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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.

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

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

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

19 I welcome the Court's questions.

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

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

25 JUSTICE THOMAS: I thought it was

1 anonymized at step 1.

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

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

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

21 JUSTICE THOMAS: No.

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

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

10 JUSTICE JACKSON: So, under your --

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

16 MR. UNIKOWSKY: I take the point that
17 you can flip it off, but I guess I just don't
18 agree that one should have to flip off one's
19 location history as well as other cloud
20 services to avoid government surveillance. I
21 mean, by the same token, you don't have to send
22 email. You can flick that off as well. But
23 that doesn't imply that you're implicitly
24 consenting to the government searching one's
25 email.

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

8 MR. UNIKOWSKY: Well, I guess I --

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

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

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

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

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

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

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

1 legal relationship to the data is similar to
2 the legal relationship between someone who
3 sends a package and --

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

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

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

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

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

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

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

17 JUSTICE GORSUCH: And the --

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

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

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

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

15 Under the property theory, it might be
16 relevant because one of our arguments here is
17 that the terms of availment are that Google
18 could possess this information but couldn't
19 necessarily turn it over. There's a strict
20 privacy policy, so it wouldn't turn it over to
21 advertisers.

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

24 MR. UNIKOWSKY: Yes, Your Honor?

25 JUSTICE GORSUCH: -- privacy policy,

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

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

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

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

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

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

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

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

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

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

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

25 And in that case, you're not just

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

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

13 (Laughter.)

14 JUSTICE ALITO: Fourteen of the 15
15 judges on the en banc Fourth Circuit voted to
16 affirm. Nine relied on the good-faith
17 exception. Unless you think that we're going
18 to say something that convinces the -- unless
19 we're -- you -- you think we are going to say
20 no reasonable officer could believe that this
21 was a valid warrant or we're going to say
22 something that will convince the judges on the
23 Fourth Circuit to reach that conclusion, what
24 you're asking for is an advisory opinion.
25 That's number one.

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

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

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

12 MR. UNIKOWSKY: So let me tick through
13 each of those points, Your Honor. So, first of
14 all, as to the good-faith exception, the Court
15 did not grant certiorari on that question and
16 so we didn't brief it, so all we'd ask for in
17 this case is, if the Court finds a Fourth
18 Amendment violation, to reverse and send it
19 back to the Fourth Circuit to consider the
20 good-faith issue in view of this Court's
21 guidance.

22 Now I admit it's going to be hard for
23 us on the facts of this case to say that the
24 officer acted maliciously or that the legal
25 issues are obvious. I think, if there's

1 anything obvious from the briefs in this case,
2 it's that they're not obvious.

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

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

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

19 In terms of the issue that Google has
20 discontinued the sensor vault and has put the
21 data onto people's phones, first of all, this
22 was fully ventilated at the certiorari stage.
23 I don't -- I don't think that there's any
24 surprises that are in the merits briefs in this
25 case.

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

11 JUSTICE JACKSON: And is it --

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

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

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

24 And we raised in our cert petition
25 that we'd like the chance to argue that the

1 questions are intertwined, and in view of the
2 holding on the Fourth Amendment issue, we'd
3 like to, you know, litigate the good-faith
4 issue. The Court didn't grant certiorari. We
5 didn't brief it.

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

12 JUSTICE ALITO: Well, that was your
13 choice.

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

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

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

25 I think that the -- that the premise

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

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

17 JUSTICE SOTOMAYOR: Mr. --

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

25 MR. UNIKOWSKY: That is correct. It

1 was 7-7 with one judge declining to reach the
2 issue. So, obviously, there are some important
3 issues that go well beyond the particular facts
4 of this case, and there's also some important
5 issues in terms of the constitutionality of the
6 warrant that go well beyond the facts of this
7 case.

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

15 MR. UNIKOWSKY: Correct.

16 JUSTICE SOTOMAYOR: Google Documents,
17 what documents you store?

18 MR. UNIKOWSKY: Correct.

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

24 MR. UNIKOWSKY: Correct. It would --
25 it would not be a search, so no search warrant

1 would be required.

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

7 MR. UNIKOWSKY: There might be some
8 constraints under the Historic Communications
9 Act, but as far as the Fourth Amendment is
10 concerned, no.

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

13 MR. UNIKOWSKY: Correct.

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

16 MR. UNIKOWSKY: Correct.

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

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

24 JUSTICE SOTOMAYOR: And we can't
25 ignore today that the district court made

1 findings that the consent here was not
2 necessarily voluntary.

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

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

12 MR. UNIKOWSKY: Yes.

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

21 MR. UNIKOWSKY: Yes.

22 JUSTICE SOTOMAYOR: That's not what
23 this does. This identifies a place, a crime, a
24 limited time frame but a time frame, so it's
25 not a general warrant in a historical sense.

1 Why isn't this closer to the warrants that
2 we've permitted with beepers, where we don't
3 have a person or necessarily a place in mind,
4 but we have a location and general things, why
5 isn't that more consonant with Berger, Zucker,
6 Carroll, those lines of cases?

7 And that didn't identify a person, but
8 it identified a crime, a place, and the nature
9 of the unlawful conduct that we were looking
10 for.

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

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

24 So, as to the first part of that, this
25 Court has said that when a third party's acting

1 with the encouragement, endorsement, or
2 participation of the government in executing a
3 search warrant, that third party is --

4 JUSTICE SOTOMAYOR: Could I pause you
5 there?

6 MR. UNIKOWSKY: Yes.

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

9 MR. UNIKOWSKY: Well, it was --

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

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

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

18 JUSTICE SOTOMAYOR: Step 1 basically.

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

23 So, as to the first part, you're
24 absolutely right, there's not a human being
25 sifting through 500 million people's accounts.

1 That would take an extremely long time. At the
2 end of the day, it was a piece of software that
3 was going through every account, piercing, from
4 our perspective, every virtual safety deposit
5 box and checking inside to see whether the
6 person was there that day.

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

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

20 MR. UNIKOWSKY: Absolutely not, Your
21 Honor. That is not our position. I think this
22 is a unique case because Google's sense really
23 is structured like a row of virtual safety
24 deposit boxes, individual accounts. It's
25 indexed by account, which means you have to put

1 in your own credentials to get to your account,
2 and that doesn't get to you anyone else's. So
3 it's exactly like a bank with safety deposit
4 boxes except it's in the cloud.

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

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

15 So the technologists' amicus brief I
16 think has a good analogy here. It says that
17 it's not, you know, arbitrary that a hotel
18 divides different people into different rooms
19 as opposed to stacking all of the bunk beds in
20 the lobby. Like, a hotel which divides people
21 into different places, it's logical to have
22 walls between them. And in this case, there's,
23 you know, virtual walls as opposed to physical
24 walls.

25 But I don't think the fact that Google

1 could have constructed its system in a
2 completely different and, from our perspective,
3 inappropriate way should affect the analysis.

4 JUSTICE BARRETT: But, Mr. --

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

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

8 MR. UNIKOWSKY: No, please go ahead.

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

16 One way to think about this case is
17 that, listen, our physical intrusion cases, our
18 property cases require a physical intrusion,
19 and Katz set us off on this course that when
20 we're talking about technology, we think about
21 it in terms of reasonable expectations of
22 privacy.

23 And I am, frankly, a little bit
24 nervous -- and, I mean, I think the government
25 makes this point well -- I'm a little bit

1 nervous because this is very complicated,
2 right, figuring out how bailments apply, what
3 the property interest in this data is. Why not
4 just think about this from the perspective of
5 reasonable expectation of privacy?

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

10 JUSTICE BARRETT: Right.

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

16 One is the fact that it was stored in
17 the password-protected account. This Court has
18 said that property issues are instructive as to
19 the reasonable expectations, even if not
20 dispositive. So, if you think it matters that
21 this was in his password-protected account, you
22 can say that that's pertinent to the privacy
23 inquiry without getting into this trespass and
24 bailment law, as well as the sensitivity of the
25 data, which was at issue in Carpenter.

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

13 So does that make this different from
14 Carpenter?

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

19 First of all, I don't think it's just
20 the two hours. I think it's the -- the
21 forever. It's the comprehensiveness and the
22 ability of the government to get access to
23 really any two-hour stretch anywhere it wants
24 to at any point in the past.

