SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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OKELLO T. CHATRIE,)
Petitioner,)
v.) No. 25-112
UNITED STATES,)
Respondent.)

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Monday, April 27, 2026

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

APPEARANCES:

ADAM G. UNIKOWSKY, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

ERIC J. FEIGIN, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 25-112, Chatrie versus United States.

Mr. Unikowsky.

ORAL ARGUMENT OF ADAM G. UNIKOWSKY

ON BEHALF OF THE PETITIONER

MR. UNIKOWSKY: Mr. Chief Justice, and may it please the Court:

The government conducted a search of Petitioner's location history, and the warrant that purported to authorize that search violated the Fourth Amendment.

The government conducted a search. The Court should hold that people have a property interest in their data in their accounts on the cloud. Location history has the core attributes of property Petitioner had a right to exclude, to control, and to destroy.

Additionally, Petitioner had a reasonable expectation of privacy in his location history given both its sensitive and revealing nature and the fact that it was stored in his password-protected account.

The warrant violated the Fourth Amendment -- Amendment. The warrant authorized the government to direct Google to search every single person's account to find those people who were within the geofence. That is a general warrant.

Even if the search materialized only when the data was found and exposed to the police, the warrant would still be unconstitutional because there was not probable cause to search the virtual private papers of every single person within the geofence merely because of their proximity to the crime.

Finally, at step 2 and step 3, the search violated the Fourth Amendment because the warrant gave the police unlimited discretion to decide who to search while casting Google into the role of magistrate.

I welcome the Court's questions.

JUSTICE THOMAS: How exactly did the warrant violate Petitioner's rights at the -- Fourth Amendment rights at step 1?

MR. UNIKOWSKY: So, at step 1, we understand this warrant to have --

JUSTICE THOMAS: I thought it was

anonymized at step 1.

MR. UNIKOWSKY: That's true. So, from our perspective, at step 1, we believe that there was a search of every single account, and, alternatively, at a minimum, there was a search of the accounts of all the people whose data was exposed to Google. But, either way, we view that as a search that the warrant authorized.

But let me specifically answer your question about anonymity. We view the anonymity in this case as both irrelevant to the Fourth Amendment analysis and also rather illusory.

So, first of all, I don't think anonymity matters because I think a search is a search even if you don't know the target of the search. Like, if you go to a bank and you break open a safety deposit box -- I'm sorry, Your Honor, did you have a question?

JUSTICE THOMAS: No.

MR. UNIKOWSKY: If you go to the bank and break open a safety deposit box, even if you don't know who owns the box, if you inspect the papers, I still think that counts as a

search, as well, as a practical matter, anonymity is somewhat illusory because one's movements within the geofence often functions as a kind of fingerprint. You can figure out who the person is based on a fairly small amount of movements. In this very case, our expert was able to identify three purportedly anonymous people via a close analysis of their movements as well as some public records.

JUSTICE JACKSON: So, under your --

CHIEF JUSTICE ROBERTS: If you don't want the government to have your location history, you just flip that off. You don't have to have that feature on your -- on your phone. So what's the -- what's the issue?

MR. UNIKOWSKY: I take the point that you can flip it off, but I guess I just don't agree that one should have to flip off one's location history as well as other cloud services to avoid government surveillance.

I mean, by the same token, you don't have to send email. You can flick that off as well. But that doesn't imply that you're implicitly consenting to the government searching one's email.

CHIEF JUSTICE ROBERTS: Well, not implicitly consenting, but the only reason the government has access to this information is because you decided to make it public to the extent it can be accessed by people any number of ways. In other words, people can use that information, not -- not simply law enforcement.

MR. UNIKOWSKY: Well, I guess I --

CHIEF JUSTICE ROBERTS: Just like, if you -- you -- you know, if you don't want them to peer into your -- your window, you can close your window or the shades.

MR. UNIKOWSKY: I take the point, Your Honor, but I guess I'd respectfully disagree with that assessment for a couple of reasons.

So, first of all, I think you could say the same thing about, you know, sending mail. If you don't want the government to look in your mail, you don't have to send it and give it to the Postal Service, or the same thing with a safety deposit box, but I think that, you know, one should be permitted to hand over data to a third party without assuming the government is going to look at it, especially since -- you know, it's true in this case

Petitioner was convicted of the crime, but geofence warrants mostly ensnare innocent people. In this case, you had 19 people within the geofence whose data was exposed, as well as two other devices whose actual identity was exposed. And, you know, Google received 9,000 of these warrants in 2019.

So I don't think a, you know, innocent person should have to shut off these services as a condition of not being subject to a search.

JUSTICE KAGAN: Do the numbers make a difference? Would it matter if only 1 percent of users enabled location history?

MR. UNIKOWSKY: I -- I don't think it should matter. The government has made a point about the fact that only one-third did -- enabled it, but I actually don't think those matters really are -- significant because, if you view a person as having, you know, a property interest in the data, in other words, if you treat one's account as kind of a virtual safety deposit box, then I don't think it matters how many people have these -- these virtual safety deposit boxes. Even if it's

only one, if the legal relationship to the data is similar to the legal relationship between someone who sends a package whereas --

JUSTICE ALITO: Mr. Unikowsky, it's -- it's not just a question of -- of shutting -- it's not a question of shutting it off. It's a question of turning it on. And according to the government, your client had to go through multiple steps in order to turn it on.

So he voluntarily disclosed to Google the information about where he was going to be.

MR. UNIKOWSKY: So if I could make two points about the voluntariness argument that the government advances.

So, first of all, I actually don't think it should matter for Fourth Amendment purposes that there was voluntariness because it's quite common for people to consent to putting their data in the cloud in the sense of every time you send an email or you send a document, have a Google calendar entry, all those things, you're consenting to sending it in encrypted fashion from your phone to the cloud. But I don't think that the consent merely to have your data stored in this virtual

storage locker in and of itself is consent to disclose to the government.

JUSTICE ALITO: Well, he not only -- he not only turned it on, but had he read his contract with Google, he could see that Google retained the right to turn this information over to law enforcement if it thought that that was appropriate.

MR. UNIKOWSKY: That is the same provision that exists for everything that you store on Google's servers, including email and documents and everything else. So it seems to me, if you're going to accept that argument, then that is really the -- the end of the Fourth Amendment for any private document you're storing with Google.

JUSTICE GORSUCH: I mean, the --

JUSTICE KAGAN: Suppose Google, you -- you know, put that warning in red and it flashed a lot and it was totally noticeable, you know, we can give this to the government. Would that make a difference?

MR. UNIKOWSKY: If there was a flashing warning saying that, you know, we reserve the right to give for any -- any reason

whatsoever, I think that might be more pertinent to the property theory than the privacy theory because, on the privacy theory, you know, the Court said in the Byrd case that, you know, terms of use aren't necessarily dispositive. They should look at sort of general expectations.

I mean, maybe if it was, like, really flashing and saying that we are the government's partner, we give data to the government all the time, you know, maybe that would -- that would result in a different analysis based on one's reasonable expectations.

Under the property theory, it might be relevant because one of our arguments here is that the terms of the bailment are that Google could possess this information but couldn't necessarily turn it over. There was a strict privacy policy so it wouldn't turn it over to advertisers.

JUSTICE GORSUCH: Well, in -- in that -- that --

MR. UNIKOWSKY: Yes, Your Honor?

JUSTICE GORSUCH: -- privacy policy,

the -- the -- the terms of service pretty much -- and I'm phrasing here -- we will respond to lawful requests from the government. I -- I don't know whether one even needs to say such a thing, right? I mean, it's -- anybody who gets a warrant and lawful -- a lawful warrant has to comply with it, a bank, a doctor, a lawyer, a -- anybody. So it doesn't seem to me to add a great deal to the analysis.

And -- and are the terms of service here materially different than they are for email and for Google documents?

MR. UNIKOWSKY: So, as to the first point, I agree. And, actually, the U.S. Postal Service has the same provision in their terms of use: We'll comply with search warrants. But I think a search warrant is still needed there.

And on the second point, no. The general language that the government will -- excuse me -- that Google will comply with search warrants and that Google will, you know, reveal aggregated information, like what's the most searched term of last year -- it turns out it's YouTube -- like that type of disclosure,

that applies to all data that's stored at Google, not just location history.

JUSTICE GORSUCH: So -- so, if we were to rule that there was a voluntary exposure here to Google that allows the government unfettered access to it, that ruling would pertain equally to email?

MR. UNIKOWSKY: That's correct. Essentially, all of your data on the cloud, which is kind of all of your data if you use a computer, would be exposed to government searches without a warrant.

JUSTICE KAGAN: So where do you think voluntariness matters and where not? What -- what you're suggesting is really that's the wrong question here. When is it the right question and when is it the wrong question?

MR. UNIKOWSKY: So I think there might be a voluntariness issue when it's very clear from the interaction that you really are consenting to the other person doing whatever they want with it, such as when you give information to someone, knowing that the someone is going to use it as a business record.

So I think that the -- the Miller case, for example, we're certainly not disputing the holding of Miller, and in the Miller case, the Court explained that if you put a check into the stream of commerce, okay, so you give it to a vendor, and then the vendor gives it to their bank, and then their bank gives it to your bank and it becomes their business record, you can't control it, they keep it for their purposes, you can't delete it, you have voluntarily put something into the stream of commerce and you've sort of given up control over it in the relevant sense.

And so, on that fact pattern, the Court -- said that you have relinquished an expectation of privacy. And there's a similar holding in the Smith case. The Court said that when you give your phone number to the phone company, you know it's their record. They're putting it on your -- you know, your phone bill. They're using it for all kinds of business purposes. It's exactly like it used to be when you just talked to a telephone operator.

And in that case, you're not just

giving someone information like you're mailing something, but you're, like, giving consent for them to treat it as theirs. And that's the fact pattern that I think the Court has said that, you know, the -- the voluntariness of that transfer of property is sufficient to say that you've given up your reasonable expectation of privacy as well as your property interest.

JUSTICE ALITO: Mr. Unikowsky, I'm struggling to understand why we are hearing this case other than the fact that at least four of us voted to take it.

(Laughter.)

JUSTICE ALITO: Fourteen of the 15 judges on the en banc Fourth Circuit voted to affirm. Nine relied on the good-faith exception. Unless you think that we're going to say something that convinces the -- unless we're -- you -- you think we are going to say no reasonable officer could believe that this was a valid warrant or we're going to say something that will convince the judges on the Fourth Circuit to reach that conclusion, what you're asking for is an advisory opinion.

That's number one.

This involves a Google feature that doesn't exist any longer. That's number two.

It involves a warrant that is structured in a particular way. That's number three.

I -- I don't -- I mean, we are all free to -- to write law review articles on this fascinating subject, but I -- that seems to be what you're asking for, asking for basically a law review article on a subject that it is largely -- unexplored by our precedents.

MR. UNIKOWSKY: So let me tick through each of those points, Your Honor.

So, first of all, as to the good-faith exception, the Court did not grant certiorari on that question and so we didn't brief it, so all we'd ask for in this case is, if the Court finds a Fourth Amendment violation, to reverse and send it back to the Fourth Circuit to consider the good-faith issue in view of this Court's guidance.

Now I admit it's going to be hard for us on the facts of this case to say that the officer acted maliciously or that the legal

issues are obvious. I think, if there's anything obvious from the briefs in this case, it's that they're not obvious.

We would make a different argument. We'd say that the Leon good-faith exception applies to fact-bound challenges to probable cause determinations in a particular case and shouldn't apply where we're challenging a new and fundamentally different type of warrant.

And if you look at Leon, there's -- there's some language in there that says that the exclusionary rule even in cases of warrants should be considered on a case-by-case basis, and exclusion is warranted in the unusual context where it would advance the purposes of the exclusionary rule.

So we'd just like a chance to make that case in the Fourth Circuit with the benefit of the Court's guidance.

In terms of the issue that Google has discontinued the -- the Sensorvault and has put the data onto people's phones, first of all, this was fully ventilated at the certiorari stage. I don't -- I don't think that there's any surprises that are in the merits briefs in

this case.

I think this is an important subject because lots of providers store data, not just Google. There's something like 30 amicus briefs or 29 amicus briefs in this case, including by many of the -- the titans of the tech world, and so I think a lot of people think that this case will have implications beyond these particular facts. So we'd urge the Court to decide the question on which it -- it granted certiorari.

JUSTICE JACKSON: And isn't --

JUSTICE ALITO: Well, we can affirm on any ground that would support the judgment and was raised below, and the good-faith exception qualifies on all those points.

So the fact that the Court did not grant certiorari on the good-faith exception does not preclude any of us from relying on that.

MR. UNIKOWSKY: I'm not sure I agree. We would -- I mean, the Court specifically declined certiorari on that question, so we didn't brief it.

And we -- we raised in our cert

petition that we'd like the chance to argue that the questions are intertwined, and in view of the holding on the Fourth Amendment issue, we'd like to, you know, litigate the good-faith issue. The Court didn't grant certiorari. We didn't brief it.

The government did have a section of the Respondent's brief addressing the good-faith exception, but adhering to the Court's decision not to grant certiorari, we didn't respond in the reply brief except to ask for a remand. So --

JUSTICE ALITO: Well, that was your choice.

MR. UNIKOWSKY: We -- the Court did not grant certiorari. We were reluctant to brief a question on which the Court specifically declined to answer --

JUSTICE ALITO: Well, you're an experienced advocate. You understand that we can affirm on -- on an issue that was raised below and would support the judgment.

MR. UNIKOWSKY: Look, I'm happy to argue the issue from the podium, Your Honor. I'll just say one word about it.

I think that the -- that the premise of Leon is that it's not necessary to apply the exclusionary rule in the case of a fact-bound challenge to a probable cause determination in a particular case because probable cause is litigated all the time outside the context of warrants, whereas, in an issue like this, a challenge to a fundamental new type of warrant, I do think litigants need an adequate incentive to litigate the constitutionality of such warrants, and the only way that'll happen is through the exclusionary rule.

And there is some language in the Davis case that -- adverts to -- to holding that in cases where you need an adequate incentive to litigate an issue, the Court would consider applying the --

JUSTICE SOTOMAYOR: Mr. --

JUSTICE JACKSON: And, Mr. Unikowsky, isn't there also a pretty significant split even within the Fourth Circuit over the issue of whether or not there was a search in this context? I mean, my understanding is that the Fourth Circuit split evenly 7 to 7 on that pretty significant issue.

