

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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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 P R O C E E D I N G S

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: Mr. Wessler, 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 -- 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 co-defendant. 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 app would -- would be  
24 vulnerable.

25 JUSTICE ALITO: Suppose that in this

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

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

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

14 MR. WESSLER: I certainly --

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

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

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

1 followed him for 24 hours?

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

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

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

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

1 (Laughter.)

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

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

7 JUSTICE KENNEDY: Which is my  
8 hypothetical.

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

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

24 JUSTICE KAGAN: Mr. Wessler, can I ask  
25 you about your understanding of the state of

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

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

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

23 First, to go to the second part of  
24 your -- your question, even in Jones, the data  
25 lacked precision. It was accurate only to

1 within 50 to 100 feet and only tracked where a  
2 car went. So, if a person parks in a parking  
3 lot or on a street, that GPS data by itself  
4 can't tell if they go to a jewelry store for a  
5 stick-up or a medical clinic for a checkup or a  
6 cafe to meet with a friend. Some other amount  
7 of evidence or inference was required. That  
8 makes it no less a search in that the same is  
9 true here.

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

25 It's also more voluminous because now

1 data connections create location information.  
2 And so the -- the 101 data points per day on  
3 average in this case pale in comparison to what  
4 --

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

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

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

24 But there's -- there's no data  
25 retention mandate for these historical cell

1 phone location records.

2 JUSTICE BREYER: Are --

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

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

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

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

24 The electronic information is  
25 infallible. You can follow them forever.



1 That's a big change. So, I agree that that  
2 change is there. It's there in many aspects of  
3 life, not just location.

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

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

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

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

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

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

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

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

13 CHIEF JUSTICE ROBERTS: One --

14 MR. WESSLER: -- clarity will emerge.

15 JUSTICE BREYER: You want to add one  
16 --

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

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

1                   Anything else you want to add?

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

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

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

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

25                  And so it's the same thing here. Yes,

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

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

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

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

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

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

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

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

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

1 prosecutor.

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

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

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

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

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

1 MR. WESSLER: So I -- I think it's  
2 possible. And I think conversion is the -- the  
3 closest --

4 JUSTICE GORSUCH: Uh-huh.

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

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

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

16 JUSTICE GORSUCH: Right.

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

19 JUSTICE GORSUCH: Right.

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

22 JUSTICE GORSUCH: Okay. Thank you.

23 MR. WESSLER: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.



1 Mr. Dreeben.

2 ORAL ARGUMENT OF MICHAEL R. DREEBEN

3 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

8 JUSTICE SOTOMAYOR: But asking --

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

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

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

1 phone.

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

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

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

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

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

24 JUSTICE SOTOMAYOR: Mr. Dreeben, why  
25 is it not okay, in the way we said about

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

6 (Laughter.)

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

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

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

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

25 MR. DREEBEN: Well, I think Justice

1 Sotomayor --

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

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

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

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

24 JUSTICE SOTOMAYOR: Yeah, but -- but  
25 an -- in an envelope, you seal the envelope.

1 You can -- you can yourself control the public  
2 disclosure.

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

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

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

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

1 business record because the business is using  
2 it in its transaction with the customer to  
3 route the calls.

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

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

18 So how is it different from that?

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

24 Jones involved government  
25 surveillance. It involved attaching a GPS

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

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

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

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



1 communicate with a tower and a business record  
2 is generated.

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

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

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

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

1 MR. DREEBEN: I don't --

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

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

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

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

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

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

25 I mean, I -- I can defer to Congress's

1 understanding of the privacy needs, but does  
2 that create an obligation for me to defer to  
3 their judgment of what protections the  
4 Constitution requires?

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

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

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

21 JUSTICE SOTOMAYOR: But we have --

22 MR. DREEBEN: -- search of --

23 JUSTICE SOTOMAYOR: -- we have said --  
24 you know, we have made exceptions all the time,  
25 Ferguson, Bond, even in creating Smith and

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

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

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

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

25 One thing Jones taught us is -- and

1 reminded us, really, is that the property-based  
2 approach to privacy also has to be considered,  
3 not just the reasonable expectation approach.