25 It's -- I think it's quite different

1 from a case like Knotts, where, you know, the
2 police were following someone on a highway and
3 they put a beeper just to enhance the quality
4 of the visual surveillance.

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

11 And, here, I think it is. I mean, the
12 government has this tool that can go any point
13 in the past at any stretch of time. It -- you
14 know, it could figure out where, you know, all
15 of the people rather than just one person in a
16 particular place, and it can follow that person
17 around. Like, we see in this case, of the nine
18 people who were of greatest interest to the
19 government at step 1, it followed those people
20 around outside the geofence at step 2. And I
21 think that all of those considerations create
22 significant privacy implications even though
23 it's true the initial geofence was just an
24 hour.

25 JUSTICE BARRETT: But you can't raise

1 the Fourth Amendment issues or the Fourth
2 Amendment rights of the other people who might
3 be captured in the geofence. We're really just
4 talking about your client's Fourth Amendment
5 rights, right? I mean, because you keep
6 pointing out, well, this swept in a lot of
7 innocent people. Sure, but, really, it's your
8 client's Fourth Amendment rights that we care
9 about here.

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

17 I understand it's just Petitioner's
18 rights at stake, but even staying laser-focused
19 on Petitioner, you know, this was a law
20 enforcement tool that allowed the government to
21 determine where Petitioner himself was at any
22 point in the past.

23 JUSTICE JACKSON: Mr. --

24 MR. UNIKOWSKY: Yes, Your Honor.

25 JUSTICE JACKSON: Oh, sorry. Are you

1 done?

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

4 MR. UNIKOWSKY: Well, the government
5 has taken the position in its brief that even
6 if you're in your own house and a geofence
7 warrant is used, the government has a footnote
8 suggesting that there wouldn't be a
9 constitutional violation either. Obviously,
10 this case did involve a bank. I acknowledge
11 that, although -- just one other word --
12 because of the error bars, because of the
13 confidence intervals in some of these
14 estimates, actually, those confidence intervals
15 may have encompassed people's homes. And, in
16 fact, three of the people within the geofence
17 went to their houses and were possibly
18 identified by our expert.

19 Yes, Your Honor?

20 JUSTICE JACKSON: So I wanted to
21 invite you to finish your answer to Justice
22 Sotomayor when you said -- you tried to defend
23 the -- the general warrant analysis, and then
24 you said, even if you don't agree with that, I
25 have another point. But, before you do that,

1 let me just home in for a second on the general
2 warrant analysis.

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

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

18 And I understand the intrusion at step
19 1 was -- was fairly limited. It was just a
20 computer zipping past all these accounts, just
21 checking quickly whether they were in a
22 particular place. But, you know, cases like
23 Jones say that even a very small trespass is
24 enough.

25 But I see my red light is on. If I

1 could just answer Your Honor's second question?

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

4 MR. UNIKOWSKY: Okay.

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

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

16 MR. UNIKOWSKY: I do. The Court made
17 that very clear in Carpenter. I mean, this
18 warrant was sought several weeks after the
19 crime, and so any exigent circumstances, I
20 think, argument would have gone away. Our
21 position today is not intended to undermine any
22 well-recognized exception to the warrant rule.

23 CHIEF JUSTICE ROBERTS: Well, my -- my
24 question is whether -- whether intended or not,
25 whether it could be used to expand it a great

1 deal. I mean, what's exigent can be expanded
2 if, in fact, it makes sense. It's when you
3 have -- you don't have this much access, you
4 can't -- doesn't do any good to say, you know,
5 okay, you know, you have to search to find out
6 who all these people are. But, if at the push
7 of a button you can find out who they are, that
8 might give you more opportunities to avail
9 yourself of the exception. I don't know which
10 way that cuts, but it does seem to me that it
11 might undermine privacy interests further --

12 MR. UNIKOWSKY: Well, if this --

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

17 MR. UNIKOWSKY: Look, if there's an
18 ongoing emergency with a bomb, I mean, we're
19 not going to argue against the use of these law
20 enforcement tools even if there might be, you
21 know, a significant amount of privacy
22 violations. And so, yeah, I mean, this can be
23 a potential useful tool in the case of a bona
24 fide exigent circumstance -- exigent
25 circumstances. We're -- we're certainly not

1 challenging that, Your Honor.

2 CHIEF JUSTICE ROBERTS: Justice
3 Thomas, anything further?

4 Justice Alito?

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

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

18 MR. UNIKOWSKY: So I don't think a
19 grand jury subpoena or any kind of subpoena
20 would have been constitutionally permissible in
21 this case.

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

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

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

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

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

23 MR. UNIKOWSKY: No, no, please.

24 JUSTICE ALITO: Well, in Carpenter,
25 what seemed to be a very important feature, I

1 think maybe a dispositive feature, was that the
2 information that was sought was information
3 that the user of the cell phone had no choice
4 but to disclose because the cell phone tower
5 location is an indispensable feature of
6 actually using your phone. That is not the
7 situation here.

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

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

18 MR. UNIKOWSKY: Right. It's actually
19 quite --

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

23 MR. UNIKOWSKY: So --

24 JUSTICE ALITO: You have to choose to
25 disclose it.

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

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

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

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

24 You know, unlike with CSLI, you have
25 total -- as Your Honor said, you can turn it

1 on, you can turn it off, you can delete all of
2 it anytime you want. You can delete part of
3 it. It's really unlike something like CSLI in
4 which you have the business keeping the records
5 for its own purposes.

6 JUSTICE SOTOMAYOR: Counsel --

7 CHIEF JUSTICE ROBERTS: Justice --

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

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

12 JUSTICE SOTOMAYOR: I want to --

13 CHIEF JUSTICE ROBERTS: I'm sorry.

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

17 JUSTICE ALITO: Go ahead.

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

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

24 MR. UNIKOWSKY: That's right.

25 Searches are determined ex ante.

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

10 MR. UNIKOWSKY: Yes.

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

14 MR. UNIKOWSKY: I agree with that.

15 JUSTICE SOTOMAYOR: So, whether it's a
16 minute that you're searching for or six weeks,
17 it's not the time that's at issue. It's
18 whether or not private information in which you
19 have a reasonable expectation of privacy will
20 be sought, correct?

21 MR. UNIKOWSKY: Yes.

22 JUSTICE SOTOMAYOR: That's why Justice
23 Scalia said it didn't matter for Fourth
24 Amendment purposes to search the heat waves
25 emanating from your house because, though it's

1 not giving out private information, it's -- you
2 can't know in advance what it's going to
3 disclose, correct?

4 MR. UNIKOWSKY: Yes.

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

11 Could you explain why not?

12 MR. UNIKOWSKY: Sure.

13 JUSTICE SOTOMAYOR: It would seem to
14 me that particularity has nothing to do with
15 time. It has to do with the relationship of
16 time to the circumstance that justifies the
17 need.

18 MR. UNIKOWSKY: Right. So there --
19 there's two questions about time, one of
20 whether there's a search at all, and the second
21 question of whether the warrant was
22 sufficiently particularized.

23 So, as to the first question, I don't
24 think the time period should matter as to the
25 search because, you know, I don't think the

1 Court should be in the business of drawing
2 lines between seven days and two days and 24
3 hours, especially since the government gets to
4 choose the time interval. So two hours at a
5 place selected by the government really can
6 reveal a lot. There's a --

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

11 MR. UNIKOWSKY: Of course.

12 JUSTICE SOTOMAYOR: All right.

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

20 We still think there is a Fourth
21 Amendment violation because there wasn't
22 probable cause to search all 19 people within
23 the geofence merely because of their proximity
24 to the crime.

25 I get the fact that a time period was

1 specified.

2 JUSTICE SOTOMAYOR: Well, Google
3 itself said that to them. And I don't know why
4 we're rely -- why we would say it's okay to
5 rely on Google to do that. They moved it from
6 19 to nine, wasn't it?

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

9 JUSTICE SOTOMAYOR: Oh, step 2. Okay.

10 MR. UNIKOWSKY: Yes. But, at step 1,
11 19 people's information was exposed merely
12 because they were near the scene of the crime.
13 And so I don't think that the problem -- you
14 know, I understand that the warrant specified a
15 time period, but the particularity requirement
16 in the Fourth Amendment requires particularity
17 as to what is searched. And I don't think that
18 there was -- certainly, I don't think there's
19 particularization here when the warrant just
20 said, whatever unspecified number of people are
21 in the proximity of the crime, those are the
22 people to be searched.

