No. 21-752

In the Supreme Court of the United States

REX HAMMOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY

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We showed in the petition that the lower courts are deeply and intractably divided on both questions presented. We showed also that both questions are tremendously important. What is more, the two questions will always be implicated in every case like this one: Because a warrantless search of real-time cell-phone location data is only ever authorized by the Stored Communications Act (18 U.S.C. § 2702(c)(4)), and because the SCA by definition requires a good faith belief that the statute authorizes the search, there will never be a case in which both questions aren't implicated. Against this background, the government's opposition in unpersausive. Both questions were squarely resolved by the Seventh Circuit and are cleanly presented for this Court's review. This is an ideal opportunity for resolving both issues and bringing to an end a frequent, invasive surveillance tactic that only Big Brother could be proud of.

A. The petition cleanly presents two important questions over which the lower courts are divided

1. We demonstrated in the petition (at 9-12) that the Seventh Circuit's conclusion in this case that real-time cell-phone tracking is not a Fourth Amendment search conflicts starkly with the authoritative holdings of at least three state supreme courts. See *Tracey* v. *State*, 152 So. 3d 504, 520, 526 (Fla. 2014); *State* v. *Muhammad*, 451 P.3d 1060, 1072-73 (Wash. 2019); *State* v. *Brown*, 202 A.3d 1003, 1014 (Conn. 2019).

The government does not expressly disagree. And little wonder why not, in light of the obviousness of the conflict. The government instead asserts (BIO 12-14) that the outcome would have been the same even supposing it had arisen in Florida, Washington, or Connecticut because there were exigent circumstances justifying the search in this case. Yet that is

precisely the issue that the Seventh Circuit refused to decide in light of its resolution of the second question presented. The court below had no need to determine whether exigent circumstances *actually* were present in this case because it concluded that, either way, Officer Ghiringhelli had "collected [petitioner's] real-time CSLI in good faith reliance on 18 U.S.C. § 2702" and his mere *belief* that exigent circumstances were present. Pet. App. 28a.

The government's position on the first question presented thus highlights precisely why review of both questions presented in the petition is so critical. The warrantless collection of real-time cell-phone location data is only ever authorized by the Stored Communications Act. See 18 U.S.C. § 2702(c)(4). That provision requires officers only to assert a "good faith" belief that "an emergency involving danger of death or serious physical injury to any person requires disclosure without delay" of the data; it does not require them to obtain a court order confirming the actual presence of an exigency. *Id*. In the government's view, that by itself will always be enough to justify a denial of further review before this Court—in every such case, it will invariably say the exigent circumstances were present because an officer said they were. If that were truly enough to disqualify a petition on "bad vehicle" grounds, no case presenting the first question would ever be suitable for review—regardless that the objective correctness of the officer's good faith reliance on the SCA is never actually tested by a court.

To countenance that reasoning would be deeply troubling. It would mean not only that government agents will remain free to continue coopting private cell phones to reveal individuals' pin-point locations without this Court ever weighing in, but also that the mere assertion of a good faith belief that such

searches are authorized by the SCA is enough to overcome the Fourth Amendment, no matter how wrong the belief might actually be.

This is a reason to grant review, not deny it—all the more so in this case because there are compelling reasons to conclude that there was in fact *no* exigency here. As we explained at length in briefing before the Seventh Circuit (C.A. Br. 20-25), Officer Ghiringhelli sat on his hands for nearly *three days*, attending his daughter's out-of-town soccer game over the weekend, without attempting to obtain a warrant. During all that time, he had all the information he needed to obtain a court order authorizing the search—and he admitted that he had obtained telephonic warrants over the weekend in past cases. He had no explanation for his lack of diligence. The Seventh Circuit has previously rejected exigency claims in cases far less egrigeous than this. See, *e.g.*, *United States* v. *Patino*, 830 F.2d 1413 (7th Cir. 1987) (rejecting the government's exigent-circumstances argument in a case likewise involving a suspect for armed robbery, where the officer had "[i]nexplicibly" declined to obtain "a telephonic search warrant" while waiting for backup for 30 minutes).

But the question of whether petitioner or the government has the better of that argument is a matter for the court of appeals in the first instance. For its part, this Court routinely grants certiorari to resolve important questions that controlled a lower court's decision even when a respondent asserts that, on remand, it may prevail for a different reason not reached the first time around. See, *e.g.*, *Kisor* v. *Wilke*, 139 S.Ct. 2400, 2424 (2019) (leaving for remand alternative grounds); *Department of Transporation* v. *Association of American Railroads*, 575 U.S. 43, 55

(2015) (same); *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (same).