4 So, if we put aside the reasonable  
5 expectation approach for just a moment, Katz,  
6 Miller, Smith, and ask what is the property  
7 right here, let's say there is a property  
8 right. Let's say I have a property right in  
9 the conversion case I posited with your  
10 colleague, 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 MR. DREEBEN: The reason that I can't  
16 concede it is it's a property right that  
17 resembles no property right that's existed.

18 JUSTICE GORSUCH: I think you --

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



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

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

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

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

18 MR. DREEBEN: So that --

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

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

24 JUSTICE GORSUCH: So -- so, let me ask  
25 you that. So -- so the government can

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

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

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

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

16 JUSTICE GORSUCH: Are they?

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

23 And Congress has calibrated under what  
24 circumstances that privacy interest shall be  
25 protected. It yields in the face of legal

1 statutes that Congress has also passed --

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

5 MR. DREEBEN: It does not.

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

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

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

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

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

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

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

23 MR. DREEBEN: Well --

24 JUSTICE GORSUCH: -- with respect to  
25 the disclosure of the information?

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

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

6 MR. DREEBEN: Well, it --

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

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

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

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

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

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

25 JUSTICE GORSUCH: So why -- why -- why

1       couldn't Congress also say you don't get an  
2       Article III judge to determine this issue?

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

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

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

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

1 company.

2 MR. DREEBEN: Justice Alito --

3 JUSTICE ALITO: Am I wrong in that?

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

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

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

18 It also made clear that it --

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

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

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

7 MR. DREEBEN: Congress --

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

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

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

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

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

24 MR. DREEBEN: Well, I think it's  
25 definitely not true. This Court is the arbiter

1 of the Fourth Amendment, but it has already  
2 decided that question.

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

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

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

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



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

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

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

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

15 JUSTICE BREYER: I just want your  
16 reaction to what I asked the other side. I  
17 agree with you that the law is at the moment  
18 third-party information is third-party, with a  
19 few exceptions, but it may be that here another  
20 exception should exist for the reason that the  
21 technology, since the time those cases have --  
22 has changed dramatically to the point where you  
23 get cell phone information, the tower  
24 information, and put it together in a way that  
25 tracks a person's movement for 274 days or

1     whatever, is an unreasonable thing for the  
2     government to do. Assume that's so.

3             Now, one thing that is bothering me  
4     about that line is what I said before. I would  
5     like your reaction as to how to draw such a  
6     line, if we draw it.

7             MR. DREEBEN: So I don't think there  
8     --

9             JUSTICE BREYER: Because -- wait,  
10    there are other things, and I want to -- I'll  
11    be very specific about them through. I said,  
12    and I didn't have much basis in your brief for  
13    saying it, is it true that it's quite frequent  
14    or at least not abnormal for the government,  
15    when faced with reason to believe that there  
16    are securities violations, white-collar crime  
17    violations, terrorism financing violations, all  
18    kinds of things like that, that they do go to  
19    banks and they do ask for purchase information  
20    or to the credit card companies, et cetera,  
21    without a warrant, just reasonable? Now --

22             MR. DREEBEN: Yes.

23             JUSTICE BREYER: -- therefore, you  
24    don't want that interfered with.

25             MR. DREEBEN: No.

1 JUSTICE BREYER: No. But -- but it  
2 may not worry you so much that -- that they  
3 can't track a person's physical, which is like  
4 his body, you know, where it is, and the  
5 technology has changed dramatically there. So  
6 maybe it's an unfair question to ask you --

7 MR. DREEBEN: Well, I'd -- I'd --

8 JUSTICE BREYER: -- but how would you  
9 draw that line because that's the problem  
10 that's --

11 MR. DREEBEN: I'm not going to draw,  
12 Justice Breyer --

13 JUSTICE BREYER: All right.

14 JUSTICE SOTOMAYOR: How would -- how  
15 would you like to lose?

16 (Laughter.)

