally, to the property
13 principles, first one -- one statutory point,
14 Justice Alito, Section 222(c)(2) actually does
15 give the customer the right to obtain the
16 information. Now, as we pointed out in our
17 brief, the carriers have not reliably complied
18 with that, at least as of several years ago,
19 but --

20 JUSTICE ALITO: No, I understand that,
21 but you said in your brief that the -- that the
22 companies wouldn't comply.

23 MR. WESSLER: That I -- I don't know
24 what the state of -- of play is today. As of a
25 few years ago, the last time I have

1 information, they were not complying. But --
2 but under Fourth Amendment property principles,
3 and property law more generally, it's of course
4 quite common for a property right to be divided
5 between different -- different parties; for the
6 bundle of sticks to be split up. And here
7 people have a right to exclude and a right to
8 determine use of the data secured by the
9 Telecommunications Act.

10 Certainly, we acknowledge that the --
11 the provider itself has some property right,
12 maybe several of those sticks in the bundle,
13 but that doesn't eliminate some right on -- on
14 the part of -- of -- of the customer.

15 If the Court has no further questions,
16 we ask that you reverse the Sixth Circuit.

17 JUSTICE ALITO: Could I just ask you
18 this question: Is any of this going to do any
19 good for -- for Mr. Carpenter?

20 (Laughter.)

21 MR. WESSLER: Uh --

22 JUSTICE ALITO: Is he going to get
23 anything suppressed? Because under Illinois
24 versus Krull, if a search is conducted in
25 reliance on a statute authorizing the search in

1 accordance with a certain procedure, the
2 exclusionary rule doesn't apply.

3 MR. WESSLER: May I answer? Thank
4 you.

5 So the -- that question is not before
6 this -- this Court.

7 JUSTICE ALITO: No, I understand that.

8 MR. WESSLER: It will be dealt with on
9 remand. I think that we have arguments on --
10 on both of the -- the types -- quite strong
11 arguments on both of the prongs of the good
12 faith exception.

13 On the statutory prong, the Stored
14 Communications Act provides two mechanisms, an
15 order and a warrant. And we think that that
16 makes this fundamentally different than other
17 statutes that may clearly provide a means.

18 And, second, on the court order, this
19 is unlike a warrant, and all of this Court's
20 cases on the good faith exception have dealt
21 with warrants based on affidavits from an
22 investigating officer, this is an unsworn
23 application from a prosecutor who we think
24 should know better.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.

3 (Whereupon, at 11:27 a.m., the case in
4 the above-entitled matter was submitted.)

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