MR. UNIKOWSKY: That is correct. It was 7-7, with one judge declining to reach the issue. So, obviously, there are some important issues that go well beyond the particular facts of this case, and there's also some important issues in terms of the constitutionality of the warrant that go well beyond the facts of this case.

JUSTICE SOTOMAYOR: Counsel, I just want to button down some of your answers. The privacy policy that the person is giving consent to would affect, you said, Internet, but it would also affect Google Photos, which have to do with what photos you take and store in your device, correct?

MR. UNIKOWSKY: Correct.

JUSTICE SOTOMAYOR: Google Documents, what documents you store?

MR. UNIKOWSKY: Correct.

JUSTICE SOTOMAYOR: Google Calendar, your entire calendar. If this is consent, that means the government can seek those documents for any reason, not just the commission of a crime, or no reason, correct?

MR. UNIKOWSKY: Correct. It would --

it would not be a search, so no search warrant would be required.

JUSTICE SOTOMAYOR: So that means the government, a police officer randomly who decides, I don't like that person, let me just go look at their life to see if I can find a crime, that would be okay?

MR. UNIKOWSKY: There might be some constraints under the Stored Communications Act, but as far as the Fourth Amendment is concerned, no.

JUSTICE SOTOMAYOR: Right. But that's not at issue here?

MR. UNIKOWSKY: Correct.

JUSTICE SOTOMAYOR: All right. And that wouldn't be for other things?

MR. UNIKOWSKY: Correct.

JUSTICE SOTOMAYOR: For some of these things, like calendar entries?

MR. UNIKOWSKY: So -- there might be a question as to whether calendar entries are protected -- as a statutory matter, but, again, we're here under the Fourth Amendment, and so that's --

JUSTICE SOTOMAYOR: And we can't

ignore today that the district court made findings that the consent here was not necessarily voluntary.

MR. UNIKOWSKY: There are findings that at midnight, when you're saying yes, I'm in, to try to get your phone to work correctly, that may not be a consent to the government searching your phone.

JUSTICE SOTOMAYOR: And there are certainly Google documents that show that it's very hard and if not opaque to figure out how to turn these things off, correct?

MR. UNIKOWSKY: Yes.

JUSTICE SOTOMAYOR: Now let's go to your -- your general warrant theory. I understood at the founding a general warrant was I have a crime and I -- a magistrate permitting you to go willy-nilly anywhere you want to anyone you want to search them. I thought that was the purpose of a general warrant, correct?

MR. UNIKOWSKY: Yes.

JUSTICE SOTOMAYOR: That's not what this does. This identifies a place, a crime, a limited time frame but a time frame. So it's

not a general warrant in its historical sense. Why isn't this closer to the warrants that we permitted with beepers, where we don't have a person or necessarily a place in mind, but we have a location and general things, why isn't that more consonant with Berger, Zucker, Karo, those lines of cases?

MR. UNIKOWSKY: Sure.

JUSTICE SOTOMAYOR: And that didn't identify a person, but it identified a crime, a place, and the nature of the unlawful conduct that we were looking for.

MR. UNIKOWSKY: Sure. So let me say a few words as to why I think this should be considered a general warrant and then a few words about why the warrant was defective even if you disagree with me on the first few words I say.

So, first of all, I think the right way to think about this search is to say, one, that Google, because it received a search warrant, was acting as the agent of the government and, two, that Google really did search every single person's virtual -- private safety deposit box.

So, as to the first part of that, this Court has said that when a third party's acting with the encouragement, endorsement, or participation of the government in executing a search warrant, that third party is --

JUSTICE SOTOMAYOR: Could I pause you there?

MR. UNIKOWSKY: Yes.

JUSTICE SOTOMAYOR: It wasn't Google doing it. It was a filter doing it.

MR. UNIKOWSKY: Well, it was --

JUSTICE SOTOMAYOR: I mean, the filter is not the government. It's not even Google. It's a mechanical item that sorts.

So why isn't -- so how could that be a search? It seems to me that the only search would be handing it over to the government.

MR. UNIKOWSKY: So let me say a few word --

JUSTICE SOTOMAYOR: Step 1 basically.

MR. UNIKOWSKY: Sure. Let me say a few words about that and then say why, even if the search is the handing over, the warrant is still defective.

So, as to the first part, you're

absolutely right, there's not a human being sifting through 500 million people's accounts. That would take an extremely long time. At the end of the day, it was a piece of software that was going through every account, piercing, from our perspective, every virtual safety deposit box and checking inside to see whether the person was there that day.

So I still think that when you're using software to search someone's phone, which is how any kind of digital search operates today, that's still a type of search because it's using a tool in order to detect information. And it's true that it's a tool, it's not the human being that's looking at it, but it's still a human effort to pierce a private area in order to find something that's there. So --

JUSTICE KAGAN: Would that mean all database searches are searches for Fourth Amendment purposes?

MR. UNIKOWSKY: Absolutely not, Your Honor. That is not our position. I think this is a unique case because Google's Sensorvault really is structured like a row of virtual

safety deposit boxes, individual accounts. It's indexed by account, which means you have to put in your own credentials to get to your account, and that doesn't get to you anyone else's. So it's exactly like a bank with safety deposit boxes except it's in the cloud. So --

JUSTICE KAGAN: So does everything depend on how a company organizes its information?

MR. UNIKOWSKY: I don't think everything depends on that. I think that this is a unique case because the fact that -- Google organizes its data that way is not some kind of arbitrary engineering decision. It really is essential to the security of a system with lots of private accounts to index them by account.

So the technologists' amicus brief, I think, has a good analogy here. It says that it's not, you know, arbitrary that a hotel divides different people into different rooms as opposed to stacking all of the bunk beds in the lobby. Like, a hotel which divides people into different places, it's logical to have

walls between them. And in this case, there's, you know, virtual walls as opposed to physical walls.

But I don't think the fact that Google could have constructed its system in a completely different and, from our perspective, inappropriate way should affect the analysis.

JUSTICE BARRETT: But, Mr. --

MR. UNIKOWSKY: But just -- I'm sorry.

JUSTICE BARRETT: I'm sorry. Finish, please.

MR. UNIKOWSKY: No, please go ahead.

JUSTICE BARRETT: I -- I was just going to say this seems very complicated from the user's point of view, frankly. You know, I have no idea how my data is stored and whether it's in these virtual lockers or not. And I guess one question that I have for you is I'm struggling to decide how to think about this case.

One way to think about this case is that, listen, our physical intrusion cases, our property cases require a physical intrusion, and Katz set us off on this course that when we're talking about technology, we think about

it in terms of reasonable expectations of privacy.

And I am, frankly, a little bit nervous -- and, I mean, I -- I think the government makes this point well -- I'm a little bit nervous because this is very complicated, right, figuring out how bailments apply, what the property interest in this data is. Why not just think about this from the perspective of reasonable expectation of privacy?

MR. UNIKOWSKY: That would be fine with us, Your Honor. We've offered two alternative paths. Different members of the Court have articulated the -- you know, the --

JUSTICE BARRETT: Right.

MR. UNIKOWSKY: -- relevant test differently. I mean, in Carpenter, the cart -- Court relied on reasonable expectations of privacy. We think there's two different sources here of the reasonable expectation.

One is the fact that it was stored in the password-protected account. This Court has said that property issues are instructive as to the reasonable expectations, even if not

dispositive. So, if you think it matters that this was in his password-protected account, you can say that that's pertinent to the privacy inquiry without getting into this trespass and bailment law, as well as the sensitivity of the data, which was at issue in Carpenter.

JUSTICE BARRETT: Okay. Well, this is pretty -- so I think Carpenter -- we haven't talked about Carpenter yet -- is -- is pretty on point, but this is different from Carpenter. Putting aside that this was in a password-protected account, taking account of the fact that Google had the right to use this for advertising purposes, right, I mean, he was -- this was a few hours and it was a public location. And nobody has a reasonable expectation of privacy in their public observable movements.

So does that make this different from Carpenter?

MR. UNIKOWSKY: So I still think that even though the stretch of time was lower than in Carpenter, there is still a reasonable expectation of privacy for a few reasons.

First of all, I don't think it's just

the two hours. I think it's the -- the forever. It's the comprehensiveness and the ability of the government to get access to really any two-hour stretch anywhere it wants to at any point in the past.

It's -- I think it's quite different from a case like Knotts, where, you know, the police were following someone on a highway and they put a beeper just to enhance the quality of the visual surveillance.

And so, you know, that -- you know, this Court in Carpenter framed the question as can't -- are police doing what they could have done in the past, or is this a fundamental increase in the ability of, you know, law enforcement to conduct surveillance.

And, here, I think it is. I mean, the government has this tool that can go any point in the past at any stretch of time. It -- you know, it could figure out where, you know, all of the people rather than just one person in a particular place, and it can follow that person around. Like, we see in this case, of the nine people who were of greatest interest to the government at step 1, it followed those people

around outside the geofence at step 2. And I think that all of those considerations create significant privacy implications even though it's true the initial geofence was just an hour.

JUSTICE BARRETT: But you can't raise the Fourth Amendment issues or the Fourth Amendment rights of the other people who might be captured in the geofence. We're really just talking about your client's Fourth Amendment rights, right? I mean, because you keep pointing out, well, this swept in a lot of innocent people. Sure. But, really, it's your client's Fourth Amendment rights that we care about here.

MR. UNIKOWSKY: That -- that's true. I just think, broadly speaking, when we're considering the privacy implications of -- of the rule and reasonable expectations of privacy, you know, I just think it's relevant, you know, what the -- the Court's rule is, how is it going to affect, you know, third parties.

I understand it's just Petitioner's rights at stake, but even staying laser-focused on Petitioner, you know, this was a law

enforcement tool that allowed the government to determine where Petitioner himself was at any point in the past.

JUSTICE JACKSON: Mr. --

MR. UNIKOWSKY: Yes, Your Honor.

JUSTICE JACKSON: Oh, sorry. Are you done?

JUSTICE BARRETT: Only -- only in public places, though?

MR. UNIKOWSKY: Well, the government has taken the position in its brief that even if you're in your own house and a geofence warrant is used, the government has a footnote suggesting that there wouldn't be a constitutional violation either.

Obviously, this case did involve a bank. I acknowledge that, although -- just one other word -- because of the error bars, because of the confidence intervals in some of these estimates, actually, those confidence intervals may have encompassed people's homes, and, in fact, three of the people within the geofence went to their houses and were possibly identified by our expert.

Yes, Your Honor?

JUSTICE JACKSON: So I wanted to invite you to finish your answer to Justice Sotomayor when you said -- you tried to defend the G -- the general warrant analysis, and then you said, even if you don't agree with that, I have another point. But, before you do that, let me just home in for a second on the general warrant analysis.

If we take Justice Barrett's point that this is really about reasonable expectation of privacy, what about the initial sorting intrudes on anyone's reasonable expectation of privacy?

MR. UNIKOWSKY: I guess I just think that when I -- if I have, you know, information in a physical storage, you know, safety deposit box, I guess I think that my expectation is that no one is going to look inside for any reason. Even if a tool is used, like, you know, the Kyllo tool, you know, the Thermovision, for any reason, if I have stuff inside, people won't look at it in order to conduct a law enforcement investigation.

And I understand the intrusion at step 1 was -- was fairly limited. It was just a

computer zipping past all these accounts just checking quickly whether they were in a particular place. But, you know, cases like Jones say that even a very small trespass is enough.

But I see my red light is on. If I could just answer Your Honor's second question?

CHIEF JUSTICE ROBERTS: Well, why don't you wait until we get --

MR. UNIKOWSKY: Okay.

CHIEF JUSTICE ROBERTS: -- back to that. It seems to me that the exigent circumstances exception could well expand if you're right. I mean, obviously, you have situations where you know somebody in this particular crowd has -- snatched a child or was involved with somebody who snatched a child.

In those situations, I suppose you agree that you don't have to go through a warrant process but can access the information under exigent circumstances?

MR. UNIKOWSKY: I do. The Court made that very clear in Carpenter. I mean, this warrant was sought several weeks after the crime, and so any exigent circumstances, I

think, argument would have gone away. Our position today is not intended to undermine any well-recognized exception to the warrant rule.

CHIEF JUSTICE ROBERTS: Well, my -- my question is whether -- whether intended or not, whether it could be used to expand it a great deal. I mean, what's exigent can be expanded if, in fact, it makes sense. It's when you have -- you don't have this much access, you can't -- doesn't do any good to say, yeah, okay, you know, you have to search to -- to find out who all these people are. But, if at the push of a button you can find out who they are, that might give you more opportunities to avail yourself of the exception. I don't know which way that cuts, but it does seem to me that it might undermine privacy interests further --

MR. UNIKOWSKY: Well, if this --

CHIEF JUSTICE ROBERTS: -- or -- or cut the other way in the sense of giving you more opportunities to perhaps catch people who are -- you know, planted a bomb or whatever.

MR. UNIKOWSKY: Look, if there's an ongoing emergency with a bomb, I mean, we're

not going to argue against the use of these law enforcement tools even if there might be, you know, a significant amount of privacy violations. And so, yeah, I mean, this can be a potential useful tool in the case of a bona fide exigent circumstance -- exigent circumstances. We're -- we're certainly not challenging that, Your Honor.

CHIEF JUSTICE ROBERTS: Justice Thomas, anything further?

Justice Alito?

JUSTICE ALITO: Justice Kagan asked you whether this would apply to all searches, all -- all digital searches. Let me go back to the pre-digital era. It wouldn't -- it's not at all uncommon, it was not at all uncommon, for a grand jury to issue a subpoena requiring a company to turn over a category of particularly described documents, but that, for the company to find those documents, required a search through a vast store of hard-copy documents.

What's the difference between this situation and that situation?

MR. UNIKOWSKY: So I don't think a

grand jury subpoena or any kind of subpoena would have been constitutionally permissible in this case.

JUSTICE ALITO: Well, I know you say that, but what is the -- what is our test for determining when a grand jury subpoena violates the Fourth Amendment?

MR. UNIKOWSKY: So I think there's two circumstances when it does. One is when the holder of the documents are really a bailee of someone else's documents. So one example would be a grand jury subpoena directed at the Postal Service or FedEx asking it to open every single package or piece of mail to find a piece of data, or, you know --

JUSTICE ALITO: When it's the company's own documents?