17 MR. DREEBEN: I do not think that -- I  
18 don't think it can be drawn coherently --

19 JUSTICE BREYER: Well, why not just  
20 say what he said on the other side? Say what's  
21 wrong with that? What we say is, look, what we  
22 have here is many, many days of the government  
23 taking previously unavailable tower information  
24 at the time of Miller, et cetera, now putting  
25 it together in order to track where this human

1 being has been for a long period of time,  
2 something that never could have been gotten  
3 before, and to do that without some probable  
4 cause is an unreasonable thing. What's wrong  
5 with that as an exception welded onto the basic  
6 rule?

7 MR. DREEBEN: It doesn't have a  
8 coherent principle that will explain why a  
9 similar rule shouldn't be applied to credit  
10 card records or debit card records or records  
11 of one's travel through Uber or through a  
12 myriad of other kinds of digital records that  
13 are created.

14 JUSTICE BREYER: Or, well, maybe it  
15 does have a principle. Maybe the principle is  
16 that look at the exception they've made for  
17 diagnostic hospital records. That is an  
18 exception. And it has to do with physical  
19 bodies, and it has to do with the private  
20 information related to those physical bodies.

21 And here, if, in fact, there are  
22 similar things in similar circumstances of  
23 highly private information, you draw, you know,  
24 several -- you draw several factors there and  
25 -- and you have it over here, if you had the

1 similar thing, all those factors are met in  
2 these other cases, so be it.

3 MR. DREEBEN: So, Justice Breyer,  
4 there is a significant difference between the  
5 kinds of cases you're talking about involving  
6 direct governmental searching activity and  
7 governmental acquisition of information from  
8 businesses.

9 The government is not monitoring the  
10 movements of this person by attaching a device  
11 to their person or by surveilling them, an  
12 issue that I think itself raises difficult  
13 questions since it does not appear that  
14 Petitioner objects to tailing somebody in  
15 multiple cars, even over 127 days.

16 What we're talking about here is the  
17 distinction between the government going and  
18 getting information from an individual and the  
19 government going to a business and asking the  
20 business to serve as a witness.

21 And I think Your Honor's point about  
22 how investigations proceed is exactly right.  
23 What the government does at the early stages of  
24 an investigation is reach out to third parties  
25 because it may not have enough information

1 about whether a crime has been committed or  
2 whether a particular individual is culpable for  
3 that crime. It goes to third-party providers  
4 who have information that allows them to narrow  
5 the field, to find out what's going on.

6 JUSTICE KENNEDY: If there -- if  
7 there's a shooting into a house, someone is  
8 killed, and witnesses say the shooter was  
9 running away with a cell phone, and the police  
10 ask the company to release all information  
11 about cell phones in that area, you don't have  
12 to go to the -- to get a 2703(d) order?

13 MR. DREEBEN: No, we do have to get a  
14 2703(d) order. And, in fact, we used that --

15 JUSTICE KENNEDY: You do even -- even  
16 for --

17 MR. DREEBEN: Yes.

18 JUSTICE KENNEDY: -- a blanket search?

19 MR. DREEBEN: Well, for -- I think  
20 what Justice Sotomayor described earlier is  
21 getting tower information. We used exactly  
22 that technique when a bullet was fired through  
23 the window of a federal judge --

24 JUSTICE KENNEDY: Right.

25 MR. DREEBEN: -- in Florida, and the

1 government did not have a clear idea of who the  
2 suspects would be. It attempted to narrow down  
3 the field by figuring out --

4 JUSTICE KENNEDY: But you did need an  
5 order?

6 MR. DREEBEN: Yes, we did need an  
7 order and we got an order. And I think this is  
8 another answer to your concern, Justice Breyer.  
9 Not only are we going to less sensitive sources  
10 of information at the early stages of an  
11 investigation to gather information and figure  
12 out what the criminal activity is and who might  
13 be inculpated in it, but we also are operating  
14 under a statutory regime that requires us to  
15 make a particularized showing.

16 It's not the case that we can just  
17 walk in and get --

18 JUSTICE KAGAN: Right. But, Mr.  
19 Dreeben, that could go away tomorrow. The  
20 question here is the constitutional question,  
21 not the statutory one. So can I take you back  
22 to what, it seems to me, is the essential  
23 identity between the factual circumstances here  
24 and in Jones, which is that the government is  
25 getting 24/7 information.