23 I don't think that's a particularized
24 description of what is to be searched, and I
25 think there's a probable cause here -- problem

1 here because the fact that someone's near the
2 crime doesn't create probable cause to search
3 their diary, and we view this as the functional
4 equivalent of a search of their diary.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

19 MR. UNIKOWSKY: Not necessarily. So
20 sort of a -- a narrower argument would be that
21 if there's probable cause to really believe
22 that every single person in the geofence has
23 relevant information, then, you know, that --
24 that's a stronger case for the government.

25 So that might come up, for example,

1 suppose there is a murder in the woods and it's
2 3 a.m. and there's, you know, one criminal and
3 one victim and you draw a circle around that
4 and there really is probable cause to think
5 that every single person in that circle is
6 either the murderer or the victim, then maybe
7 the government can say there's probable cause
8 that every person whose data is exposed to the
9 government in that case will have relevant
10 evidence.

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

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

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

24 MR. UNIKOWSKY: Right. So, I mean,
25 our -- our -- as the Court knows, we still

1 think there's a general warrant. We still
2 think that everyone's storage locker is being
3 searched. But -- and we also think there's
4 a --

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

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

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

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

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

22 JUSTICE GORSUCH: Yeah. And then, in
23 terms of the timing on the search side that
24 we've discussed, the fact that the government
25 peeks in your mail for just a quick second or

1 looks through your safety deposit box or your
2 hotel room or your diary for just a minute,
3 we -- we would -- that's a search, right?

4 MR. UNIKOWSKY: Yes.

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

7 MR. UNIKOWSKY: That's correct.

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

12 MR. UNIKOWSKY: Sure. So we believe
13 that a warrant was required under the Stored
14 Communications Act. We didn't file a motion to
15 suppress on that ground because suppression
16 isn't an available remedy. But that may be
17 pertinent to the question of a reasonable
18 expectation of privacy because people have an
19 expectation that the government will get a
20 warrant if there's a statute that requires the
21 government to get a warrant and there's also a
22 private cause of action on the table.

23 The government takes the position that
24 possibly the Stored Communications Act doesn't
25 require a warrant because the cell phone is a

1 tracking device. I mean, if that's true, then
2 anything that's transmitted from the cell phone
3 into storage, your email if you're sending it
4 from your phone or a photo or anything else,
5 all of that would be information transmitted by
6 a tracking device. None of that would be
7 protected. So I don't think that's a tenable
8 way of getting around the Stored Communications
9 Act.

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

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

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

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

7 JUSTICE GORSUCH: It is the location.

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

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

17 MR. UNIKOWSKY: So Virginia has a
18 statute, the Virginia Computer Crimes Act, that
19 defines data on a computer network to be a form
20 of property. It creates criminal liability for
21 trespasses. It also creates civil liability
22 for malicious trespasses.

23 And so, you know, we view the question
24 of whether a property interest exists to be one
25 of federal law. Like the Court held in the

1 Tyler versus Hennepin case, you know, the Court
2 should consider a common law rule, not -- not
3 state by state.

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

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

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

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

21 MR. UNIKOWSKY: That's right.

22 JUSTICE GORSUCH: -- without deciding,
23 we could just decide it on particularity
24 grounds. And you've talked quite a lot about
25 the step 1 particularity problems you see. Can

1 you talk about the particularity problems you
2 see at step 2 or step 3?

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

15 So the government says that the
16 original warrant was a sufficient basis to
17 de-anonymize and get the two hours from
18 everybody in the geofence. So that's wrong for
19 a couple reasons. One is it just -- there's
20 just clearly not probable cause to get two
21 hours of information, including data outside
22 the geofence, merely because someone was, like,
23 sitting in church within an hour of the crime.

24 And, second, even the geofence warrant
25 itself doesn't authorize that. It doesn't say

1 the police can go ahead and collect data from
2 everybody. All it says is that once the police
3 winnows down the 19 or however many there are
4 to some smaller number, then it can collect
5 additional data. But that's not particularized
6 because it doesn't say how to identify those
7 people.

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

10 MR. UNIKOWSKY: It -- that would be a
11 very narrow basis. I mean, I would caution the
12 Court that if the Court resolves the case on
13 that basis, then, in future cases, the
14 government can cure the problem here by just
15 obtaining another warrant before step 2, which
16 may be the answer, but, you know, that would be
17 a particularly narrow way of resolving the
18 case. Obviously, we have concerns with step 1
19 as well, and so, you know, we -- we believe
20 that's unconstitutional.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: Assuming it's a
25 search for purposes of this question and that I

1 don't buy your general warrant argument, how
2 can you overcome Zurcher for purposes of your
3 argument that it's not sufficiently
4 particularized, et cetera?

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

14 JUSTICE KAVANAUGH: And, here, we have
15 that?

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

18 JUSTICE KAVANAUGH: Okay. Keep going.

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

25 JUSTICE KAVANAUGH: Why do you

1 characterize it that way? It doesn't seem that
2 way to me. It's a search of one place
3 somewhere.

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

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

13 MR. UNIKOWSKY: Right.

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

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

20 JUSTICE KAVANAUGH: So we have
21 probable cause. You admitted that correctly.
22 And it's just then is it sufficiently
23 particular? And it seems like Detective Hylton
24 here, you know, really went through a lot of
25 the steps that should be applauded in terms of

1 narrowing this down and going through multiple
2 steps. I guess I'm trying to figure out why
3 this was bad police work to get a warrant.

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

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

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

16 MR. UNIKOWSKY: So, first of all, I'm
17 not casting any aspersions whatsoever on
18 Detective Hylton. There's no sign of any kind
19 of malice whatsoever. That's not our argument
20 today, okay?

21 We do think that the warrant was
22 defective. And if I could just make a couple
23 points about your questioning.

24 So, first of all, I understand a
25 warrant was obtained here, but the Court should

1 be realistic about how much protection the
2 warrant requirement really provides in a case
3 like this. Sorry, Your Honor.

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

6 MR. UNIKOWSKY: I know.

7 JUSTICE KAVANAUGH: -- keep going.

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

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

15 MR. UNIKOWSKY: Absolutely.

16 JUSTICE KAVANAUGH: -- and the history
17 of it.

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

1 is obtained. But I'm happy to stipulate --

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

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

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

13 MR. UNIKOWSKY: Your Honor, the Fourth
14 Amendment requires particularity as to the
15 place to be searched. In this case, the
16 geofence was not the place to be searched. The
17 place to be searched was these Google accounts.
18 So --

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

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

4 JUSTICE KAVANAUGH: Correct.

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

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

15 JUSTICE KAVANAUGH: Well, let me
16 ask --

17 MR. UNIKOWSKY: Yes.

18 JUSTICE KAVANAUGH: -- alter the
19 hypothetical --

20 MR. UNIKOWSKY: Sure.

21 JUSTICE KAVANAUGH: -- or maybe
22 your -- all you know is the murderer was in the
23 restaurant and the search warrant or subpoena,
24 the search warrant is to the restaurant for the
25 list of people -- to the restaurant for the

1 list of people who were in there in a two-hour
2 period.

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

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

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

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

17 MR. UNIKOWSKY: Well --

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

23 MR. UNIKOWSKY: Correct.

24 JUSTICE KAVANAUGH: Okay. And do
25 you -- this is just more practicalities, but

1 the local government amicus brief and the 31
2 states' amicus brief, which has a huge spectrum
3 of attorneys general on that amicus brief,
4 which I think warrants note, talk about the
5 practical consequences of not being able to
6 solve murders. A lot of -- you know, a huge
7 percentage of murders are never solved, for
8 example, and -- and violent crimes. Just want
9 you to respond to that.

10 MR. UNIKOWSKY: Sure. So, first of
11 all, we're not suggesting that all law
12 enforcement techniques that allow the police to
13 determine everyone within a particular area are
14 inherently unconstitutional. We think this
15 particular technique of serving geofence
16 warrants on Google and requiring search of
17 the -- searches of the Sensorvault, we do think
18 there's a constitutional violation there. But
19 there's many other law enforcement techniques
20 that deploy modern technology that would not
21 present the same types of issues.