MR. UNIKOWSKY: Right. So when it's the -- so, of course, as we've said, we don't think that's this case. But, when it's the company's own documents, I just go back to the test in Carpenter, which is there's a narrow category of cases in which a -- a person will have a reasonable expectation of privacy in business records held by a company, and in that

category of cases, the subpoena's unconstitutional. But --

JUSTICE ALITO: Well, in -- I'm sorry, go ahead.

MR. UNIKOWSKY: No, no, please.

JUSTICE ALITO: Well, in Carpenter, what seemed to be a very important feature, I think maybe a dispositive feature, was that the information that was sought was information that the user of the cell phone had no choice but to disclose because the -- the -- the cell phone tower location is an indispensable feature of actually using your phone.

That is not the situation here.

MR. UNIKOWSKY: I take the point that it's possible to function in society without having location history enabled, although, you know, it's -- it's actually quite hard to function without having anything in the cloud. I'd say virtually everyone in this room has at least something in the cloud.

JUSTICE ALITO: Well, but that's -- we're not talking about everything in the cloud. We're talking about location history --

MR. UNIKOWSKY: Right. It's actually

quite hard --

JUSTICE ALITO: -- on an Android -- on an Android phone, where you have to take a number of steps in order to disclose it.

MR. UNIKOWSKY: So --

JUSTICE ALITO: You have to choose to disclose it.

MR. UNIKOWSKY: -- I take the point that you have to click yes, I'm in, in order to enable location history on your Android phone or any other type of phone.

But, first of all, I just -- if you agree with us that this is a personal record and not a business record, that argument just doesn't matter because you make the choice to enable email or put documents or photographs into the cloud. You're choosing to send that photograph, but that choice shouldn't undermine the Fourth Amendment protection, just like your choice to put something in the mail.

JUSTICE ALITO: Well, you think this is not a commercial record? Why -- why do you think Google compiles this, keeps this information? It does it so it can sell advertisements.

MR. UNIKOWSKY: No, Google itself takes the position that these are not business records. I understand it's just a third party's view, but, you know, it's unusual for a company to refuse to say that something is its own records.

You know, unlike with CSLI, you have total -- as Your Honor said, you can turn it on, you can turn it off, you can delete all of it anytime you want. You can delete part of it. It's really unlike something like CSLI in which you have the business keeping the records for its own purposes.

JUSTICE SOTOMAYOR: Counsel --

CHIEF JUSTICE ROBERTS: Justice --

JUSTICE SOTOMAYOR: I'm sorry, are you through?

CHIEF JUSTICE ROBERTS: No, you're -- you're on.

JUSTICE SOTOMAYOR: I want to --

CHIEF JUSTICE ROBERTS: Oh, I'm sorry.

JUSTICE SOTOMAYOR: -- go back to Justice Barrett's -- if you're not through, Sam, I thought you were through.

JUSTICE ALITO: Go ahead.

JUSTICE SOTOMAYOR: To go back to Justice Barrett's question.

When the police are searching or asking for a search result, there's no way to predict whether they're going to invade your privacy, correct?

MR. UNIKOWSKY: That's right. Searches are determined ex ante.

JUSTICE SOTOMAYOR: Regrettably, because people take their phone now everywhere, including, I suspect, some people to the bathroom, you really have no idea what information, private information, because it'll follow you to a brothel, it'll follow you to a -- cannabis shop, it'll follow you to just about anywhere where there's a reasonable expectation of privacy, correct?

MR. UNIKOWSKY: Yes.

JUSTICE SOTOMAYOR: And so it really doesn't matter. I don't think the time is important, correct?

MR. UNIKOWSKY: I agree with that.

JUSTICE SOTOMAYOR: So, whether it's a minute that you're searching for or six weeks, it's not the time that's at issue. It's

whether or not private information in which you have a reasonable expectation of privacy will be sought, correct?

MR. UNIKOWSKY: Yes.

JUSTICE SOTOMAYOR: That's why Justice Scalia said it didn't matter for Fourth Amendment purposes to search the heat waves emanating from your house because, though it's not giving out private information, it's -- you can't know in advance what it's going to disclose, correct?

MR. UNIKOWSKY: Yes.

JUSTICE SOTOMAYOR. All right. Now let's go to that more important part of the question that Justice Barrett asked, which is we didn't answer this question in Carpenter, but I don't see how its logic made time the defining characteristic.

Could you explain why not?

MR. UNIKOWSKY: Sure.

JUSTICE SOTOMAYOR: It would seem to me that particularity has nothing to do with time. It has to do with the relationship of time to the circumstance that justifies a need.

MR. UNIKOWSKY: Right. So there --

there's two questions about time, one of whether there's a search at all and then a second question of whether the warrant was sufficiently particularized.

So, as to the first question, I don't think the time period should matter as to the search because, you know, I don't think the Court should be in the business of drawing lines between seven days and two days and 24 hours, especially since the government gets to choose the time interval. So two hours at a place selected by the government really can reveal a lot. There's a --

JUSTICE SOTOMAYOR: Sure. But the government, in search -- in setting forth the warrant, has to give a reason for why that two hours is reasonable, correct?

MR. UNIKOWSKY: Of course.

JUSTICE SOTOMAYOR: All right.

MR. UNIKOWSKY: So that gets to the question of particularization, and that goes to the warrant. And I would like to say a few words about what the Court should do if it doesn't agree with me that this is a general warrant in which all tens of millions of people

were searched.

We still think there is a Fourth Amendment violation because there wasn't probable cause to search all 19 people within the geofence merely because of their proximity to the crime. I get the fact that a time period was specified.

JUSTICE SOTOMAYOR: Well, Google itself said that to them. And I don't know why we're rely -- why we would say it's okay to rely on Google to do that. They moved it from 19 to nine, wasn't it?

MR. UNIKOWSKY: That was at step 2, Your Honor.

JUSTICE SOTOMAYOR: Oh, step 2. Okay.

MR. UNIKOWSKY: Yes. But, at step 1, 19 people's information was exposed merely because they were near the scene of the crime. And so I don't think that the problem -- you know, I understand that the warrant specified a time period, but the particularity requirement in the Fourth Amendment requires particularity as to what is searched. And I don't think that there was -- certainly, I don't think there's particularization here when the warrant just

said, whatever unspecified number of people are in the proximity of the crime, those are the people to be searched.

I don't think that's a particularized description of what is to be searched, and I think there's a probable cause here -- problem here because the fact that someone's near the crime doesn't create probable cause to search their diary, and we view this as the functional equivalent of a search of their diary.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: Can I ask you to explain that a little bit more? Because you were saying that this was the answer if we rejected your categorical argument, is that correct?

MR. UNIKOWSKY: If you reject our argument that there's been a search of millions of people, then yes.

JUSTICE KAGAN: Yeah, but, functionally, isn't that argument going to be the same? In other words, it's going to prevent the government from doing this kind of search in order to get these 19 people?

MR. UNIKOWSKY: Not necessarily. So

sort of a -- a narrower argument would be that if there's probable cause to really believe that every single person in the geofence has relevant information, then, you know, that -- that's a stronger case for the government.

So that might come up, for example, suppose there is a murder in the woods and it's 3 a.m. and there's, you know, one criminal and one victim and you draw a circle around that and there really is probable cause to think that every single person in that circle is either the murderer or the victim, then maybe the government can say there's probable cause that every person whose data is exposed to the government in that case will have relevant evidence.

That's not the case here, where the geofence encompassed the bank and the church, and, in fact, most of the 19 people were just sitting at church the whole time. So that would be a narrower way to invalidate this warrant that wouldn't necessarily impugn all -- geofence warrants like this one.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Gorsuch?

JUSTICE GORSUCH: So if in this case the geofence had encompassed just the bank perhaps?

MR. UNIKOWSKY: Right. So, I mean, our -- our -- as the Court knows, we still think there's a general warrant. We still think that everyone's storage lockers is being searched. But -- and we also think there's a --

JUSTICE GORSUCH: There might be probable cause to -- to think that everybody in the bank might have some information?

MR. UNIKOWSKY: Right. That's right. If you can draw a -- small enough geofence at a small enough time interval that everyone there either committed the robbery or witnessed it, then you might say there's probable cause that everyone has relevant information.

I still would say there's a -- particularity requirement. I'd still talk about a general warrant. But, yes, that defect in the warrant wouldn't exist in that --

JUSTICE GORSUCH: Right. And Google can track you down to several feet, right?

MR. UNIKOWSKY: That's right. Correct. Three meters, Your Honor.

JUSTICE GORSUCH: Yeah. And then, in terms of the timing in -- on the search side that we've discussed, the fact that the government peeks in your mail for just a quick second or looks through your safety deposit box or your hotel room or your diary for just a minute, we -- we would -- that's a search, right?

MR. UNIKOWSKY: Yes.

JUSTICE GORSUCH: Under -- under either property or a reasonable expectation?

MR. UNIKOWSKY: That's correct.

JUSTICE GORSUCH: Talk for me -- to -- with me for a minute about the Stored Communications Act and the government's responses to your arguments.

MR. UNIKOWSKY: Sure. So we believe that a warrant was required under the Stored Communications Act. We didn't file a motion to suppress on that ground because suppression isn't an available remedy. But that may be pertinent to the question of a reasonable expectation of privacy because people have an

expectation the government will get a warrant if there's a statute that requires the government to get a warrant and there's also a private cause of action on the table.

The government takes the position that possibly the Stored Communications Act doesn't require a warrant because the cell phone is a tracking device. I mean, if that's true, then anything that's transmitted -- transmitted from the cell phone into storage, your email if you're sending it from your phone or a photo or anything else, all of that would be information transmitted by a tracking device. None of that would be protected. So I don't think that's a tenable way of getting around the Stored Communications Act.

And so precisely because Congress has acted and, from our perspective, required a warrant and, in fact, in this case, a warrant was obtained, albeit one that we don't think complies with the Fourth Amendment, you know, I think that weakens the force of the government's argument that we should defer to Congress because Congress has actually said that a warrant is needed here.

And, you know, implicitly, we think that the Stored Communications Act requires a warrant that complies with the Constitution, and in this case, in our view, it did not.

JUSTICE GORSUCH: How about the question of whether it's content versus a record?

MR. UNIKOWSKY: So the government hasn't disputed that this is content. It's not metadata, it's not a record, because the content at issue here, it's not just something about a communication, like I was in this place when I sent this email.

JUSTICE GORSUCH: It is the location?

MR. UNIKOWSKY: It is the location. Like, the -- the reason you're transmitting this to Google is for it to store where you were in order to create your timeline. So this is content, and the government actually doesn't dispute that in this case.

JUSTICE GORSUCH: And talk to me about Virginia and other similar statutory laws in this area.

MR. UNIKOWSKY: So Virginia has a statute, the Virginia Computer Crimes Act, that

defines data on a computer network to be a form of property. It creates criminal liability for trespasses. It also creates civil liability for malicious trespasses.

And so, you know, we view the question of whether a property interest exists to be one of federal law. Like the Court held in the Tyler versus Hennepin case, you know, the Court should consider a common law rule, not -- not state by state.

But I think state law is a pertinent input into the ultimate federal question, and the fact that Virginia and many other states have explicitly recognized data as a type of property and have created statutory torts for trespass on that data is, I think, pertinent to the Fourth Amendment question here.

JUSTICE GORSUCH: Okay. Now we -- we could bypass the search question if -- if we just resolve the case in your favor on one of the particularity grounds, right?

MR. UNIKOWSKY: Well, I think the Court -- I mean, the government would say that if it's not a search at all, it didn't need a warrant in the first place.

JUSTICE GORSUCH: Well, if we assumed it were a search --

MR. UNIKOWSKY: That's right.

JUSTICE GORSUCH: -- without deciding, we could just decide it on particularity grounds. And you've talked quite a lot about step 1 particularity problems you see. Can you talk about the particularity problems you see at step 2 or step 3?

MR. UNIKOWSKY: Sure. So I think the problem at step 2 and step 3 is that the government conducted these follow-up searches, right, so they got an extra hour's worth of information about nine people and then they de-identified the people. But the warrant did not identify those people with particularity. It didn't even identify a means for the government to find those people. All it said was the police are going to figure out the really suspicious people and they're going to do those extra searches.

So the government says that the original warrant was a sufficient basis to de-anonymize and get the two hours from everybody in the geofence. So that's wrong for

a couple reasons. One is it just -- there's just clearly not probable cause to get two hours of information, including data outside the geofence, merely because someone was, like, sitting in church within an hour of the crime.

And, second, even the geofence warrant itself doesn't authorize that. It doesn't say the police can go ahead and collect data from everybody. All it says is that once the police winnows down the 19 or however many there are to some smaller number, then it can collect additional data. But that's not particularized because it doesn't say how to identify those people.

JUSTICE GORSUCH: Would that be a narrow basis on which to resolve this case?

MR. UNIKOWSKY: It -- it -- that would be a very narrow basis. I mean, I would caution the Court that if the Court resolves the case on that basis, then, in future cases, the government can cure the problem here by just obtaining another warrant before step 2, which may be the answer. But, you know, that would be a particularly narrow way of resolving the case. Obviously, we have concerns with

step 1 as well, and so, you know, we -- we believe that's unconstitutional.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: Assuming it's a search for purposes of this question and that I don't buy your general warrant argument, how can you overcome Zurcher for purposes of your argument that it's not sufficiently particularized, et cetera?

MR. UNIKOWSKY: Okay. So I view Zurcher as answering a very different question from this case. So Zurcher holds that the Fourth Amendment permits a search of a premises of someone who is not implicated in the crime at all as long as there's probable cause to believe that there's evidence on those premises that will be pertinent to the criminal investigation --

JUSTICE KAVANAUGH: And that -- here, we have that?

MR. UNIKOWSKY: We do. But -- what we understand --

JUSTICE KAVANAUGH: Okay. Keep going

then.

MR. UNIKOWSKY: -- to have happened here is more like a search of, you know, 19 separate safety deposit boxes rather than one single place, the Stanford University office, like in Zurcher. So I guess, you know, here would be a relevant physical --

JUSTICE KAVANAUGH: Why do you characterize it that way? It doesn't seem that way to me. It's a search of one place somewhere.

MR. UNIKOWSKY: Well, the argument the government would make is that Google, like, the -- expansive entirety of Google's servers, are a single place. I think that's a pretty dangerous holding because, if the Court were to reach that --

JUSTICE KAVANAUGH: We're talking about a warrant that's sufficiently particular here. So --

MR. UNIKOWSKY: Right.