1           I mean, in some ways, you could say  
2 this is more. Jones was just about a car; this  
3 is about every place that you are, whether  
4 you're in a car or not. And you said to me  
5 that what makes it different is that you've  
6 given the information to another person. But I  
7 recall that when you were here in the Jones  
8 case, your theory for why that was permissible  
9 was essentially that you had given that  
10 information to the entire public; in other  
11 words, just by being in the world, everybody  
12 sees you, everybody watches you, and you've  
13 lost your expectation of privacy in that way.

14           Now, we pretty conclusively rejected  
15 that argument. Why is it different when it's  
16 giving it to one person, the same information,  
17 this 24/7 tracking, than we said it was when  
18 you give it to the entire world?

19           MR. DREEBEN: So I think that it is  
20 fundamentally different in the means that we  
21 chose to employ in Jones versus this case, and  
22 it's also different in what information we're  
23 acquiring. We did not acquire, in this case,  
24 24/7 tracking of the precise movements of an  
25 individual everywhere he went. We acquired



1 information of the cell tower where a call  
2 started --

3 JUSTICE KAGAN: But let's assume you  
4 could. Let's assume Mr. Wessler is right that  
5 the -- the technology keeps on getting better  
6 and better, more and more precise, it's not 10  
7 football fields anymore; it's half of this  
8 courtroom. Next month, it may be an eighth of  
9 this courtroom.

10 You know, so let's assume that we're  
11 looking ahead just a little bit and it's pretty  
12 precision-targeting.

13 MR. DREEBEN: So I would say that the  
14 third-party doctrine doesn't change. I also  
15 think that this Court could disagree and draw a  
16 line on more precise information that involves  
17 24/7 tracking.

18 This information is just simply far  
19 more similar to what was going on in the Smith  
20 case, where we got dialed phone numbers that  
21 would reveal a much more precise location where  
22 the dialed phone number came from and the  
23 person that was being spoken to.

24 This case does not present the Court  
25 with the opportunity to decide the kind of

1 granularly that Petitioner posits may happen  
2 in the future. And if it does happen in --

3 JUSTICE KAGAN: Would it be  
4 permissible for the government to ask a cell  
5 phone company for lifetime information?

6 MR. DREEBEN: Not under the current  
7 statutory regime and --

8 JUSTICE KAGAN: No, under your view of  
9 the Constitution.

10 MR. DREEBEN: I think it would be  
11 highly questionable under the Constitution, and  
12 here's why: Providers, which are hardly shy  
13 about asserting Fourth Amendment rights, have  
14 protections against unduly broad subpoenas that  
15 this Court has recognized in a line of cases  
16 summed up in *Donovan versus Lone Steer* and  
17 summarized in our -- in our brief. There has  
18 to be a showing of --

19 JUSTICE KAGAN: Where is the line?

20 MR. DREEBEN: There has to be a  
21 showing of relevance. There has to be a  
22 showing of congressional authorization. There  
23 has to be a showing of specificity. And it  
24 cannot be unduly broad so as to be unduly  
25 burdensome. So the --

1 CHIEF JUSTICE ROBERTS: Well, all  
2 those protections are available in the  
3 magistrate's decision whether to issue the  
4 warrant, right? I -- I mean, you can --

5 MR. DREEBEN: Yes. But -- but we --  
6 we have to demand this information somehow. If  
7 we assume that the statute went away, which for  
8 reasons that I'd like to come back to, I think  
9 the Court could decide the case based on the  
10 statute's compliance with the Constitution,  
11 even if you assume that there's a privacy  
12 interest at stake, but if there's no statute  
13 and we're going just under a subpoena, there is  
14 a long-standing recognition in this Court's  
15 cases that unduly broad subpoenas are subject  
16 to being squashed -- quashed under Fourth  
17 Amendment principles.

18 And the principles that are considered  
19 in that context are raised by the provider.  
20 They can include the sensitivity of the  
21 information. This Court, in Footnote 6 of the  
22 Miller decision, expressly said: Look, we  
23 understand there's a lot of sensitive banking  
24 information that's going on here. There are  
25 other protections besides abolishing the

1 third-party doctrine. They include the First  
2 Amendment and they include objections to the  
3 overbreadth of a request.

