No.

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

PETITION FOR A WRIT OF CERTIORARI

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
ETHAN H. TOWNSEND
McDermott
Will & Emery LLP
500 North Capitol St. NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. In *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018), the Court held that the government's use of an individual's historical "cell site location information" (CSLI) to determine his past movements over a lengthy period of time constitutes a search within the meaning of the Fourth Amendment, requiring a warrant. But the Court expressly left open the question whether a government agent's use of "real-time CSLI" to track a person in real time likewise constitutes a search. *Id*. at 2220. The question reserved in *Carpenter*—over which lower courts are divided—is the first question presented here:

Whether a government agent's direction to a wireless carrier to send a signal to a person's phone, so that the phone reveals the person's precise location and movements in real time is a search within the meaning of the Fourth Amendment.

2. In *Illinois* v. *Krull*, 480 U.S. 340 (1987), the Court held that the good faith exception to the exclusionary rule prevents exclusion when officers have acted "in objectively reasonable reliance on a statute" that was subsequently found unconstitutional. *Id*. at 349. But the Court "decline[d] the State's invitation to recognize an exception for an officer who erroneously, but in good faith, believes he is acting within the scope of a statute." *Id.* at 360 n.17. The question reserved in *Krull*—over which lower courts again are divided—is the second question presented here:

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Other Authorities

Petitioner Rex Hammond respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit (App., *infra*, 2a-48a) is reported at 996 F.3d 374.

The district court's opinion (App., *infra*, 49a-60a) is unpublished but is available in the Westlaw database at 2018 WL 5292223.

JURISDICTION

The court of appeals entered its judgment on April 26, 2021 and denied rehearing en banc on August 19, 2021. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are set out in the appendix at 63a-65a.

INTRODUCTION

Technological interrogation of an individual's private property to reveal the person's precise, real-time location constitutes a search under the Fourth Amendment. The Seventh Circuit's contrary decision in this case stands as an open invitation to government agents to compel a person's cell phone to reveal its precise location without a warrant, disclosing intimate details of the user's whereabouts indefinitely, without even requiring government agents to get up from their desks. That invitation cannot be squared with the "basic purpose" of the Fourth Amendment, which is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967).

Making matters worse, the Seventh Circuit held further that the exclusionary rule need not apply even if a warrantless search took place, because the officer believed in good faith—but objectively *wrongly*—that he was complying with statutory scheme that purportedly authorized the real-time tracking. That holding ignores the reasoning underlying the good-faith exception recognized in *Illinois* v. *Krull*, 480 U.S. 340, 349 (1987).

Both issues have deeply divided federal appellate courts and state courts of last resort. And the two questions are closely linked and typically arise together. Resolution of both questions is critical to shoring up the alarming erosion of Fourth Amendment protections in our increasingly technological age. Without this Court's review, pervasive government surveillance, made possible through small pieces of plastic and metal carried in nearly every American's pocket, will overrun the Fourth Amendment altogether. The time for review is now.

STATEMENT

A. Legal and technological background

1. The Framers understood the Fourth Amendment to "secure the privacies of life against arbitrary power," and to "place obstacles in the way of a too permeating police surveillance." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2214 (2018). Modern surveillance technology, the Court has said, may not be used to eviscerate "that degree of privacy against government that existed when the Fourth Amendment was adopted." *Ibid*. (quotations and citation omitted). Accordingly, the Court has ruled that following someone's movements using modern technology "falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained

through visual surveillance." *United States* v. *Karo*, 468 U.S. 705, 707 (1984).

2. This case involves real-time cellphone tracking, which gives government agents access to precise, ongoing geolocation data. This information is "detailed, encyclopedic," and "provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." *Carpenter*, 138 S. Ct. at 2216-17 (cleaned up).

There are two methods for real-time cellphone tracking—CSLI and GPS—but there is no constitutionally significant difference between them.

In either case, the carrier determines the real-time location of a phone by "pinging" it (that is, by sending to the phone a digital signal bearing an instruction). See *Commonwealth* v. *Pacheco*, 227 A.3d 358, 363 (Pa. Super. Ct. 2020), appeal granted, 2020 WL 4332936 (Pa. July 28, 2020). The signal activates the phone to determine its location. *Ibid*. If the phone has GPS functionality, as most phones do, the phone company uses the GPS chip to determine the geolocation coordinates of the phone. See *United States* v. *Riley*, 858 F.3d 1012, 1014 n.1 (6th Cir. 2017). "[T]oday, virtually all cell phones contain a GPS receiver, thereby giving police the capability to ping the cell phones of hundreds of millions of people." *Commonwealth* v. *Almonor*, 120 N.E.3d 1183, 1193 n.12 (Mass. 2019). Accord *The Fourth Amendment in the Digital Age*, The Brennan Center (March 18, 2021).