JUSTICE KAVANAUGH: -- it is a search then for purposes of this question, but it really just boils down to, I think, is the warrant sufficiently particular?

MR. UNIKOWSKY: Right. So, if the Court considers Google --

JUSTICE KAVANAUGH: So we have probable cause. You admitted that correctly. And it's just then is it sufficiently particular? And it seems like Detective Hylton here, you know, really went through a lot of the steps that should be applauded in terms of narrowing this down and going through multiple steps. I guess I'm trying to figure out why this was bad police work to get a warrant.

A lot of Fourth Amendment cases we say get a warrant. Well, they got a warrant. And then you're saying, you know, it's not sufficiently particular. But he went multiple steps. How many names were ultimately given to the detective?

MR. UNIKOWSKY: Well, it was three devices, Your Honor.

JUSTICE KAVANAUGH: Three names? So, in the end, three names. You're talking about millions and millions, but it was three names in the end.

MR. UNIKOWSKY: So, first of all, I'm not casting any aspersions whatsoever on

Detective Hylton. There's no sign of any kind of malice whatsoever. That -- that's not our argument today, okay?

We do think that the warrant was defective, and if I could just make a couple points about your questioning.

So, first of all, I understand a warrant was obtained here, but the Court should be realistic about how much protection the warrant requirement really provides in a case like this. Sorry, Your Honor.

JUSTICE KAVANAUGH: Well, that's what the Fourth Amendment says. So --

MR. UNIKOWSKY: I know.

JUSTICE KAVANAUGH: -- keep going.

MR. UNIKOWSKY: Right. So the warrant requirement --

JUSTICE KAVANAUGH: You know, the Fourth Amendment's a floor, not a ceiling of protection. And the -- the warrant requirement, we have to stick with the words of the Fourth Amendment --

MR. UNIKOWSKY: Absolutely.

JUSTICE KAVANAUGH: -- and the history of it.

MR. UNIKOWSKY: All I was going to say is that the government obtained a warrant merely because someone was holding a cell phone near the scene of a crime. And if that's enough to obtain a warrant, it's going to be obtainable in a wide number of cases. That's not just a factual quirk about this case. That's many cases in which this type of warrant is obtained. But I'm happy to stipulate --

JUSTICE KAVANAUGH: But it's geographically -- geographically and temporally limited, though, the warrant --

MR. UNIKOWSKY: Yes, but the Fourth Amendment, and I'm happy to --

JUSTICE KAVANAUGH: -- in -- in a way that the magistrate, a third party, not the executive, not the law enforcement, will neutrally review and oversee. And lots of times judges will force the -- the warrant to be narrowed, right?

MR. UNIKOWSKY: Your Honor, the Fourth Amendment requires particularity as to the place to be searched. In this case, the geofence was not the place to be searched. The place to be searched was these Google accounts.

So --

JUSTICE KAVANAUGH: Well, so suppose we have a murder and we know all the police know is that the murder was at a restaurant, a particular restaurant. And so the search is for -- the request is for everyone who dined at that restaurant in a two-hour period and for the names of those people. Thoughts?

MR. UNIKOWSKY: So, if the Court doesn't buy the argument about a general warrant --

JUSTICE KAVANAUGH: Correct.

MR. UNIKOWSKY: -- okay, then it is possible that you might say that there's probable cause that people who were actually witnesses to the crime, they were at the -- at the restaurant when the crime was committed, you might say there's probable cause to believe that there's relevant evidence in all of those people's accounts.

Here, we don't have that. So, first of all, I view this as a search of --

JUSTICE KAVANAUGH: Well, let me ask --

MR. UNIKOWSKY: Yes.

JUSTICE KAVANAUGH: -- alter the hypothetical --

MR. UNIKOWSKY: Sure.

JUSTICE KAVANAUGH: -- or maybe your -- all you know is the murderer was in the restaurant and the search warrant or subpoena, the search warrant is to the restaurant for the list of people -- to the restaurant for the list of people who were in there in a two-hour period.

MR. UNIKOWSKY: That's fine -- that is perfectly fine. A subpoena or even a search warrant could be issued at --

JUSTICE KAVANAUGH: And that's different from this how?

MR. UNIKOWSKY: That's right, because we view that as not a search of one entity's property, like one single piece of paper containing a list. We view this more as a search of 19 different people's private papers. Ultimately, the question is the Fourth Amendment --

JUSTICE KAVANAUGH: You only got three names, but -- but --

MR. UNIKOWSKY: Well --

JUSTICE KAVANAUGH: And do you agree -- you agree with Zurcher, though? There's nothing from Zurcher you're asking -- including the footnote, there's nothing from Zurcher you're asking us to depart from?

MR. UNIKOWSKY: Correct.

JUSTICE KAVANAUGH: Okay. And do you -- this is just more practicalities, but the local government amicus brief and the 31 states' amicus brief, which has a huge spectrum of attorneys general on that amicus brief, which I think warrants note, talk about the practical consequences of not being able to solve murders. A lot of -- you know, a huge percentage of murders are never solved, for example, and -- and violent crimes. Just want you to respond to that.

MR. UNIKOWSKY: Sure. So, first of all, we're not suggesting that all law enforcement techniques that allow the police to determine everyone within a particular area are inherently unconstitutional. We think this particular technique of serving geofence warrants on Google and requiring search of the -- searches of the Sensorvault, we do think

there's a constitutional violation there. But there's many other law enforcement techniques that deploy modern technology that would not present the same types of issues.

And the other point is that --

JUSTICE KAVANAUGH: Such as?

MR. UNIKOWSKY: So we haven't taken a position on the constitutionality of tower dumps. That presents a very different set of issues because that cannot be conceptualized as the search of lots of virtual storage lockers. There are other Fourth Amendment arguments on the table there, but I don't think anything the Court says in this case would impugn the constitutionality of tower dumps.

Similarly, I don't think anything the Court says in this case would impugn the constitutionality of things like taking security videos, CCTV, and using those to identify a suspect.

So there are a lot of other law enforcement techniques that are available to solve crimes in which you know where -- where the crime happened, but you don't know who it is. And we're not challenging those. We're

just challenging this one unique particular type of method.

And the other thing is, you know, Professor Kerr's brief points out that there's actually quite a lot of geofence warrants that have been issued. Like, the district court says there was 9,000 geofence requests issued to Google in 2019. And there's actually a fairly small number of reported cases involving motions to suppress.

So it seems empirically that most geofence warrants just ensnare innocent people because I guess maybe criminals turn off their phones when they go commit bank robberies most of the time. And so, you know, the law enforcement benefits of this particular technique I think it's -- it's easy to overstate, even though, obviously, in this case --

JUSTICE KAVANAUGH: Well, the local government brief disagrees with you on that, but I'll -- I'll --

MR. UNIKOWSKY: Well, there's a lot of amici --

JUSTICE KAVANAUGH: And they have

specific cases, but I'll leave it there. Thank you.

MR. UNIKOWSKY: I mean, there's -- I think our side has some philosophical diversity on -- from the amici as well. So I think both sides have a lot of people with different views on this.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Mr. Unikowsky, would there have been a Fourth Amendment problem if the police had purchased this data from Google?

MR. UNIKOWSKY: I don't think the police could have theoretically done that.

JUSTICE BARRETT: Why?

MR. UNIKOWSKY: Because Google's policy is that it doesn't sell this data. It has a pretty strict privacy policy where it doesn't give the data away unless --

JUSTICE BARRETT: But it could. I mean, I'm just looking at the policy, and it says that Google may share non-personally identifiable information publicly and with our partners, advertisers, publishers,

rightsholders, specific partners to collect information from your browser or device for advertising purposes.

MR. UNIKOWSKY: Right. No, that -- so that's -- so, you know -- so Google shares aggregated information like, you know, how many people searched for the word "YouTube" last year and things like that, all right?

JUSTICE BARRETT: But doesn't it share location information too? I mean, I -- I feel like I get ads when I'm in particular places. I mean, I need to check my location services settings, plainly.

(Laughter.)

JUSTICE BARRETT: Not that I'm going to commit crimes. But it seems to me like Google --

JUSTICE SOTOMAYOR: I suggest you have I -- IT do it.

JUSTICE BARRETT: It does seem to me like Google does give your information away.

MR. UNIKOWSKY: I don't think it does. I think there are other less scrupulous apps --

JUSTICE BARRETT: Okay. Well, maybe it doesn't as a practical matter, but that

policy as I read it does permit Google to do it.

MR. UNIKOWSKY: I don't think it does. There's -- so there's -- there's declarations in the record that says that Google doesn't do it, and the privacy policy says that it's not going to share individual data with -- with advertisers. I think what you read is not a reference to location history. I'm -- I'm not sure what --

JUSTICE BARRETT: Yeah.

MR. UNIKOWSKY: I don't think it is, Your Honor. There's a declaration in the record and there's live testimony and there's a statement in the private -- privacy policy that Google only -- does not share individual data with -- with advertisers. It just doesn't do that. Like, an advertiser cannot go to Google and say share --

JUSTICE BARRETT: Okay. What if it did? What if it violated its own privacy policy and allowed the police to purchase it? Isn't that a problem between, like, the -- the person who has the Google account and Google? Would that be a Fourth Amendment problem?

MR. UNIKOWSKY: It might not be a Fourth Amendment problem because there's, like, the private search doctrine, even if someone unscrupulously but privately takes someone's data and illegally gives it to the government, you might call that a private search that the government --

JUSTICE BARRETT: But doesn't Google have -- I mean, I guess what I'm getting at is doesn't Google have some right? I mean, Google can dip in and dip out at least under the policy as it existed at the time this search -- or this possible arguable search occurred.

MR. UNIKOWSKY: We view this as just like FedEx. So, if you look at the FedEx privacy policy, FedEx says it reserves the right to inspect packages when it needs to do that, but I don't think that means that the government doesn't need a search warrant to inspect packages.

In the same way that if you stay at a hotel, you know, the -- hotel reserves the right to have a housekeeping service come into your room and maybe the housekeeper will see your personal possessions, but that in and of

itself is not consent to have the government do that.

So, likewise, yes, Google does reserve the right to analyze your data, like if you went to a lot of ski hills, you might see a ski ad on YouTube, but I don't think that in and of itself meant you -- you've waived Fourth Amendment protection with respect to the government seizing it without a warrant.

I mean, if Google sold it -- I don't think Google's even capable of that. If Google just voluntarily handed the data to the government, that might be a little bit more like the Jacobsen case, but I -- I don't think that's what we have here.

JUSTICE BARRETT: Thanks.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So I guess I see you as making maximalist arguments about this in ways that I'm trying to understand if they're necessary to get to the point where you want to go.

I mean, I thought the key issue was what makes a warrant for a search of this

nature sufficiently particularized. That's one way to put it.

And so, first of all, we've got Google responding in steps. We have this warrant request. The officer, according to your brief, identifies a geographic area based on where the crime took place and the time. You know, we have a bank robbery at X time. So what I'd like, says the law enforcement officer, is the location history data for 30 minutes before to 30 minutes after a 150-meter radius around the bank.

Is that right? Is that how it starts?

MR. UNIKOWSKY: Yes. Yes.

JUSTICE JACKSON: Okay. And as Justice Kavanaugh points out, at the end of the day, they end up with three names, but we have a lot of steps in between in -- under Google's iterative process for giving the officer this information.

So I guess what I don't understand is why you aren't arguing something about needing more probable cause as each one of these steps goes along. Yes?

MR. UNIKOWSKY: I do think that that

is one of the arguments we're advancing today, that the government did not obtain a fresh warrant before it conducted the step 2 search, and the initial warrant did not authorize all of the information to be obtained from -- all of the two hours of information to be obtained from everyone within the geofence, and that --

JUSTICE JACKSON: Right.

MR. UNIKOWSKY: Yes.

JUSTICE JACKSON: Okay. So fine.

But why isn't there probable cause? You -- you -- you seem to be fighting the premise that at the beginning, when the search is drawn, when the fence is drawn, 150 meters around the bank, 30 minutes before and 30 minutes after, and 19 accounts are identified, setting aside your general warrant point --

MR. UNIKOWSKY: Mm-hmm.

JUSTICE JACKSON: -- you seem to be suggesting or you're arguing that there isn't probable cause to do anything more at that point, that something about the 19 -- they have to have a -- they have to know something about a particular account? I don't understand that.

Why isn't it enough to begin with to

just ask as the magistrate is your fence reasonable? Is the 30 minutes before and 30 minutes after, is a 150-mile radius -- like, why isn't the step 1 probable cause inquiry just do we have a reasonable scope to begin with? I would think that we would just ask that and that the answer in this case would be yes.

MR. UNIKOWSKY: Well, except for that very last step, I don't disagree. I think the answer in this case would be no.

JUSTICE JACKSON: So what's wrong with the 100 -- is that too wide, is that too big?

MR. UNIKOWSKY: Well --

JUSTICE JACKSON: Why is that too big under these circumstances?

MR. UNIKOWSKY: Well, the -- the problem is that we view what happened at step 1, even before the de-anonymization happened, we view that as a search of people's private papers.

JUSTICE JACKSON: No, I understand.

MR. UNIKOWSKY: And so, if that -- if --

JUSTICE JACKSON: And you -- you said

in response to Justice Kavanaugh it's not the whole location. You -- Justice Kavanaugh says this is Zurcher, which I think has some force to it, that we have a location and there are maybe 18 people in this 19-person search who are going to be innocent, who didn't know anything about this but just happened to be there in that time, but Zurcher seems to say that's fine as long as you have probable cause to believe that there is a crime that's being committed in this location at this point.

You say no, it's each person's individual account. If we disagree with that --

MR. UNIKOWSKY: Okay.

JUSTICE JACKSON: All right. And we think this is Zurcher, then why is 150 meters or 30 minutes before or 30 minutes after unreasonable at -- at step 1?

MR. UNIKOWSKY: Okay. If you think it's just like Zurcher, I still think it's unreasonable at step 1 because I think the geofence warrant covers people who are just, you know, sitting in the church the whole time.

And I think that a geofence warrant

that encompasses not just the bank but also a church and a church parking lot 30 minutes before and 30 minutes after --

JUSTICE JACKSON: But we can't -- we can't eliminate those. We don't know anything about those people. That's -- this is a reverse warrant, says Professor Kerr, that you're allowed to have the radius encompass people who aren't necessarily the bank robber if you're trying to find the bank robber and there's probable cause to believe he was there 30 minutes before or 30 minutes after.