4 So, in response to your question,  
5 could the government just walk in with a  
6 subpoena and get a lifetime of this  
7 information, no, I don't think that we could,  
8 and I do not think that we would.

9 We are still limited by basic Fourth  
10 Amendment principles that apply even to  
11 subpoenas where there's not additional  
12 statutory protection.

13 JUSTICE ALITO: Now, yeah, Mr.  
14 Dreeben, in order to understand the issue here  
15 and to see the difference between this case and  
16 Jones, isn't it necessary to go back to old  
17 Supreme Court cases that describe -- that  
18 explain how the Fourth Amendment applies to a  
19 subpoena?

20 Asking another -- asking a party or  
21 ordering a party to produce documents is not a  
22 search in the literal sense of the word, nor is  
23 it a seizure in the literal sense of the word,  
24 but cases going back to Boyd, and Hale versus  
25 Henkel, old cases say that it's a -- it's a

1 constructive search. But in the situation  
2 where there's this constructive search, then  
3 the Fourth Amendment standards that apply to a  
4 literal search, what the Court called an actual  
5 search, are different. Isn't that -- so it's a  
6 fundamentally --

7 MR. DREEBEN: Yes.

8 JUSTICE ALITO: -- different  
9 framework.

10 MR. DREEBEN: It is a completely  
11 different framework because of both a lesser  
12 degree of intrusion, because the government is  
13 not going in itself and conducting search  
14 activity, and because there's an opportunity  
15 for pre-compliance judicial review.

16 JUSTICE BREYER: Right. And maybe  
17 you've got the answer to -- right there. You  
18 say how do we distinguish this case from all  
19 the cases where you wanted to get the  
20 commercial information.

21 In respect to the commercial  
22 information, banking and, you know, all the  
23 things for white-collar crime, it's commercial  
24 information. And you have the subpoenas and  
25 you can perhaps have the protections there that

1 -- that you were talking about here, but this  
2 is highly personal information on a -- on a  
3 line, you say, it's somewhat closer to the  
4 diagnostic testing than it is to purely  
5 commercial information.

6 Now, I could imagine writing a  
7 paragraph like that and saying leaving the  
8 other for the future. Does that work or does  
9 --

10 MR. DREEBEN: No. It --

11 JUSTICE BREYER: Now, I know you'd say  
12 no --

13 MR. DREEBEN: It doesn't -- doesn't  
14 work.

15 JUSTICE BREYER: -- but I need to know  
16 the reason.

17 MR. DREEBEN: Well, let me -- the  
18 basic principle here in the Fourth Amendment is  
19 how the government acquires information  
20 matters, not the sensitivity of the  
21 information.

22 I have to disagree, Justice Breyer,  
23 that medical information is given heightened  
24 protection under the Fourth Amendment. This --

25 JUSTICE BREYER: But the diagnostic --

1 the diagnostic test to the hospital.

2 MR. DREEBEN: Well, no. The Ferguson  
3 case, which I think --

4 JUSTICE BREYER: Yeah.

5 MR. DREEBEN: -- you're referring  
6 to --

7 JUSTICE BREYER: Yeah, I am.

8 MR. DREEBEN: -- involved a compelled  
9 search by the government, a urine test that the  
10 Court assumed was given without informed  
11 consent, so it was a government search by  
12 government hospital personnel that acquired the  
13 urine --

14 JUSTICE BREYER: All right.

15 MR. DREEBEN: -- for law enforcement  
16 purposes. That's the government search. I  
17 think this also answers Justice Sotomayor's  
18 question about acquiring GPS information under  
19 E911 from a handset. The government reaches  
20 into the phone, pulls out information. That, I  
21 would concede, is a search.

22 What we're doing here is not going to  
23 the individual and extracting information from  
24 him. We're getting information from a  
25 third-party provider, relying on the line of

1 cases that Justice Alito alluded to, that allow  
2 us to use subpoenas.