Newer GPS receivers can identify the phone's location within 10 feet; they also have a vertical accuracy of fifteen feet. See U.S. Dep't of Defense, Global Positioning System Standard Positioning Service Performance Standard V (4th ed. Sept. 2008; GPS Accu-

racy, GPS.gov, perma.cc/TD87-9F8Q). This is accurate enough to locate a cell phone within a residence, including the floor it is on. See *In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel. (Maryland Real-Time Order)*, 849 F. Supp. 2d 526, 540–41 (D. Md. 2011).

If GPS data is not available, the phone's location may instead be determined using cellphone tower triangulation. *Pacheco*, 227 A.2d at 363. The carrier initiates a communication with the phone, which responds by transmitting its location (accurate within about 30 yards) back to the carrier. *Ibid*. This is "real time" CSLI tracking.

In either case (GPS or CSLI), when a phone is "pinged," the cell phone user does not have to do anything to reveal their precise location. Users need not move the phone, call or text, or even press a button for the carrier (and thus the government) to know exactly where they are—whether they be in the bedroom, bathroom, street, office, park, or school. Furthermore, the pinging is conducted secretly, without revealing anything to the cell phone user. Real-time cell phone pinging thus allows the state to surreptitiously track the movements of any individual with a cell phone (essentially all Americans) with a voyeuristic level of precision, and without ever leaving the precinct.

B. Factual and procedural background

1. This case arises from a series of robberies committed over a three-week period in October 2017. App., *infra,* 3a-5a. On the day after one robbery—a Saturday—a task force comprising several state and federal law enforcement agents, including a Kalamazoo police detective Cory Ghiringhelli, concluded that Rex Hammond was a suspect and obtained Hammond's cell phone number. App., *infra,* 5a. Rather

than locate and arrest Hammond using ordinary police work, Ghiringhelli took the rest of the weekend off. App., *infra,* 6a. The four other agents similarly did nothing to locate Hammond. Only Ghiringhelli, days later on the following Monday afternoon, finally looked up Hammond's phone number, traced it to AT&T, and made an "exigency request" under 18 U.S.C. § 2702(c)(4) for *both* Hammond's historical cell site location information for the prior two weeks *and* for ongoing, real-time "ping" results to track his location in real time. App., *infra,* 6a. In response, AT&T sent Hammond's location data to Ghiringhelli approximately every 15 minutes, showing the location of the cell phone 15 minutes earlier. App., *infra,* 51a.[1]

Ghiringhelli provided the location information to other officers with instructions to locate, but not arrest, Hammond. App., *infra,* 22a-23a. Agents began searching for Hammond. App., *infra,* 5a. Throughout the duration, the real-time ping located Hammond at various places, including a hotel room in South Bend, Indiana (where the ping became stationary for a time) and within his vehicle on the road. Dist. Ct. Dkt. 39, at 5. In the early hours of the following day, and after Hammond made multiple stops that evening, officers located Hammond in Indiana and pulled him over for speeding. After conferring with a state prosecutor, they determined they had probable cause to arrest him and took him into custody. *Id*. at 7, 9; Dist. Ct. Dkt. 93 at 6.

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[1] The court of appeals characterized the cellphone tracking in this case as real-time CSLI tracking. App., *infra,* 6a. It may in fact have been GPS tracking, which is how AT&T ordinarily "pings" a phone. See *United States* v. *Wallace*, 885 F.3d 315 (5th Cir. 2018). We accept the court's characterization of the technology as issue here, as there is no constitutionally meaningful distinction between the two technologies.

2. A grand jury indicted Hammond on eight charges. Dist. Ct. Dkt. 1. In later proceedings, Hammond moved to suppress the cell phone location information that the government had received from AT&T without a warrant, asserting that collection of both the historical and real-time geolocation data was a search requiring a warrant. In its response, the government conceded that, under *Carpenter*, it was "clear that the government should have obtained a search warrant for historical data and violated the Fourth Amendment by not doing so." Dist. Ct. Dkt. 39, at 11. The government also "accept[ed] for the sake of argument" that it should have sought a warrant for the real-time location information. *Id.* at 11 n.1.