MR. UNIKOWSKY: Well, I get --

JUSTICE JACKSON: You don't -- you don't eventually get those people's names. That's the point I'll get to. But, for step 1, I don't understand why there's a problem.

MR. UNIKOWSKY: I guess that's the question, whether it's okay under the Fourth Amendment to say, well, we don't know which of those people it is, so we're just going to search all of them to try to find the suspect because that's essentially what happened here.

JUSTICE JACKSON: Okay. So isn't the real problem if you're looking at it as I am

that the point that you made with Justice Gorsuch that we don't understand how the police went from the nine to the 19, that the next step in opening it up and looking for more information, there has to be some rational basis or probable cause to believe that these particular accounts we need to have more information for, and that's not in this record, right?

MR. UNIKOWSKY: That is certainly true, Your Honor. The warrant just told the police basically find the people that seem most suspicious to you. And the police just initially selected all 19. Google pushed back. The police suggested --- selected nine. But the warrant itself doesn't provide any criteria and --

JUSTICE JACKSON: If it did, would it be more particularized, and isn't that what we should be saying in this opinion, for example?

MR. UNIKOWSKY: Well, that would be a -- a different way to achieve a Fourth Amendment -- to -- to -- to rule that the Fourth Amendment was violated. That would be a very narrow resolution of this case.

But, yes, I do think that that alone is a sufficient basis to invalidate this warrant even if the Court disagrees with our broader arguments.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Feigin.

ORAL ARGUMENT OF ERIC J. FEIGIN

ON BEHALF OF THE RESPONDENT

MR. FEIGIN: Thank you, Mr. Chief Justice, and may it please the Court:

As I think Justice Jackson was just getting at, Petitioner here is asking for an unprecedented transformation of the Fourth Amendment into an impregnable fortress around records of his public movements that he affirmatively consented to allow Google to create, maintain, and use.

In doing so, he would make that fortress so impregnable that not even a judge's warrant for even a moment of the public location of someone who, again, affirmatively opted to allow Google to have those records and to access them would be available to law

enforcement.

That's a debilitating and counterintuitive reading of the Fourth Amendment that would impede the investigation of kidnappings, robberies, shootings, and other crimes and would implicate any number of practices that I think opposing counsel kind of just waived his hands about, like tower dumps.

Frankly, Mr. Chief Justice, I don't know how he concedes exigent circumstances because, under this Court's recent decision just this term in Case against Montana, we need reasonable cause to believe that the -- there's a necessary search, and under his view, the -- this would be a search of everyone who has location history stored with Google. And I think he would have to say that we don't have reasonable cause as to each one of those people.

And the way he -- is trying to achieve that counterintuitive result, I think, rests on two fundamental misconceptions that have been emphasized this morning.

One is that it's like -- this is like uploading your own content to a storage locker.

Even Google doesn't treat it that way. If you see it -- if you look at Joint Appendix 55, you'll see that Google separates out user-created content from other kinds of content.

The second main misconception here, if I might just continue for one second, is that this would implicate all sorts of other types of data in which the Court has found more of a reasonable expectation of privacy, like email. Location history is different.

I'm sorry, Justice Thomas.

JUSTICE THOMAS: Mr. Feigin, would you address Justice Alito's point as to this being an advisory opinion?

MR. FEIGIN: Frankly, Your Honor, we attempted to warn the Court about that in our brief in opposition. If the Court wishes to dismiss the case as improvidently granted, we're -- we'd be fine with that.

I -- I do think there's really no chance the opinion here would make the officer's actions here unreasonable. Petitioner's suggesting now some kind of new kind of warrant requirement exception to the

good-faith exception. I don't really understand how that would work or what the contours of it would be, and I don't -- like, what does it mean to have a new kind of warrant?

At -- at bottom, we just don't think there's anything that's going to happen here other than an affirmance. You would essentially have something that looks like an advisory opinion. I mean, I suppose the Court could say that the theoretical chance that something might happen is enough to keep this case alive, but I don't think that makes a great deal of sense.

JUSTICE JACKSON: But in --

JUSTICE THOMAS: Additionally, the policy, Google's policy, has changed. And would you compare that policy to this and the effect of that change?

MR. FEIGIN: Do you mean the pushing out of location history --

JUSTICE THOMAS: Yes.

MR. FEIGIN: -- so it's now stored on the phones?

JUSTICE THOMAS: Exactly.

MR. FEIGIN: Well, I don't know that it would make a Fourth Amendment difference if Google were still able to comply with these warrants, but Google has represented to us that as of 2023 and that change that it made, it is no longer able to comply with the warrants, and that makes the difference.

CHIEF JUSTICE ROBERTS: You -- you --

MR. FEIGIN: But other -- I'm sorry, Your Honor.

CHIEF JUSTICE ROBERTS: Go ahead.

MR. FEIGIN: But, otherwise, if this were information that were exposed to Google, what Google -- I think it's an important feature of the warrant here that Google is actually the one doing the filtering on Google's accounts.

As to any account except for the 19 that were additionally returned -- and, of course, they were all anonymized and they were truly anonymized -- their expert, if you look at page 288 of the court of appeals joint appendix, admits he wasn't able to specifically identify even the three people he was talking about.

But, as to everyone else other than the 19, they might as well not have existed from the government's perspective.

CHIEF JUSTICE ROBERTS: Counsel --

MR. FEIGIN: And even Google didn't really learn very much about them other than that they were not within this 150-meter radius circle during that particular hour.

I question whether that is a -- an invasion of their reasonable privacy expectations. I think clearly not under this Court's decision in Knotts. That's a public place. These were public movements.

CHIEF JUSTICE ROBERTS: Counsel, if I could interrupt.

MR. FEIGIN: Sorry.

CHIEF JUSTICE ROBERTS: One of the -- one of the central concerns that's been voiced, of course, is what's to prevent the government from using this to find out the identities of everybody at a particular church, a particular political organization. What are the restraints that would prevent that from becoming a problem?

MR. FEIGIN: Well, number one, Your

Honor, would be the Stored Communications Act. And I respectfully disagree with Petitioner's counsel -- I mean, we have a somewhat different reading of the Stored Communications Act and exactly what it would require under these circumstances. And I know it's a statutory protection. But I disagree with counsel that it sets some kind of Fourth Amendment floor.

The Court basically rejected that position in City of Ontario against Quon, which also involved the Stored Communications Act.

CHIEF JUSTICE ROBERTS: Well, put the statute --

MR. FEIGIN: Okay.

CHIEF JUSTICE ROBERTS: -- to one side. Just in terms of the Constitution.

MR. FEIGIN: Putting the statute to the side, I mean, first of all, I don't think that there's any kind of categorical protection around something like a church. I mean, unfortunately, as you saw with Dylann Roof, we can have a shooting at a church. If he'd gotten away, we -- I -- I would have thought this would be a law enforcement technique that might be useful.

CHIEF JUSTICE ROBERTS: So you don't think there's any constitutional protection for such organizations to be subject to focused surveillance that would cover everybody in a particular location?

MR. FEIGIN: Well, I think one avenue that the Court has potentially held open, number one, is the amount of time for which the government could look. I don't know that the government could see everyone who came into a church at any time. I certainly --

CHIEF JUSTICE ROBERTS: Well, if -- if -- if services start at noon, they can go from noon to 1, however long they take.

MR. FEIGIN: So let me make a few points on that, Your Honor.

First of all, if someone doesn't want it known that they're going to a particular place, like a -- an abortion clinic, for example, they don't have to enable location history or keep it on while they are visiting that location.

I mean, if there were a surveillance camera across -- at a bodega across the street from the church that could also see everybody

who came in, then I don't think there'd be a claim to Fourth Amendment protection from government review of that.

The second thing that I -- I think I would say is that this has been -- the degree to which some -- someone can really be located in a particular location, I think, is somewhat overstated in this case. If you want to look at the sealed volume of the Joint Appendix, Joint Appendix Volume 3, you'll see that usually there's a fairly wide confidence interval of close to, you know, like, 30, 40 meters for everyone. So -- and that's only -- that only describes a circle with a 68 percent probability of containing them. So it's --

CHIEF JUSTICE ROBERTS: Well, but I don't mean to --

MR. FEIGIN: -- difficult to know exactly where they are.

CHIEF JUSTICE ROBERTS: I -- I mean, we don't -- we -- we can't rely entirely on -- on good faith, but the point is not that they're looking for a particular individual, but they want to have a catalog of the people who go to a particular location. And it seems

to me that that's a realistic problem.

MR. FEIGIN: Well, Your Honor, first of all, I mean, that can't -- that can't really happen under the Stored Communications Act.

CHIEF JUSTICE ROBERTS: Well, again --

MR. FEIGIN: And the second --

CHIEF JUSTICE ROBERTS: -- put -- put the statute to one side and just focus on the Constitution.

MR. FEIGIN: Okay. And the second thing I'd say is, you know, I would focus on this particular case, and in every case in which this has come up, the government has gotten a warrant because Google -- it's just easier to get Google to comply if we do get a warrant.

And if you -- but, if you want to put the warrant aside, Your Honor, I do think that what really matters here is that people have affirmatively opted in. Only one-third of active Google account holders do that --

CHIEF JUSTICE ROBERTS: So, to prevent surveillance of sensitive locations, you have to rely on the fact that people are going to turn off something that many, if not most,

people find is an important service?

MR. FEIGIN: Well, Your Honor, I do think, if you wish to conceal that you were at a particular location and you are effectively shouting and broadcasting your location to Google and that Google is creating, maintaining, using for any number of its own purposes those records -- I mean, Google could send you an ad saying --

JUSTICE GORSUCH: Mr. Feigin --

MR. FEIGIN: -- hey, I see you go to --

JUSTICE GORSUCH: Mr. Feigin --

MR. FEIGIN: I'm sorry.

JUSTICE GORSUCH: -- I'm sorry to interrupt, but I -- I -- I -- I've got to think the answer to the Chief Justice's question is yes. This isn't a search. You don't think it's a Fourth Amendment search at all. You don't need a warrant. And, yes, if we want to determine everybody who is at a church or a political rally or the abortion clinic or anything else like that, we're -- we can do that as long as we can get Google to comply.

Oh, and we might have a few tools

besides warrants to get social media companies to comply with governmental requests.

MR. FEIGIN: So I do think that effectively is our answer, Justice Gorsuch.

JUSTICE GORSUCH: Yeah. Okay.

MR. FEIGIN: We're not walking away from that. I'm simply --

JUSTICE GORSUCH: Now -- now -- now --

MR. FEIGIN: I'm simply noting two --

JUSTICE GORSUCH: Yeah. No, I -- no, I -- I understand -- I understand that --

MR. FEIGIN: -- very important features that -- of why.

JUSTICE GORSUCH: -- but that has to be your answer. And then -- and then there's a little tension in your argument as well. You're saying the sky will fall if you can't do this. That -- you started off with that. That was the very first point you made, how important this is. And then, in the next breath, you said that Google can no longer provide this information because it has reconstructed how it operates.

Can both things be true?

MR. FEIGIN: Yes, Your Honor, and

here's why. I think a lot of the arguments that are being made here today and are made in the briefs, if accepted -- and I think, again, this is something Justice Jackson was getting at -- would have a debilitating effect on a number of other law enforcement techniques.

JUSTICE GORSUCH: Like looking at email?

MR. FEIGIN: So email, Your Honor, we get a warrant for email absent some --

JUSTICE GORSUCH: But -- but, again, you don't think you need one because they broadcast it, as you say, to Google. It's subject to very similar terms of service.

MR. FEIGIN: That's not correct, Your Honor.

JUSTICE GORSUCH: No?

MR. FEIGIN: We view email differently, and there are several reasons for that.

JUSTICE GORSUCH: How about Google documents? How about photos?

MR. FEIGIN: We view all of those differently, and there are --

JUSTICE GORSUCH: So it's just

location data that's different?

MR. FEIGIN: Yes.

JUSTICE GORSUCH: Okay.

MR. FEIGIN: And this Court has made clear that it's different. So, in Knotts, the Court makes clear that --

JUSTICE SOTOMAYOR: Could you just footnote that answer? Are they different because you treat them differently, or are they different because something in your theory -- theory doesn't apply to them?

MR. FEIGIN: Your Honor, if -- I was just getting to that. So we think they're different because the Court has always treated, like, the contents of one's personal thoughts as recorded differently from one's exposed public location, which is all that's at issue here at least for --

JUSTICE SOTOMAYOR: How about a calendar?

MR. FEIGIN: So your calendar I also think would be different from your location history because a record -- your own personal updated calendar of where you've been, and there are several reasons for that.

I think the Court has made clear in Knotts that exposing your public location for two hours, you don't have a privacy expectation in that, and that contrasts sharply with cases like Ex Parte Jackson about physical letters or even a case like Katz, which is about telephonic --

JUSTICE SOTOMAYOR: I interrupted Justice Gorsuch.

JUSTICE GORSUCH: No, no.

JUSTICE SOTOMAYOR: And I --

MR. FEIGIN: -- communications.

Second, I think that's consistent with the original understanding of the Fourth Amendment. Justice Thomas gets into this a little bit in Footnote 8 at page 351 of his opinion in Carpenter about how the original focus of the Fourth Amendment was protecting personal confidences.

JUSTICE SOTOMAYOR: He was -- he was a dissent there, though.

MR. FEIGIN: On this particular point, Your Honor, I don't think there was -- it was inconsistent with what the majority --

JUSTICE KAGAN: Yeah, but, Mr. Feigin,

I do think that Carpenter seems quite relevant to this, what you're now saying is location is different from email and photos and calendar appointments and everything else that people give to Google.

And the reason is the location is just different because people just think that everybody knows where they are all the time. But I would have thought that Carpenter had something to say about that.

MR. FEIGIN: So one point and then -- and then I have three different reasons why this case is different from Carpenter, but -- well, let me just jump to the three reasons because that's what you're asking about.

Number one, we did exactly what Carpenter instructed us to do in this case. We got a warrant.

Number two, I do think Carpenter and Jones --

JUSTICE KAGAN: But you're saying you didn't need a warrant. So, I mean, I think the question is your theory, not what you did --

MR. FEIGIN: Okay. So --

JUSTICE KAGAN: -- out of the goodness

of your own heart.