3 JUSTICE KAGAN: But -- but, Mr.  
4 Dreeben, that line of cases was developed in a  
5 period in which third parties did not have this  
6 kind of information, valid --

7 MR. DREEBEN: Not this kind  
8 specifically, Justice Kagan, but in the  
9 dissenting opinion in Smith, Justice Stewart  
10 warned that you're getting incredibly intimate  
11 information when you get the phone numbers of  
12 people who you have called.

13 And I would submit that if the Court  
14 thinks about it, the information you get if you  
15 know who you are calling and the inferences you  
16 can draw about what kinds of conversations  
17 people are having are extremely sensitive with  
18 --

19 JUSTICE KAGAN: Yeah, but if --

20 MR. DREEBEN: -- dialed phone numbers.

21 JUSTICE KAGAN: -- I understand what  
22 you're saying, you're basically saying, well,  
23 because the government is going to a  
24 third-party here and doing it by subpoena, it  
25 doesn't matter how sensitive the information



1 is. It doesn't matter whether there's really a  
2 lack of voluntariness on the individual's part  
3 in terms of conveying that information to the  
4 third-party.

5 And we could go on and we could give,  
6 you know, other factors that you might think in  
7 a sensible world would matter to this question.  
8 And you're saying that all of that is trumped  
9 by the fact that the government is doing this  
10 by subpoena, rather than by setting up its own  
11 cell towers.

12 MR. DREEBEN: I don't think I did say  
13 that, Justice Kagan, because there is an  
14 element here of voluntariness in deciding to  
15 contract with a cell company, just like there's  
16 an element of voluntariness in getting a  
17 landline phone and making calls, and there's an  
18 element of voluntariness in signing up for a  
19 bank account and using a debit card to purchase  
20 --

21 CHIEF JUSTICE ROBERTS: That --

22 MR. DREEBEN: -- everything in your  
23 life.

24 CHIEF JUSTICE ROBERTS: -- that sounds  
25 inconsistent with our decision in Riley,

1     though, which emphasized that you really don't  
2     have a choice these days if you want to have a  
3     cell phone.

4             MR. DREEBEN: Well, and not -- not in  
5     a practical sense, I agree with you, Chief  
6     Justice Roberts, that Riley did point out that  
7     cell phones were necessities. The dissents in  
8     Smith and Miller pointed out that a private  
9     telephone has become a necessity of business  
10    and personal life, and a bank account is a  
11    necessity of carrying out financial  
12    transactions.

13            JUSTICE GINSBURG: Mr. Dreeben --

14            MR. DREEBEN: The fact that --

15            JUSTICE GINSBURG: -- what you do in  
16    bringing up Riley with the distinction you made  
17    between -- you say it's the means that the  
18    government is using -- -

19            MR. DREEBEN: Uh-huh.

20            JUSTICE GINSBURG: -- we must be  
21    concerned about, not the information it  
22    obtains. But in Riley, it was the most  
23    traditional means. It was a search incident to  
24    an arrest.

25            MR. DREEBEN: Yes, it was a search.

1 And I think that that's the key point. The  
2 Court in Footnote 1 of Riley actually reserved  
3 whether acquiring aggregated information  
4 through other means would be subject to a  
5 different Fourth Amendment analysis.

6 JUSTICE GORSUCH: Mr. Dreeben, it  
7 seems like your whole argument boils down to if  
8 we get it from a third-party we're okay,  
9 regardless of property interest, regardless of  
10 anything else. But how does that fit with the  
11 original understanding of the Constitution and  
12 writs of assistance?

13 You know, John Adams said one of the  
14 reasons for the war was the use by the  
15 government of third parties to obtain  
16 information forced them to help as their  
17 snitches and snoops. Why -- why isn't this  
18 argument exactly what the framers were  
19 concerned about?

20 MR. DREEBEN: Well, I think that those  
21 -- those were writs that allowed people acting  
22 under governmental power to enter any place  
23 they wanted to search for anything that they  
24 wanted.

25 JUSTICE GORSUCH: Isn't that exactly

1 your argument here, that so long as a third  
2 party's involved, we can get anything we want?