The district court denied Hammond's motion. App., *infra,* 60a. The court did not reach the constitutional question on the ground that "if Mr. Hammond's phone data was collected in a good-faith reliance on the Stored Communications Act, the evidence needn't be suppressed." *Id* at 54a.

At trial, the government introduced the evidence found in Hammond's car, evidence that the district court later called "considerable" in connecting Hammond "to the robberies." App., *infra,* 19a. A jury convicted Hammond. App., *infra,* 9a.

3. The Seventh Circuit affirmed. It held, in relevant part, that the government's real-time cellphone tracking was not a "search" under the Fourth Amendment. The court reasoned that agents had tracked Hammond only for "a matter of hours while the suspect travelled on public roadways." App., *infra,* 27a. In coming to that conclusion, the court relied exclusively on the 1983 case of *United States* v. *Knotts*, 460 U.S. 276 (1983), which involved the use a police-placed beeper in a drum of chloroform.

The court did not rely on the reasoning in *Jones* seemingly because the Court in *Jones* "grounded its analysis in common law trespass doctrine and emphasized that the government physically occupied private property for the purpose of obtaining information" when it attached a GPS unit to a suspect's car. App., *infra*, 19a-20a. (alteration incorporated). In describing *Carpenter*, the court quoted this Court's language that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." App., *infra,* 27a. But because "*Carpenter* disclaimed providing any answer to the question before us," the panel reasoned, the question was simply "whether the facts of this case are more similar to *Carpenter* or to *Knotts*." App., *infra,* 21a-22a. In the court's view, under *Carpenter*, where the government has not used real-time location information "to peer into the intricacies of [someone's] private life," there is no search under the Fourth Amendment. App., *infra,* 22a.

Reasoning that "law enforcement only followed Hammond on public roads, for the duration of one car trip," the court found no search. App., *infra,* 23a. In the Seventh Circuit's view, society "is fully aware that officers may follow and track a suspect's movements for several hours." App., *infra,* 24a. Accordingly, pinging Hammond's cell phone to locate him is "not inconsistent with society's expectations of privacy from law enforcement's prying eyes." *Ibid*.

Real-time pinging does not involve "stored" information. Nonetheless, the Seventh Circuit held in the alternative that Ghiringhelli had relied in good faith on the Stored Communications Act (SCA) when obtaining Hammond's CSLI and real-time location data. The court's decision rested on the lower court's factual finding that Ghiringhelli believed in good faith that "a

federal statute allowed him to act as he did." App., *infra,* 29a. In other words, Ghiringhelli's "good faith" was based on his (mistaken) interpretation of what the statute permitted him to do. Concluding that good faith but mistaken reliance on a statute is permissible, the court below did not address whether the SCA in fact authorized Ghiringhelli's actions.

REASONS FOR GRANTING THE PETITION

This case cries out for further review. The first question presented implicates a deep split on the question whether real-time cellphone tracking is a search within the meaning of the Fourth Amendment. The importance of that question is self-evident: If the decision below is allowed to stand, government agents will be able to convert private cellphones into government tracking devices, giving them near omniscience as to the location of the vast majority of Americans at any time. The Fourth Amendment is an essential bulwark against that dystopian outcome.

The second question presented—which arises in every real-time cellphone search case in which officers do not obtain a warrant—likewise implicates a split of authority. And it also is enormously important: If the exclusionary rule turns only on the good faith beliefs of officers concerning the meaning of statutes, and not on the *actual* meaning of statutes, there will be a powerful incentive for government agencies to leave law enforcement agents in the dark on the meaning of statutes like the Stored Communications Act (which, on its face, does not authorize the government to require the collection of new data not already stored). As a tool to discourage government misconduct, the exclusionary rule should not excuse objectively incorrect reliance on federal statutes. Further review is therefore in order.

A. There is a 3-3 split on the first question

The Seventh Circuit's resolution of the first question presented conflicts with holdings of the courts of last resort in Florida, Washington, and Connecticut. In line with the Seventh Circuit are the Sixth Circuit and the Texas Court of Criminal Appeals. This entrenched 3-3 split warrants review.