MR. FEIGIN: -- putting the warrant, which I think is the easy way to resolve this case, to one side, I think there are two key distinctions between this and Carpenter.

One, in Carpenter, you had essentially the creation of CSLI, you know, Cell Site Location Information, as the price of even having a cell phone, which the Court had said in Riley was a device that basically nobody can live without.

That's not the case here. You have people affirmatively --

JUSTICE KAGAN: Is -- is that the -- the standard, the nobody-can-live-without-this standard?

MR. FEIGIN: That's the one fixed point that the Court has given us. But, here, we're a long ways away from that because even one-third of active accounts -- of -- only one-third of active Google account holders bother to enable location history.

JUSTICE KAGAN: So where -- where is the -- the -- the -- the line? If -- if 80 percent enabled this, would that -- would

that make it a different case?

MR. FEIGIN: I think that would be much closer to Carpenter because I think, if I'm recalling correctly from Riley, it's something like 90 percent of people have cell phones. But I certainly think one-third of active Google account holders, which is a fairly small percentage of the world's population overall, shows that people don't need this. You can use Google Maps without location history. You can use Google Maps even without a Google account.

The second thing I would say about Carpenter is that although neither Carpenter nor some of the separate opinions in Jones, like Justice Alito's opinion that you joined, drew clear temporal lines, I do think both Jones and Carpenter -- both the opinions in Jones and Carpenter focus on detecting the patterns of life and long enough periods of location to show the patterns of life.

I don't think two hours is enough to show the patterns of one's life. They might show that you went to a church once. It doesn't show that you're a regular churchgoer.

It might show that you went to a doctor's office. It doesn't show why.

JUSTICE KAGAN: I guess one -- I guess one question would be why is it -- why -- why would the only thing that you would have an interest in protecting is the patterns of one life as opposed to the things that you do in one's life that you particularly don't want people to know about, such as going to a political event, going to an abortion clinic, et cetera?

It's like you can -- I can tell you a lot of things about the patterns of my life. What I really want to keep private is particular things that I might do, you know, on very discrete occasions.

MR. FEIGIN: Well, two points, Your Honor. One is I think the fundamental insight of Knotts is that if you walk out in public and you walk into some sensitive location, then you are exposing all of that to public view.

In Knotts, they were following people to private residences. They didn't follow them into the private residences, but they were following people to private residences through

the use of a beeper and stopping outside the private residence.

Maybe you don't want someone to know that you're having an affair, but if you have a beeper in your car under Knotts and they're following you for two hours, they will find that out.

Number --

JUSTICE KAGAN: Would your position be the same if you had picked up Mr. Chatrie in his home?

MR. FEIGIN: If -- well --

JUSTICE KAGAN: If it had revealed his --

MR. FEIGIN: -- there's testimony at page 120 of the Joint Appendix from this Court that shows that we couldn't locate which of the houses was his even though he eventually did go to a house because, as it turns out, because the confidence intervals were simply too --

JUSTICE KAGAN: But -- but --

JUSTICE BARRETT: But could you?

JUSTICE KAGAN: -- your -- your -- your position would remain the same regardless whether somebody was in his home at the time?

MR. FEIGIN: Well, Your Honor, I guess I would make a couple points. I think that -- I think that we would argue that. I think the Court could draw a distinction.

And the reasons we would argue that it would still remain the same is, number one, we had no warrant. Number two, I think this would make this case somewhat like Karo, where it doesn't invalidate the law enforcement technique ab initio. It just means that someone with standing could suppress the information about the particular home.

And, number three, I think this is distinct from other home circumstances precisely because of the opt-in and the fact that the person is advertising the fact that they are at home, sharing that with Google, and Google could say: You know, I see -- I mean, Google could say: I see you go to church every Sunday, maybe you'd be interested in this particular religious item. Google could say: I see you're often in the house on Saturday mornings, maybe you'd be interested in this particular thing that could be delivered to your house on Saturday mornings.

And so they are opting to share that information to get a purely voluntary service. And they're doing so, if you want to look at the terms of service, which we don't -- which we agree aren't controlling, subject to the full knowledge that Google -- of what Google is doing with it and the ability of Google to respond in good faith to law enforcement or to make any number of other choices, like sharing with service providers for Google that will expose that information to public view.

JUSTICE BARRETT: Mr. Feigin, you're really saying -- I mean, you're leaning pretty heavily on the -- the -- the -- the correct proposition that what you do in public view is not generally -- you don't have a reasonable expectation of privacy in.

But now you're telling Justice Kagan, really, that if you go into a private home, it wouldn't be a search, I mean, if you trace --

MR. FEIGIN: Well --

JUSTICE BARRETT: -- trace location services? I mean, I understand in this case --

MR. FEIGIN: -- just the --

JUSTICE BARRETT: -- and is that true,

that in this case, you're saying he didn't -- you didn't pick him up in any home?

MR. FEIGIN: Well, Your Honor, he was -- he -- he eventually stopped at the end of his journey away from the bank at a group of homes, but there's testimony, this is page 120 of the Joint Appendix --

JUSTICE BARRETT: But not inside the home. You didn't --

MR. FEIGIN: We couldn't tell which home he was even in.

JUSTICE BARRETT: Yes. Okay. But you really are saying that you could track someone going inside a home, Justice Sotomayor asked Mr. Unikowsky about movements inside a home, movements to the bathroom, movements to the bedroom, all of that, if the confidence interval is narrow enough?

MR. FEIGIN: Your Honor, I think -- I think what I'm saying is two things. One, I do think we could have done that here because of the warrant, like under Karo.

JUSTICE BARRETT: Okay. But I think the question is, is that a search under your theory?

MR. FEIGIN: Is it a search? I -- I -- I don't -- I think probably, Your Honor. Like, I acknowledge that's going to be a much harder case for us.

JUSTICE BARRETT: But no is your answer?

MR. FEIGIN: I think, if we were to argue that -- I think -- I'd like to reserve the possibility that we could argue that it's not a search principally because of the opt-in and the broadcasting, but, look, I fully accept that that would be a very, very difficult argument to sustain. Nothing in our argument in this case depends on it.

And I -- I'm not, like, saying that that -- that that's critical to our argument. And if the Court thinks that that is a bridge too far, I'm fine with that.

JUSTICE GORSUCH: Well --

MR. FEIGIN: I would just have it on the proposition.

JUSTICE GORSUCH: -- except for it's totally inconsistent with your theory, but other than that.

(Laughter.)

MR. FEIGIN: Other than that, Justice Gorsuch.

JUSTICE GORSUCH: On -- on -- on -- on the particularity side, Mr. Feigin, let -- let's say you go to a hotel and the -- the warrant is search all the rooms in the hotel for the gun on the bedside, or a storage facility, search all the storage units for a -- a particular contraband, or to a bank, go search all the safe deposit boxes for the pearl necklace that's been stolen.

What's the difference between those cases and this case, assuming that I have a term of service with the hotel, with the storage facility, with the bank that says you can access these places from time to time for purposes that we agree upon and, of course, you -- you can -- you can do something with the government if the law allows it?

MR. FEIGIN: So, Your Honor, I think this is a somewhat -- this goes to a somewhat under-theorized portion of the Fourth Amendment, which is the definition of a place. I think we often have an intuitive sense of what's a place. In particular, with an

apartment building, I think --

JUSTICE GORSUCH: You -- you would agree those warrants would all be impermissible?

MR. FEIGIN: I don't know about -- necessarily about a storage locker one. That would probably be impermissible. Certainly, we couldn't search every apartment in a building, both because homes are first among equals and because --

JUSTICE GORSUCH: Well, hotel -- hotel rooms, bank safe deposit boxes, storage facilities, the warrants I just described, go search for the contraband, the gun, the pearl necklace, okay or not okay? Are those sufficiently particularized?

MR. FEIGIN: Well, let me take them each in turn because I think the analysis might be slightly different under -- under each of those things, Your Honor.

First of all, for the apartment homes, no. And I think that's --

JUSTICE GORSUCH: Still haven't asked about apartments. I asked about hotels, but --

MR. FEIGIN: I'm sorry. A hotel -- a

hotel is the same because the Court's treated it as a home.

JUSTICE GORSUCH: Okay.

MR. FEIGIN: And houses are specifically listed in the Fourth Amendment --

JUSTICE GORSUCH: All right.

MR. FEIGIN: -- and they're first among equals.

JUSTICE GORSUCH: All right. How about the other two?

MR. FEIGIN: Okay. I think -- a storage locker, I think probably we could not do that, so -- and I think we probably couldn't do a storage room, although it would depend how it's organized. But if --

JUSTICE GORSUCH: Like every storage facility in America, you know, with one of those awful rolling gates and a padlock at the bottom.

MR. FEIGIN: So let me explain why and why that's different from this case if I could.

JUSTICE GORSUCH: I'm just asking you, do you think that warrant would be sufficiently particularized, the one I described? Yes or no?

MR. FEIGIN: I think it would be sufficiently particularized because it would describe what the government had a basis to search for.

JUSTICE GORSUCH: So the government --

MR. FEIGIN: But what I don't think is --

JUSTICE GORSUCH: -- the government could ask the storage facility and require them to search every locker in 500 lockers for the contraband?

MR. FEIGIN: What I don't think is that it describes a discrete Fourth Amendment place in which to search for the things that the government --

JUSTICE GORSUCH: Okay. So it's not particularized then?

MR. FEIGIN: So I -- I think it's --

JUSTICE GORSUCH: I mean, I'm really just looking --

MR. FEIGIN: -- more about place than particularization there, assuming there's probable cause to believe that the area writ large is going to contain the contraband.

If I could explain a little further on

this, Your Honor. I think what makes the difference in some of these hypotheticals versus what we have here --

JUSTICE GORSUCH: Well, first, I just want an answer to my hypotheticals, and then we'll get to here if that's all right with you.

MR. FEIGIN: Your Honor -- Your Honor, my answer to the hotels is no. My answer to the other two is very likely not.

JUSTICE GORSUCH: Okay.

MR. FEIGIN: Yeah, I would need to know a little more about it.

JUSTICE GORSUCH: Okay. All right. And now --

MR. FEIGIN: And now let me explain why --

JUSTICE GORSUCH: And now turning to this, do you agree that -- that Google had to query every single user's account?

MR. FEIGIN: No.

JUSTICE GORSUCH: Well, you said so --

MR. FEIGIN: I mean, I -- I -- I --

JUSTICE GORSUCH: -- on page 10 of your brief.

MR. FEIGIN: Do you mean query in

the -- do you mean "query" as like a synonym for "search" in the Fourth Amendment sense?

JUSTICE GORSUCH: I'm using your word from page 41.

MR. FEIGIN: Oh, okay. Yes, I do agree Google had to query in that sense. I'm sorry.

JUSTICE GORSUCH: And -- and -- and there are --

MR. FEIGIN: I thought you meant "query" as a synonym for "search."

JUSTICE GORSUCH: -- about 500 million users' accounts, right?

MR. FEIGIN: Yes, I agree with that.

JUSTICE GORSUCH: Okay. All right.

MR. FEIGIN: I -- I agree, and let me tell you why it's different. I think the reasons the hypotheticals -- the -- I -- but I apologize for misunderstanding your use of "query" as a synonym for "search." The -- the reason this is different is I think it's a lot about opacity and control. And what I mean by "opacity" is the separateness of the different spaces. And "control" is who has control over those spaces.

Here is a case where I think, as the Court recognized in Riley can often happen, the physical analogies kind of break down to some degree. The Court has been clear in Smith against Maryland --

JUSTICE GORSUCH: But let's -- let's just stop there.

MR. FEIGN: Yeah.

JUSTICE GORSUCH: Let's -- let's assume that these accounts are -- are kept in what you can call opacity or whatever you want, but are kept in the same kind of discrete manner as your -- as your email is.

MR. FEIGIN: Well, Your Honor, I don't think that's the case here. I think what's happening --

JUSTICE GORSUCH: Let's assume it is. Let's assume it is. Let's assume that the Google user account -- we have -- we've got a lot of briefs on this.

MR. FEIGIN: So, Your Honor --

JUSTICE GORSUCH: That they're -- they're categorized similarly by user and -- and walled off from other users, both the email and the location data. Let's assume they're

similar in that respect.

MR. FEIGIN: Your Honor, if this were a record that the user created and uploaded, our answer to this case would be different, but if this is -- but, in this case, this is a record that Google creates, Google software sends it, Google processes it, it runs its own algorithms to actually figure out what information it's storing. It is data that Google maintains and data that Google accesses for any number of reasons.

If we were to have a physical analogy to storage lockers -- and I'm not sure how useful these physical analogies are -- it's like having a bunch of storage lockers where there's a glass wall in front of them instead of having an opaque door for each box. All the government is asking for here is to get in the room and look at the front of those storage lockers.

I don't think that the limited amount that even Google sees at step 1 is going to be considered a search. And for -- as I said earlier, from the government's perspective, all of those other storage lockers, if you want to

call them that, and we're accepting that analogy for purposes of this answer, all of those other storage lockers might as well not exist. For all the government knows, they -- there are only 19 people --

JUSTICE JACKSON: Is that because --

MR. FEIGIN: -- who have their location history stored.

JUSTICE JACKSON: Mr. Feigin, is that because, at step 1, unlike the examples that we've been talking about, you don't know how many apartments there are? You don't know how many storage lockers there are? At step 1, it's just like getting a list. There are 16 apartments in this building, right?

Isn't -- I mean, that's why I'm appreciating a difference between the steps as the iterative process with Google goes forward. Step 1 is we have a bank robbery. Here's the bank. We would like to know how many cell phone accounts were in this radius during this period of time, right? I mean, you don't have the names, you don't have anything more than that.

I'm -- I'm struggling to understand

the step 1 problem other than to figure out how the government came up with 150 meters and 30 minutes before and after. So can you start maybe by answering that question? Where -- where does that number -- where do those numbers come from?

MR. FEIGIN: Sure. I can't help your struggle with step 1 because I too don't see a problem with step 1. But the 150-meter radius and the half an hour before and half an hour after were based on wanting to exclude -- there's some testimony in the record about this. They did want to include the church because they had testimony about a suspicious car that had been parked at the church, and they thought the robber, as it turns out, directly might have come from there.

JUSTICE JACKSON: So evidence was presented to the magistrate. The reason why we're making the circle this big to include these structures is because there could be some connection to this robbery?