22 And the other point is that --

23 JUSTICE KAVANAUGH: Such as?

24 MR. UNIKOWSKY: So we haven't taken a
25 position on the constitutionality of tower

1 dumps. That presents a very different set of
2 issues because that cannot be conceptualized as
3 the search of lots of virtual storage lockers.
4 There are other Fourth Amendment arguments on
5 the table there, but I don't think anything the
6 Court says in this case would impugn the
7 constitutionality of tower dumps.

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

13 So there are a lot of other law
14 enforcement techniques that are available to
15 solve crimes in which you know where -- where
16 the crime happened but you don't know who it
17 is. And we're not challenging those. We're
18 just challenging this one unique particular
19 type of method.

20 And the other thing is, you know,
21 Professor Kerr's brief points out that there's
22 actually quite a lot of geofence warrants that
23 have been issued. Like, the district court
24 says there was 9,000 geofence requests issued
25 to Google in 2019. And there's actually a

1 fairly small number of reported cases involving
2 motions to suppress.

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

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

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

17 JUSTICE KAVANAUGH: And they have
18 specific cases, but I'll leave it there. Thank
19 you.

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

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

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

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

8 JUSTICE BARRETT: Why?

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

13 JUSTICE BARRETT: But it could. I
14 mean, I'm just looking at the policy, and it
15 says that Google may share non-personally
16 identifiable information publicly and with our
17 partners, advertisers, publishers,
18 rightsholders, specific partners to collect
19 information from your browser or device for
20 advertising purposes.

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

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

6 (Laughter.)

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

10 JUSTICE SOTOMAYOR: I suggest you have
11 IT do it.

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

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

16 JUSTICE BARRETT: Okay. Well, maybe
17 it doesn't as a practical matter, but that
18 policy as I read it does permit Google to do
19 it.

20 MR. UNIKOWSKY: I don't think it does.
21 There's -- so there's -- there's declarations
22 in the record that says that Google doesn't do
23 it, and the privacy policy says that it's not
24 going to share individual data with -- with
25 advertisers. I think what you read is not a

1 reference to location history. I'm -- I'm not
2 sure what --

3 JUSTICE BARRETT: Yeah.

4 MR. UNIKOWSKY: I don't think it is,
5 Your Honor.

6 There's a declaration in the record
7 and there's live testimony and there's a
8 statement in the private -- privacy policy that
9 Google only -- does not share individual data
10 with -- with advertisers. It just doesn't do
11 that. Like, an advertiser cannot go to Google
12 and say share --

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

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

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

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

14 In the same way that if you stay at a
15 hotel, you know, the hotel reserves the right
16 to have a housekeeping service come into your
17 room and maybe the housekeeper will see your
18 personal possessions, but that in and of itself
19 is not consent to have the government do that.

20 So, likewise, yes, Google does reserve
21 the right to analyze your data, like if you
22 went to a lot of ski hills, you might see a ski
23 ad on YouTube, but I don't think that in and of
24 itself meant you -- you've waived Fourth
25 Amendment protection with respect to the

1 government seizing it without a warrant.

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

8 JUSTICE BARRETT: Thanks.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

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

16 I mean, I thought the key issue was
17 what makes a warrant for a search of this
18 nature sufficiently particularized. That's one
19 way to put it.

20 And so, first of all, we've got Google
21 responding in steps. We have this warrant
22 request. The officer, according to your brief,
23 identifies a geographic area based on where the
24 crime took place and the time. You know, we
25 have a bank robbery at X time.

1 So what I'd like, says the law
2 enforcement officer, is the location history
3 data for 30 minutes before to 30 minutes after
4 a 150-meter radius around the bank.

5 Is that right? Is that how it starts?

6 MR. UNIKOWSKY: Yes. Yes.

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

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

17 MR. UNIKOWSKY: I do think that that
18 is one of the arguments we're advancing today,
19 that the government did not obtain a fresh
20 warrant before it conducted the step 2 search,
21 and the initial warrant did not authorize all
22 of the information to be obtained from -- all
23 of the two hours of information to be obtained
24 from everyone within the geofence, and that --

25 JUSTICE JACKSON: Right.

1 MR. UNIKOWSKY: Yes.

2 JUSTICE JACKSON: Okay. So, fine.

3 But why isn't there probable cause?

4 You -- you -- you seem to be fighting the
5 premise that at the beginning, when the search
6 is drawn, when the fence is drawn, 150 meters
7 around the bank, 30 minutes before and 30
8 minutes after, and 19 accounts are identified,
9 setting aside your general warrant point --

10 MR. UNIKOWSKY: Mm-hmm.

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

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

25 MR. UNIKOWSKY: Well, except for that

1 very last step, I don't disagree. I think the
2 answer in this case would be no.

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

5 MR. UNIKOWSKY: Well --

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

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

12 JUSTICE JACKSON: No, I understand.

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

15 JUSTICE JACKSON: You -- you said in
16 response to Justice Kavanaugh it's not the
17 whole location. You -- Justice Kavanaugh says
18 this is Zurcher, which I think has some force
19 to it, that we have a location and there are
20 maybe 18 people in this 19-person search who
21 are going to be innocent, who didn't know
22 anything about this but just happened to be
23 there in that time, but Zurcher seems to say
24 that's fine as long as you have probable cause
25 to believe that there is a crime that's being

1 committed in this location at this point.

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

5 MR. UNIKOWSKY: Okay.

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

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

15 And I think that a geofence warrant
16 that encompasses not just the bank but also a
17 church and a church parking lot 30 minutes
18 before and 30 minutes after --

19 JUSTICE JACKSON: But we can't -- we
20 can't eliminate those. We don't know anything
21 about those people. That's -- this is a
22 reverse warrant, says Professor Kerr, that
23 you're allowed to have the radius encompass
24 people who aren't necessarily the bank robber
25 if you're trying to find the bank robber and

1 there's probable cause to believe he was there
2 30 minutes before or 30 minutes after.

3 MR. UNIKOWSKY: Well, I get --

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

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

14 JUSTICE JACKSON: Okay. So isn't the
15 real problem if you're looking at it as I am
16 that the point that you made with Justice
17 Gorsuch that we don't understand how the police
18 went from the nine to the 19, that the next
19 step in opening it up and looking for more
20 information, there has to be some rational
21 basis or probable cause to believe that these
22 particular accounts we need to have more
23 information for, and that's not in this record,
24 right?

25 MR. UNIKOWSKY: That is certainly

1 true, Your Honor. The warrant just told the
2 police basically find the people that seem most
3 suspicious to you. And the police just
4 initially selected all 19. Google pushed back.
5 The police suggested --- selected nine. But
6 the warrant itself doesn't provide any criteria
7 and --

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

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

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

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Feigin.

24

25

1 ORAL ARGUMENT OF ERIC J. FEIGIN
2 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

16 One is that it's like -- this is like
17 uploading your own content to a storage locker.
18 Even Google doesn't treat it that way. If you
19 see it -- if you look at Joint Appendix 55,
20 you'll see that Google separates out
21 user-created content from other kinds of
22 content.

23 The second main misconception here, if
24 I might just continue for one second, is that
25 this would implicate all sorts of other types

1 of data in which the Court has found more of a
2 reasonable expectation of privacy, like email.
3 Location history is different.

4 I'm sorry, Justice Thomas.

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

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

13 I -- I do think there's really no
14 chance the opinion here would make the
15 officer's actions here unreasonable.
16 Petitioner is suggesting now some kind of new
17 kind of warrant requirement exception to the
18 good-faith exception. I don't really
19 understand how that would work or what the
20 contours of it would be, and I don't -- like,
21 what does it mean to have a new kind of
22 warrant?

23 At bottom, we just don't think there's
24 anything that's going to happen here other than
25 an affirmance. You would essentially have

1 something that looks like an advisory opinion.
2 I mean, I suppose the Court could say that the
3 theoretical chance that something might happen
4 is enough to keep this case alive, but I don't
5 think that makes a great deal of sense.