Florida. In *Tracey* v. *State*, 152 So. 3d 504 (Fla. 2014), the Florida Supreme Court has held that tracking an individual's movements using real-time CSLI constitutes a search for Fourth Amendment purposes. There, the defendant's cellphone carrier provided police with real-time CSLI, which they used to track him on his drive to a house where they believed drugs were stored. *Id*. at 506-08. The court held that the defendant had a reasonable expectation of privacy in his cellphone location signals. *Id.* at 525.

The court so held in spite of the limited duration and public location of the tracking. *Id.* at 520, 526. Citing this Court's opinion in *Oliver* v. *United States*, 466 U.S. 170 (1984), the court concluded that "the length of time the cell phone is monitored is not a workable analysis" for balancing law enforcement needs with privacy interests: the resulting framework would be too ad-hoc to clearly define the boundaries of Fourth Amendment rights. *Id.* at 520-21. The court similarly held the fact that the tracking took place on public roads to be irrelevant. Police were not simply following Tracey's vehicle, as in *Knotts*. Instead, as in the case below, they had to use the CSLI information to locate him in the first place. *Id.* at 525. Moreover, the court found that the public/private distinction makes little sense in the context of CSLI tracking: cell phone pinging can traverse the public/private line quickly, and without warning. *Id.* at 524. That is the opposite of the Seventh Circuit's reasoning below.

Washington. In *State* v. *Muhammad*, 451 P.3d 1060 (Wash. 2019), The Washington Supreme Court similarly held that pinging a suspect's phone using CSLI constituted a warrantless search. Police there had briefly suspended in-person surveillance of the defendant's home, during which time he left. Having lost him, they pinged his phone without a warrant to determine his location. *Id.* at 1067. The court applied *Carpenter* to real-time CSLI and held that even an "isolated cell phone ping" implicates the Fourth Amendment. *Id.* at 1071-72.

According to the court, "'[e]ven short-term monitoring' can generate a 'comprehensive record of a person's public movements that reflects a wealth of [personal information.]" *Id.* at 1072 (alteration in original) (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). Therefore, the duration of monitoring or number of pings "is [an] arbitrary [line to draw] and unrelated to a reasonable expectation of privacy." *Id.* at 1073. Although the court there ultimately allowed the fruits of the unconstitutional search into the record on exigency grounds, it expressly rejected the Seventh Circuit's interpretation of the Fourth Amendment in this case. There can be no question that the outcome here would have been different if the case had arisen in the state courts of Washington.

Connecticut. In *State* v. *Brown*, 202 A.3d 1003 (Conn. 2019), the Connecticut Supreme Court held that an ex parte order to obtain prospective CSLI by pinging a burglary suspect's phone "every ten minutes from midnight on November 23, 2010 until 7 a.m. on November 25, 2010" had been obtained illegally under a Connecticut statute akin to the SCA. *Id*. at 1008, 1009. The court held that, because the violation "implicated important fourth amendment interests," the

appropriate remedy was exclusion of the evidence obtained via the illegal order. *Id.* at 1014. In sharp contrast with the Seventh Circuit, the Connecticut Supreme Court explained that "[t]he concerns expressed by the court in *Carpenter* regarding historical CSLI apply with equal force to prospective CSLI." *Id.* at 1018. Because the Connecticut Supreme Court found that the logic of *Carpenter* should be extended to real-time CSLI, without placing any particular limits on the duration or location of the tracking, the court affirmed the suppression of Brown's CSLI obtained from the ex parte order. *Ibid*.[2]

In contrast with the decisions just described, the Sixth Circuit and the Texas Court of Criminal Appeals have held that real-time cellphone tracking is not a search. See *United States* v. *Riley*, 858 F.3d 1012, 1018 (6th Cir. 2017) (holding that "seven hours of GPS location data to determine an individual's location (or a cell phone's location), so long as the tracking does not reveal movements within the home (or hotel room), does not cross the sacred threshold of the home, and thus cannot amount to a Fourth Amendment search") (emphasis omitted); *Sims* v. *State*, 569 S.W.3d 634, 645 (Tex. 2019) (holding that a suspect does not "have a legitimate expectation of privacy in his physical movements or his location as reflected in

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[2] Although, the District of Columbia Court of Appeals has not directly addressed the issue of real-time monitoring via GPS or CSLI, it has held that tracking a cell phone using a cell-site simulator—an artificial method of creating CSLI—is a search. See *Jones* v. *United States*, 168 A.3d 703 (D.C. 2017). It is very likely that, in light of *Jones*, the D.C. Court of Appeals would side with the courts on this side of the split. *Cf. United States* v. *Banks*, 884 F.3d 998, 1013 (10th Cir. 2018) ("declin[ing] to address" "whether tracking a cell-phone's real-time location is a search under the Fourth Amendment").

the less than three hours of real-time CSLI records accessed by police by pinging his phone less than five times").