MR. FEIGIN: I don't believe that evidence -- that particular reason for including that was presented to the

magistrate --

JUSTICE JACKSON: Okay.

MR. FEIGIN: -- no.

JUSTICE JACKSON: All right.

MR. FEIGIN: I'll just explain to you how they got 150 meters. And half an hour before and half an hour after allows you some information about, for example, there was a reference -- and the magistrate did learn this -- to co-conspirators in the demand note, and you might want to see if someone dropped the robber off or someone picked up the robber afterwards. You want to know more about the movements around it.

The advantage the magistrate has that I think is difficult for a reviewing court to replicate is knowledge of local conditions and realizing that 150 -- if I could just finish this sentence, Your Honor?

CHIEF JUSTICE ROBERTS: Sure.

MR. FEIGIN: A hundred and fifty meters in Midlothian, Virginia, isn't likely to turn up the entire phone book.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

JUSTICE ALITO: You've been asked quite a few questions that analogize what happened here to searches, old-fashioned searches, of physical places, so searching the room of everybody in a hotel.

If that happened, I think there would be an awful lot of angry hotel guests, all of those who had nothing whatsoever to do with the crime.

Here, Mr. Unikowsky says 500 million people were injured when there was a search for their data even though it was completely anonymized. How many of those 500 million people have come forward to complain about anything like this, which may be going on every day?

MR. FEIGIN: Well, I think that's right, Your Honor. I think, that points out that if they did want to complain, that would be a -- separate Fourth Amendment standing question, of course, and I -- I don't think that Petitioner here can represent their standing, but one reason they wouldn't complain

is, first of all, I don't think this would violate the reasonable expectations of privacy even if the government were doing it.

Second of all, Google was doing it and it's no different from any number of other things that Google does for its own -- for its own particular purposes. But the --

JUSTICE ALITO: Well, do you think that -- don't you think that makes a difference for Fourth Amendment purposes, the distinction between a law enforcement officer invading a physical space and a request to a company to conduct a search with which the company complies?

MR. FEIGIN: Well, not only do I think that, Your Honor, but I think the Court has said that multiple times if you look at cases like Oklahoma Press against Walling or Lone Steer. It's very different when an officer comes into the premises and looks around versus something that functions, although this had the protections of a warrant, in many ways, it functioned like a subpoena in that it was the provider doing the filtering and the provider disclosing the records, which limited what the

government saw considerably.

The only non-anonymized information the government got was for three individual users. It didn't know anything about anyone in the Sensorvault other than the 19 that were returned for step 1, and as to them, it didn't know their identities.

JUSTICE ALITO: You've heard --

MR. FEIGIN: So I do think that's -- that's critical. But the argument that he's trying to make about step 1, I think it's very important that it really does implicate tower dumps, for example, because, in -- it implicates any number of law enforcement techniques that might incidentally find data about someone else.

Let's -- even a CSLI warrant, you might have a company that organizes its data by tower. And in order to find, let's call them Carpenter, in order to find Carpenter's CSLI data, the company has to search across all of its towers during the time period and figure out which ones are Carpenter and which ones aren't.

It's going to learn everything about

all its users in theory. I mean, I'm sure it's using software to do this and having a filtering mechanism, just like Google did here, but it's going to learn everything about all its users for that period of time. I don't know how he distinguished that.

For tower dumps --

JUSTICE ALITO: Well, tower -- this --

MR. FEIGIN: -- I don't know how he distinguished --

JUSTICE ALITO: Tower dumps are not before us. Emails are not before us. Calendars are not before us. Photos are not before us.

I mean, I understand that if we're going to write a treatise on the application of the Fourth Amendment to the new digital world, we might want to include sections on all of these things, but none of those things is at issue in the actual case or controversy -- controversy that is before us.

You've heard some proposals about narrow theories on which the case could be decided that would, as I understand them, focus on whether there was a lack of probable cause

or a lack of particularity at step 2 or step 3.

What would be the precedential importance of a decision like that which turns on the particular warrant that is at issue in this case?

MR. FEIGIN: Well, Your Honor, unless the Court upholds the warrant, I do think the Court needs to reach the search questions in some way because the Court would have to address whether the warrant was even necessary.

And I think -- as I've tried to make clear, the Court -- a lot of the arguments that Petitioner is making here, while those other techniques are not directly at issue, would have implications on a lot of those other techniques and would create a lot of litigation and have a potentially debilitating effect on law enforcement. But -- they could even affect such things as visual camera surveillance.

But, as to the specific question you asked about the particularity at steps 2 and 3, I do think it was sufficiently particularized because you had geospatial and temporal coordinates that showed that these people might be either suspects or witnesses, and the

government simply was able to obtain enough information to figure out which of them might have information or be worth identifying.

And I -- I -- I think the Court's been clear that those are permissible law enforcement interests. The Court might say that --

JUSTICE ALITO: Let me just --

MR. FEIGIN: I'm -- I'm sorry.

JUSTICE ALITO: Let me just -- I -- I don't want to take up too much time. Let me just ask one final question.

Of all of the arguments that Petitioner has raised, which do you think would be the most disruptive of what everybody has understood to be the limitations of the Fourth Amendment up to this point?

His argument that this is a general warrant, his argument that he had a property interest in the -- in this data that was collected by Google? His request that we treat this search by a company as if law enforcement officers were themselves searching through records? Which of the -- which is the worst?

MR. FEIGIN: Is -- is all of the above

an option, Justice Alito?

(Laughter.)

MR. FEIGIN: I do think the idea that you have a privacy right or a property right in even a moment's worth of location history could be debilitating to all sorts of types of visual surveillance. The agent theory could debilitate subpoenas. The property theory, I don't even know where the Fourth Amendment goes after that.

And I -- I -- I do think a lot of these theories are -- and the general warrant theory that Your Honor mentioned, I think, would call into question how we do a lot of computer warrants. We often name the servers as the place to be searched.

And I -- I don't, frankly, know and I don't think courts are well-equipped to find out exactly how data is organized within a particular company, and I don't know whether we have to take discovery on that in every case where we seek a warrant and actually really go down to the nuts and bolts or the virtual nuts and bolts of how a company does this.

JUSTICE ALITO: All right, thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: A few questions. Number one, the Stored Communications Act, a violation, Mr. Unikowsky said, may be a violation, there may be criminal penalties for it, but it doesn't give a suppression remedy, correct?

MR. FEIGIN: That's right.

JUSTICE SOTOMAYOR: All right. Number two, you're saying everything would be horrible, but Carpenter has already said you need a warrant, correct, for data, correct?

MR. FEIGIN: And we got a warrant here, yes.

JUSTICE SOTOMAYOR: All right.

MR. FEIGIN: And --

JUSTICE SOTOMAYOR: But you're saying I didn't need a warrant because it was a short period of time. Assuming I disagree with that --

MR. FEIGIN: Well, Your Honor -- I'm sorry.

JUSTICE SOTOMAYOR: -- that the -- just assume that, okay? There are three steps

to this process. Were the three steps approved by the warrant? I read the warrant, but now I've forgotten. Were the three steps approved?

MR. FEIGIN: Yeah, the three steps were all laid out within the warrant -- within the warrant itself.

JUSTICE SOTOMAYOR: But the one who made the choice at step 2 and step 3 was -- was Google, not a magistrate, correct?

MR. FEIGIN: Well, Your Honor, the warrant required the government to make reasonable efforts to minimize between steps 1 and 2 and steps 2 and 3.

JUSTICE SOTOMAYOR: Well, usually, isn't it -- I thought that if, for the foreign sovereign -- for the foreign checking system that we have, that magistrate judge says you have to minimize as you're doing it, but come back to us if you want a greater scope, correct? And, here, you went from 30 minutes to two hours, and you didn't get a magistrate judge, correct?

MR. FEIGIN: That was expressly authorized within the warrant. The warrant's parameters said that step 2 would be an hour

before and an hour after the robbery.

JUSTICE SOTOMAYOR: Okay. I thought it was two hours. Maybe I misunderstood.

MR. FEIGIN: That's a total of two hours --

JUSTICE SOTOMAYOR: I see. All right.

MR. FEIGIN: -- Your Honor, one hour before, one hour after.

JUSTICE SOTOMAYOR: I misunderstood that.

MR. FEIGIN: The original was an hour, half an hour before, half an hour after.

JUSTICE SOTOMAYOR: There are, I understood, many jurisdictions in which the government is going back at step 2 and step 3, correct? That's not much of a -- of a burden.

MR. FEIGIN: So, Your Honor --

JUSTICE SOTOMAYOR: If you've gotten step 1 and you can explain your reasons for why you're narrowing the warrant and -- and why you need it at step 2, you could do that.

MR. FEIGIN: We -- we could do that, and with more recent warrants, the government has done that. Obviously, this was a Virginia warrant, but just to defend this warrant for

one second, I think the Court recognized in Scott, which is a case we cite in our brief, that -- which is under the Wire Tap Act, not directly a Fourth Amendment case, but the same principle applies, that the --

JUSTICE SOTOMAYOR: Now there's value, isn't there, in our saying something like or deciding we need a warrant, it has to be particular as to time, place, time, and it has to explain the reasons why those limitations are reasonable because that's always a part of a warrant -- warrant search?

And wouldn't that have value for the dispute that's going on around the country and between and among judges even on this Court? Some said there was -- some took your position that there's no right of privacy whatsoever and you don't need a warrant. Others have taken the position that you need a warrant, but you don't need much supervision from the magistrate judge. There is value in our setting the parameters of this process, isn't there?

MR. FEIGIN: I think, if the Court were to say something about warrants, that could have value. And I'm not going to claim

that the sky is going to fall if we had needed a separate warrant at steps 2 and 3 and a total of three warrants. We've actually done that in more modern times.

But what I am saying is that I would caution the Court against saying that it's -- that warrants can never include any kind of discretion like the warrant did here because --

JUSTICE SOTOMAYOR: We don't need -- we don't need to say that.

MR. FEIGIN: You --

JUSTICE SOTOMAYOR: We -- we -- we -- if all we said was you generally need particularity, the way you do in any situation, you have to give enough to say there's a reasonable probability or fair probability, I think, is our language, that evidence is in a particular -- would -- would be disclosed, and what -- it's a limited search to these times and places, and you have to do it at each stage of a warrant.

MR. FEIGIN: Your Honor, I think we met all of those requirements here.

JUSTICE SOTOMAYOR: We don't even -- I don't even know if we need to go that far, but

you would not be troubled by that rule?

MR. FEIGIN: Your Honor, you're simply describing what the Fourth Amendment requires. And as we laid out --

JUSTICE SOTOMAYOR: All right. That's exactly --

MR. FEIGIN: -- in our brief --

JUSTICE SOTOMAYOR: That's exactly --

MR. FEIGIN: -- we think the Fourth Amendment satisfies those requirements -- our warrant -- I'm sorry -- our warrant satisfies those Fourth Amendment requirements.

JUSTICE SOTOMAYOR: I'm -- I'm not quite so sure of that because you don't explain why it's narrow, but that's a different issue.

MR. FEIGIN: Well, Your Honor --

CHIEF JUSTICE ROBERTS: Thank --

MR. FEIGIN: -- if I could be --

JUSTICE SOTOMAYOR: All right. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: Mr. Feigin -- Feigin, I'm going to give you one of these physical location hypotheticals that you're going to resist, but you'll have a chance to tell me why

it's different. But I -- I want to understand your theory, and the easiest way for me to do it is through these.

So let's go back to what Justice Gorsuch said. Let's use the -- the storage locker. And there's a -- storage locker facility in town, it has 500 storage lockers, and they have a relationship with the police chief so that the police chief can come to them and ask the storage locker manager to search all the storage lockers for particular things that the police chief needs.

So the police chief goes to the storage locker -- manager, and he says we're looking for somebody with a particular kind of weapon. You know, we're looking for somebody with a Glock. And -- and the manager goes through each of the 500 lockers, and he comes back to the police chief and he says: I've got a list for you. We have eight lockers with -- that contain a Glock. And now we're going to have a further conversation, you and me, the manager and the police chief, about which of these eight you really want, all right? And they do that.

So, in that situation, how many of the lockers would you say have been searched and how should a warrant respond to that? In other words, have 500 lockers been searched? Has -- have eight lockers been searched? Or have zero lockers been searched?

MR. FEIGIN: I think some of that might depend on exactly the circumstances under which the proprietor of the storage facility was permitted to go into these storage lockers, because that might set some of the parameters of the reasonable expectation of privacy or at least inform them.

I also think it's distinct from the circumstances we have here because you actually have someone who more plausibly could be seen to be acting as a government agent than the recipient of a warrant or a -- subpoena or an order of protection from the court.

JUSTICE KAGAN: No, I'm -- what I'm -- I guess what I'm saying is just assume that the relationship is similar to the relationship between Google and the government, and just assume that the terms are similar to the terms that Google has with its customers. So all of

that is the same.

MR. FEIGIN: So there --

JUSTICE KAGAN: Five hundred lockers searched, eight lockers searched, zero lockers searched?

MR. FEIGIN: Your Honor, I think, to the extent we're talking about physical objects that are put into a storage locker that is expected to remain locked except when the user comes and wants to take something out of it, I think we might say the -- that that was a search of all of the lockers because someone went in and looked in every single locker.

JUSTICE KAGAN: And so what would you need for a warrant for that search?

MR. FEIGIN: I think we'd need probable cause that there was going to be a Glock in one of the lockers, but I think -- I'm not -- I am --

JUSTICE KAGAN: So you couldn't -- you couldn't get it for all 500?

MR. FEIGIN: -- I am uncertain that would be valid for the reasons I was discussing with Justice Gorsuch in that those might all be separate Fourth Amendment places, and we'd

need -- specific probable cause as to each.

I don't think that's true of the database that Google maintains because --

JUSTICE KAGAN: Okay. So what is the difference in your view?

MR. FEIGIN: So I think the difference in our view is, first of all, to the extent that I -- I heard opposing counsel -- and this is in their brief -- just suggest that Google's database is quite large, I don't think that in and of itself is a problem. I mean, obviously, you could get a warrant to search a large house where the rooms are accessible to one another or a large file room even if it's physically separated across multiple rooms in a facility.

I think the main difference here is that the -- and, you know, Your Honor, here, I maybe am going to resist the physical analogy a little bit, but I don't think that these are the same thing as discrete storage lockers. These are more like storage lockers that don't have the set of expectations that I was just positing in answer to your hypothetical and really are like a bunch of storage lockers with a glass wall.