3 MR. DREEBEN: Well, I think the search  
4 is being carried out under a writ of assistance  
5 by a government agent, operating under  
6 government authority; whereas here, we -- the  
7 -- if there's a search in the acquisition of  
8 cell site information, then it's the cell site  
9 company that is acquiring that information  
10 without governmental instigation, without --

11 JUSTICE GORSUCH: The subpoena --

12 MR. DREEBEN: -- governmental  
13 agency --

14 JUSTICE GORSUCH: -- being, though,  
15 the equivalent of a writ of assistance?

16 MR. DREEBEN: Oh, I don't think a  
17 subpoena is an equivalent of a writ of  
18 assistance. A writ of assistance allowed the  
19 agent to go into any house, to rip open  
20 anything looking for contraband, no  
21 limitations.

22 JUSTICE GORSUCH: Yeah. And you can  
23 subpoena anything that any company has anywhere  
24 in the globe regardless of any property rights,  
25 regardless of any privacy interests, simply

1 because it's a third-party?

2 MR. DREEBEN: So I -- I think that, as  
3 Justice Alito was explaining, there is a  
4 traditional understanding that dates back to  
5 the time of the founding that subpoenas stand  
6 on a different footing from search warrants.  
7 And they do that because they are less  
8 intrusive, since they do not require the  
9 government going into private property and  
10 searching itself.

11 CHIEF JUSTICE ROBERTS: Why does that  
12 --

13 MR. DREEBEN: And --

14 CHIEF JUSTICE ROBERTS: -- why does  
15 that make a difference? The subpoena tells the  
16 person who gets it: this is what you have to  
17 do.

18 MR. DREEBEN: Well, I think that most  
19 --

20 CHIEF JUSTICE ROBERTS: Why is that  
21 less intrusive? The whole question is whether  
22 the information is accessible to the  
23 government.

24 MR. DREEBEN: So I -- I think most  
25 basically it makes a difference because this

1 Court's cases have said so from time  
2 immemorial. And the reason why it has said so  
3 is that if I go into your house to search, I  
4 will expose a great deal of additional  
5 information to government view beyond what is  
6 sought by the terms of an authorization.

7 And so, if I could just complete the  
8 answer.

9 CHIEF JUSTICE ROBERTS: Sure.

10 MR. DREEBEN: The -- the difference  
11 here is that the government is operating under  
12 court supervision with an order that provides  
13 particularity. It provides the interposition  
14 of a neutral magistrate between the government  
15 and the acquisition of information. And it  
16 does require a showing that is less than  
17 probable cause but is above what a traditional  
18 subpoena requires.

19 So even if the Court does think that  
20 there is a search here, Congress has properly,  
21 in our view, calibrated the balancing of  
22 interests, and the Court should affirm it as a  
23 constitutionally reasonable order.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Four minutes, Mr. Wessler.

2 REBUTTAL ARGUMENT OF NATHAN F. WESSLER

3 ON BEHALF OF PETITIONER

4 MR. WESSLER: Thank you, Mr. Chief  
5 Justice.

6 If I could begin, I have several  
7 points, but to begin on that subpoena point.  
8 And, Justice Alito, to your question about the  
9 historical pedigree of the subpoena doctrine, I  
10 think this Court made absolutely clear in Riley  
11 that the historical pedigree of older Fourth  
12 Amendment doctrines does not automatically  
13 determine the outcome in the digital age.

14 And as you yourself, Your Honor,  
15 recognized in your concurrence there, the  
16 search incident to arrest doctrine had its  
17 origins at least a century before the -- the  
18 framing of the Fourth Amendment, and yet it  
19 yielded to a new understanding.

20 And I think that --

21 JUSTICE ALITO: That's certainly true,  
22 but you'd want to -- so this is -- this would  
23 be revolutionary, to fundamentally change the  
24 understanding of the application of the Fourth  
25 Amendment to subpoenas. Do you want us to do

1 that?

2 MR. WESSLER: Well, I -- I don't think  
3 it's revolutionary at all. And I think the  
4 reason that is is the government's concession,  
5 as I hear it, that the contents of electronic  
6 communications should be protected.

7 Once we recognized that there is an  
8 exception for the contents of e-mails, we've  
9 already acknowledged that the subpoena doctrine  
10 can't stand in its most severe form. And if --  
11 if the contents of e-mails are to be protected,  
12 it's not because they are sealed in transit,  
13 as, Justice Sotomayor, you pointed out.