The holdings of the Seventh Circuit, Sixth Circuit, and Texas Court of Criminal Appeals cannot be squared with the decisions of the high courts of Florida, Washington, and Connecticut. For the benefit of police officers who must conform their conduct to constitutional rules, of the courts that must administer those rules, and of citizens whose liberty is protected by them, this Court should grant review of this important constitutional issue.

B. There is a 5-4 split on the second question

Every time a police officer obtains a suspect's real-time cellphone tracking data without a warrant, he will have relied mistakenly on the SCA, which authorizes officers to demand historical (stored) CSLI from wireless carriers, but not to command wireless carriers to collect new data that they do not already have. See, *e.g.*, *United States* v. *Wallace*, 885 F.3d 315, 317 (5th Cir. 2018) (Dennis, J., dissenting from denial of rehearing en banc) (explaining that "real-time collection of GPS tracking information is not authorized by [the SCA]" because "GPS coordinates that have not yet been created and would not be created absent the Government's intervention cannot be called 'records' or 'stored' communications under any commonsense understanding of those terms").

The question thus arises in every such case whether an officer's reliance on a good faith but objectively wrong reading of the SCA permits entry at trial of the evidence thereby obtained. There is a deep split on that question as well.

In *Krull*, this Court held that the good faith exception to the exclusionary rule prevented exclusion

where officers had acted "in objectively reasonable reliance on a statute" that was subsequently found unconstitutional. 480 U.S. at 349. The Court reasoned that in such cases, exclusion would "not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 350. But the Court acknowledged that the outcome "might well be different when police officers act outside the scope of a statute, albeit in good faith." *Id* at 360 n.17. "In that context, the relevant actors are not legislators or magistrates," but the police officers themselves. *Ibid.* (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)).

1. Applying *Krull*, the Sixth, Fifth, and Ninth Circuits and the Illinois Supreme Court have all held that an officer's subjective, good-faith belief that his actions are legally authorized is not alone sufficient to invoke the good faith exception.

Sixth Circuit. The Sixth Circuit addressed this question in *United States* v. *Warshak*, 631 F.3d 266 (2010), where it assessed whether law enforcement's reliance on the SCA triggered the good faith exception, permitting the government to submit emails seized in violation of the Fourth Amendment at trial. *Id.* at 289-92 (6th Cir. 2010). The government passed an initial requirement for good faith: the SCA was not "so conspicuously unconstitutional as to preclude good-faith reliance." *Id.* at 289. The court nonetheless held that "the good-faith reliance inquiry does not end with the facial validity of the statute at issue." *Ibid.* Instead, it held, a court must also determine whether the government acted "'outside the scope of the statute' on which it purported to rely." *Ibid.* (quoting *Krull*, 480 U.S. at 360 n.17).

The Sixth Circuit tied this second inquiry closely to the overarching purpose of exclusion: deterrence of officer misconduct. *Ibid.* As it explained,

> an officer's failure to adhere to the boundaries of a given statute should preclude him from relying upon it in the face of a constitutional challenge [because o]nce the officer steps outside the scope of an unconstitutional statute, the mistake is no longer the legislature's, but the officer's. * * * * Therefore, use of the exclusionary rule is once again efficacious in deterring officers from engaging in conduct that violates the Constitution.

Ibid. (citing *Krull*, 480 U.S. at 360 n.17).

Thus, the Sixth Circuit's test requires that law enforcement not only *subjectively believe* that a facially valid law authorized its actions but also stay within that law's objective boundaries. *Ibid.* Holding that the officers in *Warshak* had done so, the court applied the good faith exception. *Id.* at 292. But applying *Warshak* here would have produced a different result, both because the SCA does not authorize the government to order wireless carriers to collect new information that they not already have, and because there was no exigency within the meaning of Section 2702(c)(4).