6 JUSTICE JACKSON: But in --

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

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

13 JUSTICE THOMAS: Yes.

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

16 JUSTICE THOMAS: Exactly.

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

24 CHIEF JUSTICE ROBERTS: You --

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

1 Your Honor.

2 CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

20 CHIEF JUSTICE ROBERTS: Counsel --

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

25 I question whether that is a -- an

1 invasion of their reasonable privacy
2 expectations. I think clearly not under this
3 Court's decision in Knotts. That's a public
4 place. These were public movements.

5 CHIEF JUSTICE ROBERTS: Counsel, if I
6 could interrupt.

7 MR. FEIGIN: Sorry.

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

16 MR. FEIGIN: Well, number one, Your
17 Honor, would be the Stored Communications Act.
18 And I respectfully disagree with Petitioner's
19 counsel -- I mean, we have a somewhat different
20 reading of the Stored Communications Act and
21 exactly what it would require under these
22 circumstances. And I know it's a statutory
23 protection. But I disagree with counsel that
24 it sets some kind of Fourth Amendment floor.

25 The Court basically rejected that

1 position in City of Ontario against Quon, which
2 also involved the Stored Communications Act.

3 CHIEF JUSTICE ROBERTS: Well, put the
4 statute --

5 MR. FEIGIN: Okay.

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

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

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

22 MR. FEIGIN: Well, I think one avenue
23 that the Court has potentially held open,
24 number one, is the amount of time for which the
25 government could look. I don't know that the

1 government could see everyone who came into a
2 church at any time. I certainly --

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

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

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

14 I mean, if there were a surveillance
15 camera across -- at a bodega across the street
16 from the church that could also see everybody
17 who came in, then I don't think there'd be a
18 claim to Fourth Amendment protection from
19 government review of that.

20 The second thing that I think I would
21 say is that this has been -- the degree to
22 which some -- someone can really be located in
23 a particular location, I think, is somewhat
24 overstated in this case. If you want to look
25 at the sealed volume of the Joint Appendix,

1 Joint Appendix Volume 3, you'll see that
2 usually there's a fairly wide confidence
3 interval of close to, you know, like, 30, 40
4 meters for everyone. So -- and that's only --
5 that only describes a circle with a 68 percent
6 probability of containing them. So it's --

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

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

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

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

21 CHIEF JUSTICE ROBERTS: Well, again --

22 MR. FEIGIN: And the second --

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

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

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

13 CHIEF JUSTICE ROBERTS: So, to prevent
14 surveillance of sensitive locations, you have
15 to rely on the fact that people are going to
16 turn off something that many if not most people
17 find is an important service?

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

1 JUSTICE GORSUCH: Mr. Feigin --

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

4 JUSTICE GORSUCH: Mr. Feigin --

5 MR. FEIGIN: I'm sorry.

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

16 Oh, and we might have a few tools
17 besides warrants to get social media companies
18 to comply with governmental requests.

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

21 JUSTICE GORSUCH: Yeah. Okay.

22 MR. FEIGIN: We're not walking away
23 from that completely.

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

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

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

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

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

15 MR. FEIGIN: Yes, Your Honor, and
16 here's why: I think a lot of the arguments
17 that are being made here today and are made in
18 the briefs, if accepted -- and I think, again,
19 this is something Justice Jackson was getting
20 at -- would have a debilitating effect on a
21 number of other law enforcement techniques.

22 JUSTICE GORSUCH: Like looking at
23 email?

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

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

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

7 JUSTICE GORSUCH: No?

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

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

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

15 JUSTICE GORSUCH: So it's just
16 location data that's different?

17 MR. FEIGIN: Yes.

18 JUSTICE GORSUCH: Okay.

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

22 JUSTICE SOTOMAYOR: Could you just
23 footnote that answer? Are they different
24 because you treat them differently, or are they
25 different because something in your theory --

1 theory doesn't apply to them?

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

9 JUSTICE SOTOMAYOR: How about a
10 calendar?

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

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

23 JUSTICE SOTOMAYOR: I interrupted
24 Justice Gorsuch.

25 JUSTICE GORSUCH: No, no.

1 JUSTICE SOTOMAYOR: And I --

2 MR. FEIGIN: -- communications.

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

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

12 MR. FEIGIN: On this particular point,
13 Your Honor, I don't think there was -- it was
14 inconsistent with --

15 JUSTICE KAGAN: Yeah, but, Mr. Feigin,
16 I do think that Carpenter seems quite relevant
17 to this, what you're now saying is location is
18 different from email and photos and calendar
19 appointments and everything else that people
20 give to Google.

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

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

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

9 Number two, I do think Carpenter and
10 Jones --

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

14 MR. FEIGIN: Okay. So --

15 JUSTICE KAGAN: -- out of the goodness
16 of your own heart.

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

21 One, in Carpenter, you had essentially
22 the creation of CSLI, you know, Cell Site
23 Location Information, as the price of even
24 having a cell phone, which the Court had said
25 in Riley was a device that basically nobody can

1 live without.

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

4 JUSTICE KAGAN: Is that the -- the
5 standard, the nobody-can-live-without-this
6 standard?

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

13 JUSTICE KAGAN: So where -- where is
14 the -- the -- the -- the line? If -- if
15 80 percent enabled this, would that -- would
16 that make it a different case?

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

1 location history. You can use Google Maps even
2 without a Google account.

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

12 I don't think two hours is enough to
13 show the patterns of one's life. They might
14 show that you went to a church once. It
15 doesn't show that you're a regular churchgoer.
16 It might show that you went to a doctor's
17 office. It doesn't show why.

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

1 et cetera?

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

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

12 In Knotts, they were following people
13 to private residences. They didn't follow them
14 into the private residences, but they were
15 following people to private residences through
16 the use of a beeper and stopping outside the
17 private residence.

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

23 Number --

24 JUSTICE KAGAN: Would your position be
25 the same if you had picked up Mr. Chatrue in

1 his home?

2 MR. FEIGIN: If -- well --

3 JUSTICE KAGAN: If it had revealed

4 his --

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

11 JUSTICE KAGAN: But -- but --

12 JUSTICE BARRETT: But could you?

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

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

20 And the reasons we would argue that it
21 would still remain the same is, number one, we
22 had no warrant. Number two, I think this would
23 make this case somewhat like Karo, where it
24 doesn't invalidate the law enforcement
25 technique ab initio. It just means that

1 someone with standing could suppress the
2 information about the particular home.

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

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

1 expose that information to public view.

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

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

11 MR. FEIGIN: Well --

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

14 MR. FEIGIN: -- just the --

15 JUSTICE BARRETT: -- and is that true,
16 that in this case, you're saying he didn't --
17 you didn't pick him up in any home?

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

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

25 MR. FEIGIN: We couldn't tell which

1 home he was even in.

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

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

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

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

20 JUSTICE BARRETT: But no is your
21 answer?

22 MR. FEIGIN: I think if we were to
23 argue that -- I think -- I'd like to reserve
24 the possibility that we could argue that it's
25 not a search principally because of the opt-in

1 and the broadcasting, but, look, I fully accept
2 that that would be a very, very difficult
3 argument to sustain. Nothing in our argument
4 in this case depends on it.

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

9 JUSTICE GORSUCH: Well --

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

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

15 (Laughter.)

16 MR. FEIGIN: Other than that, Justice
17 Gorsuch.

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

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

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

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

19 MR. FEIGIN: I don't know about --
20 necessarily about storage locker 1, that would
21 probably be impermissible. Certainly, we
22 couldn't search every apartment in a building,
23 both because homes are first among equals and
24 because --

25 JUSTICE GORSUCH: Well, hotel -- hotel

1 rooms, bank, safety deposit boxes, storage
2 facilities, the warrants I've just described,
3 go search for the contraband, the gun, the
4 pearl necklace, okay or not okay? Are those
5 sufficiently particularized?

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

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

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

15 MR. FEIGIN: I'm sorry. A hotel is
16 the same because the Court has treated it as a
17 home.

18 JUSTICE GORSUCH: Okay.

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

21 JUSTICE GORSUCH: All right.

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

24 JUSTICE GORSUCH: How about the other
25 two?

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

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

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

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

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

21 JUSTICE GORSUCH: The government --

22 MR. FEIGIN: -- but what I don't --

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

1 contraband?