2. We demonstrated further (Pet. 12-18) that there is a deep and intractable conflict over the second question presented as well. The government once again does not disagree—indeed, it says nothing about the conflict on the second question at all.

The government instead asserts (BIO 15) that petitioner "did not make this argument in the court of appeals." That is a baffling argument. Petitioner devoted more than ten pages of his opening brief before the Seventh Circuit to establishing three different ways in which Officer Ghiringhelli acted outside the scope of Section 2702(c)(4). See C.A. Br. 18-28. But the court of appeals dodged those issues. It held, instead, that even assuming the search of petitioner's real-time CSLI was not authorized by the statute, suppression was unwarranted "because law enforcement collected [the] real-time CSLI *in good faith reliance on* 18 U.S.C. § 2702," regardless whether the statute *actually* authorized the search. Pet. App. 28a (emphasis added).

The question whether that holding was correct is the second question posed in the petition: "Whether a government agent's good faith but objectively incorrect reading of a statute prevents the exclusion of constitutionally tainted evidence in a criminal trial." Pet. i. That issue is thus plainly and fully preserved for this Court's review. See *Citizens United* v. *FEC*, 558 U.S. 310, 330 (2010) (confirming the Court's routine practice of reviewing any issue that "has been passed upon" by the lower court (quoting *Lebron* v. *National Railroad Passenger Corporation*, 513 U.S. 374, 379 (1995), in turn quoting *United States* v.

Williams, 504 U.S. 36, 41 (1992))).[1]

3. The government says (BIO 17-18) this is an unsuitable vehicle because it presents two issues, neither of which is singularly outcome determinative. That misses the point, which is that both questions are tremendously important (each for the same basic reasons) and will virtually always arise together. Again, the warrantless collection of real-time cellphone location data will only ever be authorized by Section 2702 or a highly similar state-law analogue. And invocation of Section 2702 with respect to real-time CSLI will always entail a government assertion of an exigency and "good faith" reliance on the provision. Thus resolution of the first question will always implicate the second question. The Court would have to wait indefinitely—likely many years—before seeing clean presentations of the questions separated from one another. Meanwhile, the hugely important practical concerns that underlie both questions will persist until the Court resolves both. There is no reason to wait when both questions are so neatly presented in a single package, as here.

B. The decision below is troublingly incorrect and warrants review

The government contends (BIO 9-10) that an individual does not have a "reasonable expectation" that their cellphone will not be tracked in real time. While *Carpenter* v. *United States* left open the question of real-time cellphone tracking, its underlying

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[1] To be sure, petitioner did not argue specifically that the SCA authorizes the collection only of historical CSLI and does not authorize the government to direct cell-phone carriers to create new records for future collection. See Pet. 22-23. But that is not an issue that the Court would have to resolve on the merits if it granted the petition.

premise that an individual has the "anticipation of privacy in his physical location" governs in this case. 138 S. Ct. 2206, 2217 (2018). Both retrospective and prospective data have the same capacity to reveal private, intimate information, intruding impermissibly on the "private sphere." *Id.* at 2213. But the bottom line is even simpler than that: Citizens do not reasonably expect government officials to be able to monitor their every movement in real-time from desk chairs sitting in distant, fluorescent-lit offices. That is especially true because when an officer requests real-time CSLI, he does not know how long the surveillance will last (hours, days, or weeks) or where it will find the target (on the open road, at the gym, or at home and in bed). That is precisely the kind of "arbitrary power" that offends an individual's "reasonable expectation of privacy." *Id*. at 2214 (quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)).

The government also fails to grapple with *United States* v. *Jones*. Just as in that case, here "[t]he Government usurped [petitioner's] property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded." 565 U.S. 400, 413-414 (2012) (Sotomayor, J., concurring).

It is no answer to say that Officer Ghiringhelli believed in good faith that the search was permissible under the SCA. To hold otherwise "would essentially eviscerate the exclusionary rule." *People* v. *Madison*, 520 N.E. 2d 374, 380 (Ill. 1988). If courts were to rely on officers' erroneous understandings of the scope of a statute, there would be no "incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *United States* v. *Song Ja Cha*, 597 F.3d 995, 1005 (9th Cir. 2010) (quoting *United States* v. *Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000)). And, in doing so, it would

grant the police nearly "unlimited authority to conduct searches and seizures until specifically restricted by the legislature or the courts." *Madison*, 520 N.E.2d at 380. We made these points in the petition (at 22), but the government tellingly declines to take them head-on.

The petition should be granted.

Respectfully submitted.

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