Fifth Circuit. The Fifth Circuit has also addressed the accuracy of law enforcement's legal interpretations in its application of the good faith test. In *United States* v. *Wallace*, 885 F.3d 806 (2018), it assessed a defendant's challenge to a warrantless search of his real-time cell location data under the SCA. The court ultimately held that the good faith exception applied. *Id.* at 810–11. In its assessment, however, the court explicitly noted that "[t]he holding of *Krull* does

not extend to scenarios in which an officer 'erroneously, but in good faith, believes he is acting within the scope of a statute.'" *Id.* at 811 n.3 (quoting *Krull*, 480 U.S. at 360 n.17).

Because the defendant did not challenge the accuracy of the officers' interpretation of the SCA, the court assumed for the purposes of its decision that they had acted within its boundaries. *Krull* 480 U.S. at 810-811. But the court was clear that its application of the good faith exception depended on that assumption. *Id.* at 811 n.3 ("Our assumption today that the officers acted within the scope of the statute keeps us within the confines of *Krull*."). Thus, like the Sixth Circuit, the Fifth Circuit's good faith inquiry accounts for the actual "the scope of [the] statute"—not just law enforcement's subjective understanding of it. *Ibid*.

Florida. In *Tracey*, the officers relied on a state analogue to the federal SCA. After holding that the officers' search of the defendant's real-time location data violated the Fourth Amendment, the court there concluded:

> We further hold that under the circumstances of this case in which there was no warrant, court order, or binding appellate precedent authorizing real time cell site location tracking upon which the officers could have reasonably relied, the "good faith" exception to the exclusionary rule for "objectively reasonable law enforcement activity" * * * is not applicable. Thus, Tracey's motion to suppress the evidence should have been granted

152 So. 3d at 526. (citation omitted). That is the exact opposite conclusion at the Seventh Circuit in this case, on *both* questions presented.

Two other courts—the Ninth Circuit and Illinois Supreme Court—have addressed the second question

presented in other legal contexts. Their decisions indicate that they would have applied the exclusionary rule in this real-time tracking case.

Ninth Circuit. The Ninth Circuit too has assessed the accuracy of law enforcement's legal interpretations when assessing whether to apply the good faith exception—and it has affirmatively declined to apply the exception where officers have relied on a mistake of law. See *United* States v. *Song Ja Cha*, 597 F.3d 995 (9th Cir. 2010).

In *Song Ja Cha*, the government argued that the good faith exception should apply to a warrantless 26.5-hour seizure of the defendant's home and business. *Id.* at 999. The court held that the warrantless seizure was unreasonably long under *Illinois* v. *McArthur,* 531 U.S. 326 (2001), and upheld the trial court's suppression ruling on that basis. *Song Ja Cha*, 597 F.3d at 1000. The court explicitly observed that "the officers [had] made a mistake of law—they did not realize that a seizure must last 'no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.'" *Id.* at 1005 (citing *McArthur*, 531 U.S. at 332). And—most relevant here—the court held that the officers' mistake of law did not trigger the good faith exception. *Ibid.* The court thus held that the good faith exception could not apply. *Ibid.*

Illinois Supreme Court. Finally, the Illinois Supreme Court has firmly rejected the idea that the good faith exception can apply where law enforcement has relied on its own erroneous interpretation of relevant law. In *People* v. *Madison*, 520 N.E.2d 374 (Ill. 1988),[3] the state argued that law enforcement's good faith belief that a statute authorized a warrantless seizure of

[3] Abrogated on unrelated grounds as recognized in *Horton* v. *California*, 496 U.S. 128 (1990).

the defendant's documents should trigger the good faith exception. *Id.* at 380. As the Court pointed out, however, the statute in question explicitly required a warrant. *Ibid.* And, the Court observed,

> [under] *Krull*, the officer's good faith alone is not sufficient to validate the search and seizure; the officer must also be acting on the authority of a seemingly valid warrant or statute. Here, * * * * [t]he officers were acting in defiance of, not reliance on, the language of a statute.

Ibid. Thus, the officer could not rely on the good faith exception to avoid suppression. *Ibid.*

2. In contrast, the Eleventh Circuit has held that "the good-faith exception to the exclusionary rule applies" when an officer relies in good faith the SCA to obtain "real-time tracking data." *United States* v. *Green*, 981 F.3d 945, 957-958 (11th Cir. 2020), cert. denied, 141 S. Ct. 2690 (2021). The Fifth Circuit has held the same. See *United States* v. *Wallace*, 885 F.3d 806, 810–11 (5th Cir. 2018) (holding that officers' good faith reliance on the SCA defeated the exclusionary rule, without deciding whether the SCA actually permits real-time tracking). And for its part, the Second Circuit has suggested its alignment with the Fifth, Seventh, and Eleventh Circuits. See *United States* v. *Carabello*, 831 F.3d 95 (2d Cir. 2016) (declining to apply the exclusionary rule because "[t]he investigating officers believed that applicable law permitted them to request a warrantless search of a phone's GPS location" even if it did not).