14 They're unlike in a fundamental way  
15 the paper letters at issue in 1877 in Ex Parte  
16 Jackson. They are actually accessible to and  
17 accessed by the service providers, as the  
18 government has argued in other cases, including  
19 the Microsoft case to be heard later this --  
20 this term.

21 So, if they're to be protected, it's  
22 because of their sensitivity and because of  
23 people's long-standing expectation that their  
24 communications are highly sensitive and would  
25 remain private.



1           And as the concurrences at least  
2           recognized in Jones, also highly private and  
3           sensitive are these kinds of longer-term  
4           location records.

5           Second, I just want to highlight that  
6           the -- the government, Mr. Dreeben, as I heard  
7           him, conceded that the precision of these  
8           records doesn't matter at all to the  
9           government's theory here.

10           They could be precise, I take it, to  
11           within a single inch. And the fact that a  
12           third party has custody of them would, in the  
13           government's view, vitiate any expectation of  
14           privacy, which we think would be a very  
15           destructive rule.

16           Third, this is not an area where the  
17           Court should pause and wait for Congress to --  
18           to act. My colleague intimated that in an area  
19           of rapidly changing technology, it's  
20           appropriate to -- to perhaps abstain and let  
21           Congress step in. We -- we are well over two  
22           decades into the cell phone age. This is an  
23           area where, as the Court recognized in Riley,  
24           people's use of this technology is well settled  
25           and only becoming more pervasive over time. We

1 know the -- the direction, the cases before the  
2 Court now, and -- and it is crucial that the  
3 Court act.

4 And, finally, to the property  
5 principles, first one statutory point, Justice  
6 Alito, Section 222(c)(2) actually does give the  
7 customer the right to obtain the information.  
8 Now, as we pointed out in our brief, the  
9 carriers have not reliably complied with that,  
10 at least as of several years ago, but --

11 JUSTICE ALITO: No, I understand that,  
12 but you said in your brief that the -- that the  
13 companies wouldn't comply.

14 MR. WESSLER: That I -- I don't know  
15 what the state of -- of play is today. As of a  
16 few years ago, the last time I have  
17 information, they were not complying. But --  
18 but under Fourth Amendment property principles  
19 and property law more generally, it's of course  
20 quite common for a property right to be divided  
21 between different -- different parties, for the  
22 bundle of sticks to be split up. And here  
23 people have a right to exclude and a right to  
24 determine use of the data secured by the  
25 Telecommunications Act.

1           Certainly, we acknowledge that the --  
2           the provider itself has some property right,  
3           maybe several of those sticks in the bundle,  
4           but that doesn't eliminate some right on -- on  
5           the part of -- of -- of the customer.

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

8           JUSTICE ALITO: Could I just ask you  
9           this question: Is any of this going to do any  
10          good for -- for Mr. Carpenter?

11          (Laughter.)

12          MR. WESSLER: Uh --

13          JUSTICE ALITO: Is he going to get  
14          anything suppressed? Because under Illinois  
15          versus Krull, if -- if a search is conducted in  
16          reliance on a statute authorizing the search in  
17          accordance with a certain procedure, the  
18          exclusionary rule doesn't apply.

19          MR. WESSLER: May I answer? Thank  
20          you.

21          So the -- that question is not before  
22          this -- this Court.

23          JUSTICE ALITO: No, I understand that.

24          MR. WESSLER: It will be dealt with on  
25          remand. I think that we have arguments on --

1 on both of the -- the types -- quite strong  
2 arguments on both of the prongs of the good  
3 faith exception.

4 On the statutory prong, the Stored  
5 Communications Act provides two mechanisms, an  
6 order and a warrant. And we think that that  
7 makes this fundamentally different than other  
8 statutes that may clearly provide a means.

9 And, second, on the court order, this  
10 is unlike a warrant, and all of this Court's  
11 cases on the good faith exception have dealt  
12 with warrants based on affidavits from an  
13 investigating officer, this is an unsworn  
14 application from a prosecutor who we think  
15 should know better.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel. The case is submitted.

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

21

22

23

24

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