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

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

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

9 JUSTICE GORSUCH: I mean, it really --

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

14 If I could explain a little further on
15 this, Your Honor. I think what makes the
16 difference in some of these hypotheticals
17 versus what we have here --

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

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

24 JUSTICE GORSUCH: Okay.

25 MR. FEIGIN: Yeah, I would need to

1 know a little more about it.

2 JUSTICE GORSUCH: Okay. All right.

3 And now--

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

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

9 MR. FEIGIN: No.

10 JUSTICE GORSUCH: Well, you said so --

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

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

14 MR. FEIGIN: Do you mean query in the
15 -- do you mean "query" as like a synonym for
16 the First Amendment sense?

17 JUSTICE GORSUCH: I'm using your
18 words, from page 41.

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

22 JUSTICE GORSUCH: And -- and there are
23 --

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

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

3 MR. FEIGIN: Yes, I agree with that.

4 JUSTICE GORSUCH: Okay. All right.

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

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

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

22 MR. FEIGN: Yeah.

23 JUSTICE GORSUCH: Let's -- let's
24 assume that these accounts are -- are kept in
25 what you can call opacity or whatever you want,

1 but are kept in the same kind of discrete
2 manner as your -- as your e-mail is.

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

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

10 MR. FEIGIN: So, Your Honor --

11 JUSTICE GORSUCH: They're -- they're
12 categorized similarly by user and -- and walled
13 off from other users, both the e-mail and the
14 location data. Let's assume they're similar in
15 that respect.

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

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

10 I don't think that the limited amount
11 that even Google sees at step 1 is going to be
12 considered a search. And for -- as I said
13 earlier, from the government's perspective, all
14 of those other storage lockers, if you want to
15 call them that, and we're accepting that
16 analogy for purposes of this answer, all of
17 those other storage lockers might as well not
18 exist. For all the government knows, they --
19 there are only 19 people --

20 JUSTICE JACKSON: Is that because --

21 MR. FEIGIN: -- who have --

22 JUSTICE JACKSON: Mr. Feigin, is that
23 because, at step 1, unlike the examples that
24 we've been talking about, you don't know how
25 many apartments there are? You don't know how

1 many storage lockers there are? At step 1,
2 it's just like getting a list. There are 16
3 apartments in this building, right?

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

13 I'm -- I'm struggling to understand
14 the step 1 problem, other than to figure out
15 how the government came up with 150 meters and
16 30 minutes before and after. So can you start
17 maybe by answering that question? Where --
18 where does that number -- where do those
19 numbers come from?

20 MR. FEIGIN: Sorry. I can't help
21 you're struggling with step 1 because I too
22 don't see a problem with step 1. But the
23 150-meter radius and the half an hour before
24 and half an hour after were based on wanting to
25 exclude -- there's some testimony in the record

1 about this. They did want to include the
2 church because they had testimony about a
3 suspicious car that had been parked at the
4 church. And they thought the robber, as it
5 turns out, directly might have come from there.

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

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

15 JUSTICE JACKSON: Okay.

16 MR. FEIGIN: -- no.

17 JUSTICE JACKSON: All right.

18 MR. FEIGIN: I'll just explain to you
19 how they got 150 meters. And half an hour
20 before and half an hour after allows you some
21 information about, for example, there was a
22 reference -- and the magistrate did learn this
23 -- to co-conspirators in the demand note. And
24 you might want to see if someone dropped the
25 robber off or someone picked up the robber

1 afterwards. You want to know more about the
2 movements around it.

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

8 CHIEF JUSTICE ROBERTS: Sure.

9 MR. FEIGIN: 150 meters in Midlothian,
10 Virginia isn't likely to turn up the entire
11 phone book.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas, anything further?

15 Justice Alito?

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

21 If that happened, I think there'd be
22 an awful lot of angry hotel guests, all of
23 those who had nothing whatsoever to do with the
24 crime.

25 Here Mr. Unikowsky says 500 million

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

7 MR. FEIGIN: Well, I think that's
8 right, Your Honor. I think, that points out if
9 they did want to complain, that would be a
10 separate Fourth Amendment standing question, of
11 course, and I -- I don't think that Petitioner
12 here can represent their standing but one
13 reason they wouldn't complain is, first of all,
14 I don't think this would violate the reasonable
15 expectations of privacy even if the government
16 were doing it.

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

21 JUSTICE ALITO: Would you think that
22 -- don't you think that makes a difference for
23 Fourth Amendment purposes, the distinction
24 between a law enforcement officer invading a
25 physical space and a request to a company to

1 conduct a search with which the company
2 complies?

3 MR. FEIGIN: Well, not only do I think
4 that, Your Honor, but I think the Court has
5 said that multiple times. If you look at cases
6 like Oklahoma Press against Walling or Lone
7 Steer. It's very different when a than officer
8 comes into the premises and looks around versus
9 something that functions, although this had the
10 protections of the warrant, in many ways it
11 functioned like a subpoena in that it was the
12 provider doing the filtering and the provider
13 disclosing the records, which limited what the
14 government saw considerably.

15 The only non-anonymized information
16 the government got was for three individual
17 users. It didn't know anything about anyone in
18 the sensor vault, other than the 19 that were
19 returned for step 1. And as to them, it didn't
20 know their identities.

21 JUSTICE ALITO: You've heard --

22 MR. FEIGIN: I do think that's --
23 that's critical. But the argument that he's
24 trying to make about step 1, I think it's very
25 important that it really does implicate tower

1 dumps, for example, because in -- it implicates
2 any number of law enforcement techniques that
3 might incidentally find data about someone
4 else.

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

13 It's going to learn everything about
14 all its users in theory. I mean, I'm sure it's
15 using software to do this and having a
16 filtering mechanism, just like Google did here,
17 but it's going to learn everything about all
18 its users for that period of time.

19 I don't know how he distinguished
20 that. For tower dumps --

21 JUSTICE ALITO: Let's --

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

24 JUSTICE ALITO: Tower dumps are not
25 before us. E-mail are not before us.

1 Calendars are not before us. Photos are not
2 before us.

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

10 You've heard some proposals about
11 narrow theories on which the case could be
12 decided that would, as I understand them, focus
13 on whether there was a lack of probable cause
14 or a lack of particularity at step 2 or step 3.

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

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

24 And I think as I've tried to make
25 clear the Court -- a lot of the arguments that

1 Petitioner is making here, while those other
2 techniques are not directly at issue, would
3 have implications on a lot of those other
4 techniques and would create a lot of litigation
5 and have a potentially debilitating effect on
6 law enforcement. But -- they could even affect
7 such things as visual camera surveillance.

8 But as to the specific question you
9 asked about the particularity at steps 2 and 3,
10 I do think it was sufficiently particularized
11 because you had geospatial and temporal
12 coordinates that showed these people might be
13 either suspects or witnesses, and the
14 government simply was able to obtain enough
15 information to figure out which of them might
16 have information or be worth identifying.

17 And I -- I -- I think that the Court
18 has been clear that those are permissible law
19 enforcement interests. The Court might say
20 that --

21 JUSTICE ALITO: Well, let me just --

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

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

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

6 His argument that this is a general
7 warrant, his argument that he had a property
8 interest in the -- in this data that was
9 collected by Google?

10 His request that we treat this search
11 by a company as if law enforcement officers
12 were themselves searching through records?
13 Which of the -- which is the worst?

14 MR. FEIGIN: Is all of the above an
15 option, Justice Alito?

16 (Laughter.)

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

25 And I -- I -- I do think a lot of

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

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

14 JUSTICE ALITO: All right, thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 JUSTICE SOTOMAYOR: A few questions.
18 Number 1, the Stored Communications Act, a
19 violation, Mr. Unikowsky said, may be a
20 violation, there may be criminal penalties for
21 it, but it doesn't give a suppression remedy,
22 correct?

23 MR. FEIGIN: That's right.

24 JUSTICE SOTOMAYOR: All right. Number
25 2, you're saying everything would be horrible

1 but Carpenter has already said you need a
2 warrant, correct, for data?

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

5 JUSTICE SOTOMAYOR: All right.

6 MR. FEIGIN: And --

7 JUSTICE SOTOMAYOR: But you're saying
8 I didn't need a warrant because it was a short
9 period of time. Assuming I disagree with that
10 --

11 MR. FEIGIN: Well, Your Honor --

12 JUSTICE SOTOMAYOR: Just assume.
13 Okay? There are three steps to this process.
14 Were the three steps approved by the warrant?
15 I read the warrant but now I've forgotten.
16 Were the three steps approved?