The lower courts are thus intractably divided on the question left open in *Krull*: 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. This Court's intervention is thus desperately needed.

C. The questions are exceptionally important and analytically connected

1. The questions presented warrant the Court's attention. With increasing frequency, law enforcement agencies are using real-time location monitoring and tracking to obtain sensitive, hyper-specific information about Americans. By submitting a pro-forma request to a wireless provider, the government can track Americans in real-time at all hours of the day, whether they're going to work, at the doctor's office, or in the bathroom.

As Justice Alito recognized in *Jones*, of the "many new devices that permit the monitoring of a person's movements," cell phones are "[p]erhaps most significant." 132 S. Ct. at 963 (Alito, J., concurring in the judgment). People carry their phones with them virtually everywhere they go, including inside their homes and other constitutionally protected spaces. By offering accurate ongoing geolocation, real-time cell phone tracking upsets the "reasonable expectation of privacy" that exists "in the whole of [an individual's] physical movements." *Jones*, 565 U.S., at 430 (Alito, J., concurring in judgment).

Moreover, there is significant frequency—as well as a staggering rise—in the use of real-time tracking of cell phones. AT&T alone received 26,614 demands for real-time data from January 2020 to June 2021, as well as 45,110 "exigent" requests, many of which include demands for real-time tracking data.[4] In 2020,

[4] Compiled from AT&T US, Inc., *Transparency Reports* (2020-2021), perma.cc/2BT9-L2D3.

Verizon Wireless and T-Mobile received 236,663 such exigency requests.[5]

As long as these important legal questions remain unanswered, *tens of thousands* of citizens will be subjected to warrantless real-time phone tracking every year. And the over "90% of American adults" who own a cell phone will remain vulnerable to this invasive breach of privacy. *Riley* v. *California,* 134 S. Ct. 2473, 2490 (2014).

2. This case is a suitable vehicle for addressing both questions presented. The Seventh Circuit answered both questions clearly on facts that present the questions cleanly. And because answering either question practically demands resolution of the other question, this case provides the Court with an appropriate opportunity to resolve these important, logically related questions together, in a single go.

A law enforcement agency seeking to obtain real-time locational information without a warrant necessarily must invoke Section 2702(c)(4) of the Stored Communications Act. Absent a warrant, a telephone carrier may only convey such information to a law enforcement agency "if the provider, in good faith, believes that an emergency * * * requires disclosure without delay of information relating to the emergency." 18 U.S.C. 2702(c)(4). Almost invariably when officers attempt to justify a warrantless acquisition of real-time tracking data, courts must decide whether the use of real-time location monitoring constitutes a search under the Fourth Amendment and, if it does, to determine the applicability of the good faith exception under the SCA. As just one example, in *Tracey*,

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[5] Compiled from T-Mobile US, Inc. Transparency Report for 2020, perma.cc/B3PD-7CRS; and Verizon Wireless, Transparency Report for the Second Half of 2020, perma.cc/Y4GN-L7UE.

the State invoked the good-faith exception, but the Florida Supreme Court ultimately concluded that the officers were not entitled to that exception because they could not have reasonably relied on the SCA's state analogue. 152 So. 3d at 526. There is therefore no denying this case would have come out differently if it had arisen in the state courts of Florida.

Awaiting independent presentations of the questions presented here would perpetuate a pervasive, ongoing offense to the Fourth Amendment. The costs of a wait-and-see approach are too grave. The time for review is now.

D. The decision below is wrong

1. In addressing whether real-time CSLI constituted a search, the Seventh Circuit ignored the logic of *Carpenter* and instead relied on *Knotts*, an almost forty-year-old case involving tracking via radio transmitter rather than real-time GPS or CSLI data. App., *infra,* 19a. Instead of considering the intrusiveness of the technology at issue, the court focused on the duration of the pinging and the fact that, as in *Knotts*, the police "only collected location data that Hammond had already exposed to public view" while driving on public roads. *Id.* at 22a. This analysis misses the point.