You could imagine, Your Honor, a coat check where we know that somebody dropped off drugs at the coat check and we know what the person's name is. We don't know the coat check number. On their view, we couldn't get a warrant to go look at all the bags for the ID on -- on the bag that -- for the ID matching the person who dropped off the bag because those would be unnatural bag searches that would be unlawful under the Fourth Amendment, and so we'd wind up searching everybody's bag.

I think this is somewhat addressed somewhat obliquely, I suppose, by the citation we have on page 44 of our brief to Chapter 8 of Professor LaFave's treatise, which allows for, even in a bailment situation -- we don't think this is a bailment situation -- but even in a bailment situation, there's general agreement among courts that the bailee, the person with possession of the property, can look at it for -- on behalf of law enforcement within the terms of the bailment.

And, here, what you have -- again, we deny that it's a bailment, but if you want to analogize this to some kind of bailment

scenario like you might have with the storage lockers, we'd still be within the terms of the bailment because Google wasn't doing anything other than stuff that Google could already do.

JUSTICE KAGAN: Thank you, Mr. Feigin.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

JUSTICE KAVANAUGH: You always get a warrant, you said, and the states always get a warrant. So, in terms of practical problems that would ensue, I gather there would be no practical problems -- I understand your legal theory, but no practical problems from our saying that a warrant is required.

Is that accurate for these particular kinds of warrants?

MR. FEIGIN: Your Honor, if the Court were to say that this warrant was fine, we have no --

JUSTICE KAVANAUGH: That wasn't my question.

MR. FEIGIN: Ah. Well, I mean, Your Honor, I think it is a huge caveat --

JUSTICE KAVANAUGH: The question was,

are there any practical problems that you want to identify with our --

MR. FEIGIN: With getting a warrant in particular?

JUSTICE KAVANAUGH: Yes.

MR. FEIGIN: I don't --

JUSTICE KAVANAUGH: And I assume the answer's no because you've many times today said we always get a warrant in response to tests, so --

MR. FEIGIN: That -- that's right, Your Honor, my answer is no, but I would worry about an -- an opinion that --

JUSTICE KAVANAUGH: How we say that, I get that.

MR. FEIGIN: What you say.

JUSTICE KAVANAUGH: Yes.

MR. FEIGIN: But, like, I -- I do -- I don't think we've had practical problems getting the warrants we need in these cases.

JUSTICE KAVANAUGH: And then, if -- if a warrant's required, it comes down to how particular, I think, correct --

MR. FEIGIN: Yes. I -- I -- I do think --

JUSTICE KAVANAUGH: -- it has to be in describing -- and on that, I just want to -- I think you're going to agree with this, but I just want to get this out there, and you tell me.

There's a big difference between the issuing judge and the reviewing judge. That's the good faith. And the issuing judge, it seems to me, we should set some parameters, reasonable -- temporal scope, reasonable geographic scope, but then we trust issuing magistrates around the country to implement those rules. When it comes to the reviewing judge, we don't micromanage in second-guessing what the issuing judge did so long as it doesn't exceed, you know, certain bounds that we've set forth. Is that correct?

MR. FEIGIN: Yes.

JUSTICE KAVANAUGH: And what should we say if we say reasonable, temporal, and geographic bounds for these kinds of geofence warrants? Is that all we need to say?

Maybe we should -- you want us to say the ones in this case? Should we get into the -- this case, or should we just say it has

to be reasonable, temporal, and geographic bounds and -- and send it back? To Justice Alito's first question, we're on a -- we're at the reviewing stage, not the issuing stage here.

MR. FEIGIN: Your Honor, I think that would probably be the better course because, you know, I think what this Court's centuries, frankly, of Fourth Amendment jurisprudence teaches is that it's difficult to put a ton of meat on the bone of reasonableness in this context or probable cause or reasonable suspicion or -- or any of these standards because they're --

JUSTICE KAVANAUGH: Well, yeah, and this is particular. How particular? You know, is 150 meters okay? Two hundred okay? It strikes me micromanaging that's going to be problematic, and it's really problematic when you're distinguishing the issuing judge from the reviewing court down the road given what we've said reviewing courts have to be extraordinarily deferential.

MR. FEIGIN: Yeah. And I think the Court could direct some attention to the

magistrate about, you know, not wanting, as -- as I was suggesting to Justice Jackson, drawing parameters that under local conditions are likely to turn up much more than the government needs. But I would --

JUSTICE KAVANAUGH: Exactly. Exactly. If we say things like that, that should -- we trust the -- the issuing judges around the country who do this every day to make --

MR. FEIGIN: You -- you should trust them, Your Honor. And, frankly, our incentives are perfectly aligned with theirs because, when we're seeking a warrant like this, we don't want more information than we really need because that just increases the noise-to-signal ratio and makes these more difficult to actually find the -- the criminals.

I -- I believe there was some suggestion from opposing counsel that -- that often these warrants get abandoned or -- or quashed and they don't really turn up much evidence of crime.

And that may be because some law enforcement agencies -- I'm not impugning any specific one, we have many wonderful law

enforcement partners -- aren't drawing the parameters narrowly enough to even help themselves. So everyone's incentives are aligned here.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: So you describe Mr. Unikowsky's position as maximalist, but there's a risk of the government's position being maximalist the other way. And I think, you know, two particular concerns are the ability to track into private resident -- residences, and you didn't concede that.

The other is calendar, photos, email. Can you -- you -- you -- did I -- did I understand you before to say that you are conceding that would be different and that would be a search?

MR. FEIGIN: Yes. And I -- I -- I do concede that tracking into a private residence without a warrant, I think, is a very, very difficult argument for us to make, and I'm not frank -- I'm, frankly, not sure that we would actually make it.

I was simply noting that unlike in Karo, where the Court held that we would have needed a warrant --

JUSTICE BARRETT: Sure.

MR. FEIGIN: -- which was quite clear --

JUSTICE BARRETT: But you didn't rule it -- you didn't rule it out.

MR. FEIGIN: Yeah.

JUSTICE BARRETT: I -- I understand your hedge.

MR. FEIGIN: I -- I'm not -- I didn't want to categorically rule it out.

JUSTICE BARRETT: But you -- right. But you are saying that you would need a warrant for calendar, photos, email?

MR. FEIGIN: Yes.

JUSTICE BARRETT: That that would be a search?

MR. FEIGIN: Yes.

JUSTICE BARRETT: Okay.

MR. FEIGIN: And let me -- I mean, I -- I'm happy to --

JUSTICE BARRETT: Sure. I mean, if you want to --

MR. FEIGIN: -- explain again --
JUSTICE BARRETT: Well --
MR. FEIGIN: -- why -- why I think that would be.
JUSTICE BARRETT: -- I -- I just wanted to --
MR. FEIGIN: Okay.
JUSTICE BARRETT: -- make sure we had a crisp understanding what the government's position was on that. So that's your position?
MR. FEIGIN: Yes, that -- that is the government's position on both of those issues.
CHIEF JUSTICE ROBERTS: Justice Jackson?
JUSTICE JACKSON: Yes, really quickly. I -- I think there's something about the iterative process that may matter. And so just taking Justice Kagan's hypo really quickly for an understanding of what is happening, tell me if the government is thinking about it in this way.
You keep saying this is like storage lockers with glass fronts, where the piece -- with glass on the front of it. They don't have solid doors. Anyone can look and see what's in

there.

So step 1 is the government saying tell us if, by looking at these lockers, any include -- have bags in them that might have a gun in them. Give us the list of the ones or how many have that, I think, is sort of a step 1 concern.

And then maybe step 2 is, once you've gotten that subset, open the -- the lockers and, you know, see if there's really a bag or feel if there's really a bag, and then step 3 is open the bags inside each of the lockers.

I feel like there's something happening with the way in which Google is providing this information in response to the government that may be requiring more probable cause or more particularity as you go along.

So what is the government's thought about that?

MR. FEIGIN: Your Honor, with -- with my continuing caveat that I think there's a limited utility in some of these physical analogies, I would kind of resist breaking it down exactly that way.

I think step 1, you know, if we want

to use the gun example, step 1 might be more, okay, you've got -- a glass partition here, tell us which of them have guns in them.

Number 2 would be, okay, of that subset, continuing to look through the glass wall, you don't even need to open it for this because this is still stuff that is exposed to your view, please tell us which of them have a gun and a box of ammunition.

And then step 3 is, okay, for the two or three you found, please tell us who's rented those storage lockers.

JUSTICE JACKSON: Do you agree that you need more to get to each step? I -- I mean, here, what criteria did -- did the detectives use to narrow down the list from the 19 to the nine to the three that were ultimately there? And wouldn't a particularized warrant need to have some criteria in it to guide law enforcement at each of these stages?

MR. FEIGIN: So, Your Honor, with -- with apologies, I think I need to take a step back and say that I don't really view this as getting more particularized. I believe there

was enough probable cause to -- that the original warrant was -- and the 19 people that turned up, probable cause to believe those people would be either witnesses or suspects, and then there's a question of how to figure out which ones to follow up on.

So what you actually have here is a warrant that I think is fully particularized with probable cause the whole way through.

JUSTICE JACKSON: You could have gotten the 19 names from the beginning?

MR. FEIGIN: I think that we -- I think that we could have. But, in order to maximize privacy, what happened here was that the warrant included a minimization requirement on the government at each step, which is akin to the kind of minimization requirement you see in the Wire Tap Act.

JUSTICE JACKSON: Okay, thank you.

MR. FEIGIN: Okay. Thanks.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Unikowsky?

REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY
ON BEHALF OF THE PETITIONER

MR. UNIKOWSKY: Thank you, Your Honor. So I'd like to say a few words about why this was a search, a few words about the warrant, and then, finally, why the Court should decide the case.

So, first, why this was a search. I -- I welcome counsel's concession from the podium that if there was a search for something like -- something else in the cloud, like email or calendar entries or photographs, in that case, there really would be a search and a warrant would be needed.

But, although I welcome that concession, I just don't understand the distinction that is drawn between those types of data and this type of data for Fourth Amendment purposes either under a property or a privacy lens.

So, under a property lens, a person's relationship to their location information is the same thing as their relationship to their photographs or to their email. It's in their password-protected account.

Counsel suggested that the answer might be different because it's in some way raw data, it's sort of generated by your phone as opposed to sort of a creative writing. So, first of all, it's generated by the person in the sense that you move around.

And, second of all, I don't understand what that distinction has anything to do with the Fourth Amendment. Just as an example, you know, your Fitbit or your Apple watch might measure heartbeat and that information might be transmitted into the cloud. I still think that's yours even though it's generated by your autonomic nervous system as opposed to the fact that you've written a journal.

It just seems to me that if you have control over the data, you can turn it on, you can turn it off, you can delete it, it just doesn't matter if it's created by taking a photo as opposed to by the fact that you've decided to go somewhere.

Similarly, from a privacy perspective, I don't see why a photo you take outside is somehow more private than where you were that day because you don't have an expectation of

privacy in, like, the thing that you were seeing if you were outside, but you do have an expectation of privacy in all of your photos.

And, likewise, you have an expectation of privacy in everywhere you've gone. So I think that if the Court accepts the government's concession that you have an expectation of privacy or a property interest in photos and emails, the same thing would be the case for location history.

As to the warrant on the step 1 issue, you know, Justice Jackson suggested that what happened here is that the government received a list of, like, 19 different people that were in the geofence. But, respectfully, I don't think that's what happened.

What it actually got is all of the movements of those 19 people within that hour stretch. So it's a little bit like going into 19 apartments and taking a complete inventory of everything in the apartment but not disclosing the person's name because, if you look at the record, like, all of those granular movements for that entire hour were exposed.

And so that's why I think that the

Ybarra case is directly on point here. You don't have probable cause to search based on someone's proximity to the crime. What happened here is each person's, what we regard as a virtual storage locker, was searched solely because of their proximity to the crime and because the -- their movements within the hour were exposed every two minutes. That's different from simply identifying which accounts were within the geofence. It's really exposure of information about them.

And although it's nominally anonymous, the record shows it's actually quite easy a lot of the time to figure out exactly who a person is based on a relatively small record of their movements.

But, look, I've heard some questions from the bench today about steps 2 and 3. There's clearly a constitutional problem with those steps. I mean, as Justice Jackson suggested, the warrant wasn't particularized. There's no criteria given for identifying those people.

In terms of how to decide this case, I think it would be a very significant case

giving a lot of guidance to the bar if the Court says, one, a search happened, and, number two, at step 2 and step 3, at a minimum, there was a problem with the warrant, without reaching some of the broader questions about general warrants or particularization if the Court is inclined to resolve the warrant question narrowly because the government has a lot of very striking arguments on the warrant issue that could have significant implications.

One is that Google wasn't acting as the government's agent, so it makes a difference that, you know, Google pushed the button as opposed to the police.

Another argument that's made is that the fact that software is conducting the search is constitutionally relevant, which could have revolutionary implications when, like, AI is monitoring everything we do as opposed to a human being. Also the arguments that as long as something is nominally anonymous, that makes a Fourth Amendment difference, which also can have radical implications when de-anonymizing someone is very easy.

So, like, all of these arguments that

the government is using to defend the earlier searches could have very broad implications. So, if the Court believes that the warrant is unconstitutional at step 2 and step 3, it has the option of just setting aside those broader questions and deciding the warrant issue narrowly and also deciding that's a search. That would be more than a broad enough opinion to be useful to the bar.

And I guess, on the final question of whether the Court should decide the question presented, look, it's very hard to see how the Court could decide a question like this outside the context of a motion to suppress. If the Court says the good-faith exception applies here, it'll apply in every single case.

And Justice Alito posed the question of what about all the other people, the 500 million people who were searched? Well, number one, they're not told. All of these warrants are sealed. The reason the outcry doesn't exist is that no one knows that thousands of times per year their accounts are being searched.

Second, a 1983 claim by any of those

people against the detectives would clearly fail on a qualified immunity basis. So, really, the only way these issues would be litigated is through a motion to suppress in a case exactly like this one.

And this is a good vehicle to decide the case because there's an extensive evidentiary record. There is declarations from Google. There's live testimony from Google. You'll never have a case with a more detailed account of the technical aspects of the case than this one. And so that's why I think the Court should decide the Fourth Amendment question in this case.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:05 p.m., the case was submitted.)

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