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

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

23 MR. FEIGIN: Well, Your Honor, the
24 warrant required the government to make
25 reasonable efforts to minimize between steps 1

1 and 2 and step --

2 JUSTICE SOTOMAYOR: Well, usually
3 isn't it -- I thought that if, for the foreign
4 sovereign -- for the foreign checking system
5 that we have, that magistrate judge says you
6 have to minimize as you're doing it, but come
7 back to us if you want a greater scope.
8 Correct?

9 And here you went from 30 minutes to
10 two hours. And you didn't get a magistrate
11 judge --

12 MR. FEIGIN: That was expressly
13 authorized within the warrant. The warrant's
14 parameters said that step 2 would be an hour
15 before and an hour after the robbery.

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

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

20 JUSTICE SOTOMAYOR: I see. All right.

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

23 JUSTICE SOTOMAYOR: I misunderstood
24 that.

25 MR. FEIGIN: The original was an

1 hour -- a half hour before, a half hour after.

2 JUSTICE SOTOMAYOR: There are, I
3 understood, many jurisdictions in which the
4 government is going back at step 2 and step 3,
5 correct?

6 That's not much of a burden.

7 MR. FEIGIN: So --

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

12 MR. FEIGIN: We -- we could do that
13 and with more recent warrants, the government
14 has done that. Obviously this was a Virginia
15 warrant but just to defend this warrant for one
16 second, I think the Court recognized in Scott,
17 which was a case we cite in our brief, that --
18 which is under the Wire Tap Act, not directly a
19 Fourth Amendment case but the same principle
20 applies --

21 JUSTICE SOTOMAYOR: Now there's value,
22 isn't there, in our saying something like or
23 deciding we need a warrant, it has to be
24 particular as to time, place, time, and it has
25 to explain the reasons why those limitations

1 are reasonable because that's always a part of
2 a warrant search?

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

13 MR. FEIGIN: I think, if the Court
14 were to say something about warrants, that
15 could have value. And I'm not going to claim
16 that the sky is going to fall if we had needed
17 a separate warrant at steps 2 and 3 and a total
18 of three warrants. We've actually done that in
19 more modern times.

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

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

1 MR. FEIGIN: You --

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

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

14 JUSTICE SOTOMAYOR: We don't even -- I
15 don't even know if we need to go that far, but
16 you would not be troubled by that rule?

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

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

22 MR. FEIGIN: -- in our brief --

23 JUSTICE SOTOMAYOR: That's exactly --

24 MR. FEIGIN: -- we think the Fourth
25 Amendment satisfies those requirements -- our

1 warrant -- I'm sorry -- our warrant satisfies
2 those Fourth Amendment requirements.

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

6 MR. FEIGIN: Well, Your Honor --

7 CHIEF JUSTICE ROBERTS: Thank --

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

9 JUSTICE SOTOMAYOR: All right. Thank
10 you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: Mr. Feigin, I'm going
13 to give you one of those physical location
14 hypotheticals that you're going to resist, but
15 you'll have a chance to tell me why it's
16 different. But I -- I want to understand your
17 theory, and the easiest way for me to do it is
18 through these.

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

1 storage lockers for particular things that the
2 police chief needs.

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

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

22 MR. FEIGIN: I think some of that
23 might depend on exactly the circumstances under
24 which the proprietor of the storage facility
25 was permitted to go into these storage lockers,

1 because that might set some of the parameters
2 of the reasonable expectation of privacy or at
3 least inform them.

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

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

17 MR. FEIGIN: So there --

18 JUSTICE KAGAN: Five hundred lockers
19 searched, eight lockers searched, zero lockers
20 searched?

21 MR. FEIGIN: Your Honor, I think, to
22 the extent we're talking about physical objects
23 that are put into a storage locker that is
24 expected to remain locked except when the user
25 comes and wants to take something out of it, I

1 think we might say the -- that that was a
2 search of all of the lockers because someone
3 went in and looked in every single locker.

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

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

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

12 MR. FEIGIN: -- I am uncertain that
13 would be valid for the reasons I was discussing
14 with Justice Gorsuch in that those might all be
15 separate Fourth Amendment places, and we'd need
16 specific probable cause as to each.

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

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

21 MR. FEIGIN: So I think the difference
22 in our view is, first of all, to the extent
23 that I heard opposing counsel -- and this is in
24 their brief -- just suggest that Google's
25 database is quite large, I don't think that in

1 and of itself is a problem. I mean, obviously,
2 you could get a warrant to search a large house
3 where the rooms are accessible to one another
4 or a large file room even if it's physically
5 separated across multiple rooms in a facility.

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

16 You could imagine, Your Honor, a coat
17 check where we know that somebody dropped off
18 drugs at the coat check and we know what the
19 person's name is. We don't know the coat check
20 number. On their view, we couldn't get a
21 warrant to go look at all the bags for the ID
22 on -- on the bag that -- for the ID matching
23 the person who dropped off the bag because
24 those would be unnatural bag searches that
25 would be unlawful under the Fourth Amendment,

1 and so we'd wind up searching everybody's bag.

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

13 And, here, what you have -- again, we
14 deny that it's a bailment, but if you want to
15 analogize this to some kind of bailment
16 scenario like you might have with the storage
17 lockers, we'd still be within the terms of the
18 bailment because Google wasn't doing anything
19 other than stuff that Google could already do.

20 JUSTICE KAGAN: Thank you, Mr. Feigin.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: You always get a
25 warrant, you said, and the states always get a

1 warrant. So, in terms of practical problems
2 that would ensue, I gather there would be no
3 practical problems -- I understand your legal
4 theory, but no practical problems from our
5 saying that a warrant is required. Is that
6 accurate for these particular kinds of
7 warrants?

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

11 JUSTICE KAVANAUGH: That wasn't my
12 question.

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

15 JUSTICE KAVANAUGH: The question was,
16 are there any practical problems that you want
17 to identify with our --

18 MR. FEIGIN: With getting a warrant in
19 particular?

20 JUSTICE KAVANAUGH: Yes.

21 MR. FEIGIN: I don't --

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

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

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

6 MR. FEIGIN: What you say.

7 JUSTICE KAVANAUGH: Yes.

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

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

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

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

21 There's a big difference between the
22 issuing judge and the reviewing judge. That's
23 the good faith. And the issuing judge, it
24 seems to me, we should set some parameters,
25 reasonable -- temporal scope, reasonable

1 geographic scope, but then we trust issuing
2 magistrates around the country to implement
3 those rules. When it comes to the reviewing
4 judge, we don't micromanage in second-guessing
5 what the issuing judge did so long as it
6 doesn't exceed, you know, certain bounds that
7 we've set forth. Is that correct?

8 MR. FEIGIN: Yes.

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

13 Maybe we should -- you want us to say
14 that one is in this case, should we get into
15 the -- this case or should we just say it has
16 to be reasonable, temporal and geographic
17 bounds and -- and send it back to Justice
18 Alito's first question? We're on a -- we're at
19 the reviewing stage, not the issuing stage
20 here.

21 MR. FEIGIN: Your Honor, I think that
22 would probably be the better course because,
23 you know, I think what this Court's centuries,
24 frankly, of Fourth Amendment jurisprudence
25 teaches is that it's difficult to put a ton of

1 meat on the bone of reasonableness in this
2 context or probable cause or reasonable
3 suspicion or -- or any of these standards
4 because they're --

5 JUSTICE KAVANAUGH: This is
6 particular. How particular, you know, is 150
7 meters okay? 200 okay? It strikes me
8 micromanaging that's going to be problematic
9 and it's really problematic when you're
10 distinguishing the issuing judge from the
11 reviewing court down the road, given what we've
12 said reviewing courts have to be
13 extraordinarily deferential.

14 MR. FEIGIN: Yeah. And I think the
15 Court could direct some attention to the
16 magistrate about, you know, not wanting, as --
17 as I was suggesting to Justice Jackson, drawing
18 parameters that under local conditions are
19 likely to turn up much more than the government
20 needs. But I would --

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

25 MR. FEIGIN: You -- you should trust

1 them, Your Honor. And frankly our incentives
2 are perfectly aligned with theirs. Because
3 when we're seeking a warrant like this, we
4 don't want more information than we really need
5 because that just increases the noise-to-signal
6 ratio and makes these more difficult to
7 actually find the -- the criminals.