First, when an officer compels a carrier to send a ping to a cell phone, he does so because he *does not know where the person currently is*. The suspect could be driving to work. But she could just as easily be in the shower. "Cell phone tracking can easily invade the right to privacy in one's home or other private areas, a matter that the government cannot always anticipate and one which, when it occurs, is clearly a Fourth Amendment Violation." *Tracey*, 152 So. 3d at 524.

The analogy to *Knotts* is thus misplaced. The technology in that case "merely enable[d] police officers to

accomplish the same task that they could have accomplished through '[v]isual surveillance from public places.'" *Jones*, 168 A.3d at 712 (quoting *Knotts*, 460 U.S. at 282). A radio transmitter helps police track an individual they have already located; it does not allow them—as CSLI or GPS does—to locate an individual out of thin air.

The Seventh Circuit's conclusion that the public would not reasonably expect privacy from this kind of tracking is also deeply misguided. App., *infra,* 24a. ("[S]ociety is fully aware that officers may follow and track a suspect's movements for several hours.") Police cannot guarantee that information obtained from real-time location monitoring will always point to suspects in public places. And once an officer has located a suspect sitting privately in her home, there is no unseeing that information. The public do not expect police to be able to locate them at any moment, anywhere.

2. Additionally, the decision below misinterpreted the good faith exception, mistakenly relying on Ghiringhelli's erroneous interpretation of the SCA.

The good faith exception does not apply where officers act outside the boundaries of their statutory authority. The essential purpose of the exclusionary rule is "to deter police officers from violating the Fourth Amendment." *Krull*, 480 U.S. at 348. The good faith exception operates where police officers reasonably rely on the judgement of other governmental actors, like legislators or judges, and thus cannot "properly be charged with knowledge, that [a] search was unconstitutional under the Fourth Amendment." *Id.* at 348–49. Yet, where, as here, officers rely on their own legal interpretations, "the relevant actors are not legislators or magistrates, but police officers" themselves. *Id.* at 360 n.17.

For that reason, as the Illinois Supreme Court has powerfully explained, to adopt the extension of the good-faith exception endorsed by the Seventh Circuit "would essentially eviscerate the exclusionary rule." *Madison*, 520 N.E.2d at 380. If courts were to rely on officers' erroneous understandings of statutory law, that reliance "would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *Song Ja Cha*, 597 F.3d at 1005. 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. An interpretation of the good faith exception that is so "fundamentally at odds with the central purpose of deterring police misconduct which underlies the exclusionary rule," *Madison*, 520 N.E.2d at 380, cannot be a correct reading of this Court's jurisprudence.

Both courts below relied on Ghiringhelli's erroneous interpretation of the SCA as a basis for applying the good faith exception in this case. Contrary to Ghiringhelli's understanding, the SCA does not in fact authorize law enforcement officers to obtain real-time CSLI. Multiple courts have held and judges have opined as much. See *In re Application of the U.S. for an Order Authorizing the Installation and Use of a Pen Register Device, a Trap and Trace Device, & for Geographic Location Info.*, 497 F. Supp. 2d 301 (D.P.R. 2007); *In re Application for an Order Authorizing the Installation & Use of a Pen Register & Directing the Disclosure of Telecomms. Records for the Cellular Phone Assigned the No. [Sealed]*, 439 F. Supp. 2d 456 (D. Md. 2006); *In re Application for Pen Reg. & Trap/Trace Device with Cell Site Location Auth.*, 396

F. Supp. 2d 747 (S.D. Tex. 2005); *United States* v. *Wallace*, 885 F.3d 315 (5th Cir. 2018) (Dennis, J., dissenting)). As one court explained,

> [T]he entire focus of the SCA is to describe the circumstances under which the government can compel disclosure of *existing* communications and transaction records in the hands of third party service providers. Nothing in the SCA contemplates a new form of ongoing surveillance in which law enforcement uses coopted service provider facilities.

In re Application for Pen Reg. & Trap/Trace Device with Cell Site Location Auth., 396 F. Supp. 2d 747, 760 (S.D. Tex. 2005) (emphasis added).

The Seventh Circuit nevertheless held that Ghiringhelli's interpretation was sufficient to invoke the good faith exception—regardless of whether it led him to step "outside the scope" of the SCA. *Krull*, 480 U.S. at 360 n.17 (1987)). That was reversible error.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
ETHAN H. TOWNSEND
McDermott Will & Emery, LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com