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

13 And that may be because some law
14 enforcement agencies -- I'm not impugning any
15 specific one, we have many wonderful law
16 enforcement partners -- aren't drawing the
17 parameters narrowly enough to even help
18 themselves. Everyone's incentives are aligned
19 here.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: So you describe
24 Mr. Unikowsky's position as maximalist but
25 there's a risk of the government's position

1 being maximalist the other way. And I think,
2 you know, two particular concerns are the
3 ability to track into private residences and
4 you didn't concede that.

5 The other is calendar, photos, e-mail.
6 Can you -- you -- you -- did -- did I
7 understand you before to say that you are
8 conceding that would be different and that
9 would be a search?

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

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

19 JUSTICE BARRETT: Sure.

20 MR. FEIGIN: -- which was quite clear
21 --

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

24 MR. FEIGIN: Yeah.

25 JUSTICE BARRETT: I -- I understand

1 that.

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

4 JUSTICE BARRETT: Right. But you are
5 saying that you would need a warrant for
6 calendar, photos, e-mail?

7 MR. FEIGIN: Yes.

8 JUSTICE BARRETT: That would be a
9 search?

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

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

14 MR. FEIGIN: -- explain again --

15 JUSTICE BARRETT: Well --

16 MR. FEIGIN: -- why -- why I think
17 that would be.

18 JUSTICE BARRETT: I -- I just wanted
19 to make sure we had a crisp of understanding
20 what the government's position was on that. So
21 that's why I asked it.

22 MR. FEIGIN: Yes, that -- that's the
23 government's position on both of those issues.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 JUSTICE JACKSON: Yes, really quickly.
2 I -- I think there's something about the
3 iterative process that may matter. And so just
4 taking Justice Kagan's hypo really quickly for
5 an understanding of what is happening, tell me
6 if the government is thinking about it in this
7 way.

8 You keep saying this is like storage
9 lockers with glass fronts, with pieces -- with
10 glass on the front of it. They don't have
11 solid doors, anyone can look and see what's in
12 there.

13 So step 1 is the government saying
14 tell us if, by looking at these lockers, any
15 include -- have bags in them that might have a
16 gun in them. Give us the list of the ones or
17 how many have that, I think is a sort of a step
18 1 concern.

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

24 I feel like there's something
25 happening with the way in which Google is

1 providing this information in response to the
2 government that may be requiring more probable
3 cause or more particularity as you go along.

4 So what is the government's thought
5 about that?

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

11 I think step 1, you know, if we want
12 to use the gun example, step 1 might be more,
13 okay, you've got a glass partition here, tell
14 us which of them have guns in them.

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

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

24 JUSTICE JACKSON: Do you agree that
25 you need more to get to each step? I -- I

1 mean, here what criteria did -- did the
2 detectives use to narrow down the list from the
3 19 to the nine to the three that were
4 ultimately there? And wouldn't a
5 particularized warrant need to have some
6 criteria in it to guide law enforcement at each
7 of these stages?

8 MR. FEIGIN: So Your Honor, with a --
9 with apologies, I think I need to take a step
10 back and say that I don't really view this as
11 getting more particularized. I believe there
12 is enough probable cause to -- that the
13 original warrant was -- and the 19 people that
14 turned up, probable cause to believe those
15 people would be either witnesses or suspects.
16 And then there's a question of how to figure
17 out which ones to follow up on.

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

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

23 MR. FEIGIN: I think that we -- I
24 think that we could have. But in order to
25 maximize privacy, what happened here was that

1 the warrant included a minimization requirement
2 on the government at each step, which is akin
3 to the kind of minimization requirement you see
4 in the Wire Tap Act.

5 JUSTICE JACKSON: Okay, thank you.

6 MR. FEIGIN: Okay. Thanks.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Rebuttal, Mr. Unikowsky?

10 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY

11 ON BEHALF OF THE PETITIONER

12 MR. UNIKOWSKY: Thank you, Your Honor.

13 So I'd like to say a few words about why this
14 was a search, a few words about the warrant,
15 and then finally why the Court should decide
16 the case.

17 First why this was a search. I
18 welcome counsel's concession from the podium
19 that if there was a search for something
20 like -- something else in the cloud like e-mail
21 or calendar entries or photographs, in that
22 case there really would be a search and a
23 warrant would be needed.

24 But although I welcome that
25 concession, I just don't understand the

1 distinction that is drawn between those types
2 of data and this type of data for Fourth
3 Amendment purposes, either under a property or
4 a privacy lens.

5 So under a property lens, a person's
6 relationship to their location information is
7 the same thing as their relationship to their
8 photographs or to their e-mail. It's in their
9 password protected account.

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

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

25 It just seems to me that if you have

1 control over the data, you can turn it on, you
2 can turn it off, you can delete it, it just
3 doesn't matter if it's created by taking a
4 photo as opposed to by the fact that you've
5 decided to go somewhere.

6 Similarly from a privacy perspective,
7 I don't see why a photo you take outside is
8 somehow more private than where you were that
9 day because you don't have an expectation of
10 privacy in, like, the thing that you were
11 seeing if you were outside but you do have an
12 expectation of privacy in all of your photos.

13 And likewise, you have an expectation
14 of privacy in everywhere you've gone. So I
15 think that if the Court accepts the
16 government's concession, that you have an
17 expectation of privacy or a property interest
18 in photos and e-mails, the same thing would be
19 the case for location history.

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

1 What it actually got is all of the
2 movements of those 19 people within that hour
3 stretch. So it's a little bit like going into
4 19 apartments and taking a complete inventory
5 of everything in the apartment but not
6 disclosing the person's name because if you
7 look at the record, like all of those granular
8 movements for that entire hour were exposed.

9 And so that's why I think that the
10 Ybarra case is directly on point here. You
11 don't have probably cause to search based on
12 somebody's proximity to the crime. What
13 happened here is each person's, what we regard
14 as a virtual storage locker, was searched
15 solely because of their proximity to the crime
16 and because of the -- their movements within
17 the hour were exposed every two minutes.
18 That's different from simply identifying which
19 accounts were within the geofence. It's really
20 exposure of information about them.

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

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

8 In terms of how to decide this case, I
9 think it would be very significant case giving
10 a lot of guidance to the bar if the Court says
11 when a search happened, and, number two, at
12 step 2 and step 3, at a minimum, there was a
13 problem with the warrant, without reaching some
14 of the broader questions about general warrants
15 or particularization if the Court is inclined
16 to resolve the warrant question narrowly
17 because the government has a lot of very
18 striking arguments on the warrant issue that
19 could have significant implications.

20 One is that Google wasn't acting as
21 the government's agent, so it makes a
22 difference that, you know, Google pushed the
23 button as opposed to the police. Another
24 argument that's made is that the fact that
25 software is conducting the search is

1 constitutionally relevant, which could have
2 revolutionary implications when, like, AI is
3 monitoring everything we do as opposed to a
4 human being. Also the arguments that as long
5 as something is nominally anonymous, that makes
6 a Fourth Amendment difference, which also can
7 have radical implications when de-anonymizing
8 someone is very easy.

9 So, like, all of these arguments that
10 the government is using to defend the earlier
11 searches could have very broad implications.
12 So if the Court believes that the warrant is
13 unconstitutional at step 2 and step 3, it has
14 the option of just setting aside those broader
15 questions and deciding the warrant issue
16 narrowly and also deciding that's a search.
17 That would be more than a broad enough opinion
18 to be useful to the bar.

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

1 And Justice Alito posed the question
2 of what about all the other people, the 500
3 million people who were searched? Well, number
4 one, they're not told. All of these warrants
5 are sealed. The reason the outcry doesn't
6 exist is that no one knows that thousands of
7 times per year their accounts are being
8 searched. Second, a 1983 claim by any of those
9 people against the detectives would clearly
10 fail on a qualified immunity basis. So,
11 really, the only way these issues would be
12 litigated is through a motion to suppress in a
13 case exactly like this one.

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 The case is submitted.

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