

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY IVORY CARPENTER,)
)
) Petitioner,)
)
) v.) No. 16-402
)
) UNITED STATES,)
)
) Respondent.)
)

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TIMOTHY IVORY CARPENTER,)
Petitioner,)

v.) No. 16-402

UNITED STATES,)
Respondent.)

- - - - -

Washington, D.C.

Wednesday, November 29, 2017

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

APPEARANCES:

NATHAN F. WESSLER, New York, N.Y.; on
behalf of the Petitioner

MICHAEL R. DREEBEN, Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Respondent

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 16-402, Carpenter
5 versus United States. Before we commence,
6 though, I'd like to advise counsel that I'll
7 provide an additional 10 minutes of them to
8 their argument time. I don't think you'll have
9 -- I don't think you'll have trouble filling
10 it.

11 Mr. Wessler.

12 ORAL ARGUMENT OF NATHAN F. WESSLER

13 ON BEHALF OF THE PETITIONER

14 MR. WESSLER: Thank you. Mr. Chief
15 Justice, and may it please the Court:

16 At issue in this case is the
17 government's warrantless collection of 127 days
18 of Petitioner's cell site location information
19 revealing his locations, movements, and
20 associations over a long period.

21 As in Jones, the collection of this
22 information is a search, as it disturbs
23 people's long-standing, practical expectation
24 that their longer-term movements in public and
25 private spaces will remain private.

1 JUSTICE KENNEDY: So what -- what is
2 the rule that you want us to adopt in this
3 case, assuming that we keep Miller -- Miller
4 and Smith versus Maryland on the books?

5 MR. WESSLER: The rule we seek is that
6 longer-term periods or aggregations of cell
7 site location information is a search and
8 requires a warrant. We are not asking the
9 Court to overturn those older cases. We think
10 that the -- the lesson to be drawn from Riley
11 and Jones and Kyllo is that any extension of
12 pre-digital precedents to these kinds of
13 digital data must rest on their own bottom.

14 JUSTICE ALITO: How would you
15 distinguish Miller?

16 MR. WESSLER: Miller involved more
17 limited records, certainly they could reveal
18 some sensitive information, but more limited
19 records and, as this Court held, they were
20 voluntarily conveyed in that they were created
21 by the passing of negotiable instruments into
22 the stream of commerce to transfer funds.

23 What we have here is both more
24 sensitive and less voluntary.

25 JUSTICE ALITO: Why is it more -- why

1 is it more sensitive? Why is cell site
2 location information more sensitive than bank
3 records, which particularly today, when a lot
4 of people don't use cash much, if at all, a
5 bank record will disclose purchases? It will
6 not only disclose -- everything that the person
7 buys, it will not only disclose locations, but
8 it will disclose things that can be very
9 sensitive.

10 MR. WESSLER: I absolutely agree,
11 Justice Alito, that the information in bank
12 records can be quite sensitive, but what it
13 cannot do is chart a minute-by-minute account
14 of a person's locations and movements and
15 associations over a long period regardless of
16 what the person is doing at any given moment.

17 JUSTICE ALITO: Yeah, I understand
18 that. But why is that more sensitive than bank
19 records that show, for example, periodicals to
20 which a person -- to which a person subscribes
21 or hotels where a person has stayed or
22 entertainment establishments -- establishments
23 that a person has visited --

24 JUSTICE KENNEDY: And particularly --

25 JUSTICE ALITO: -- and all sorts of

1 other things.

2 JUSTICE KENNEDY: Particularly because
3 the information in the bank records that
4 Justice Alito referred to are not publicly
5 known. Your whereabouts are publicly known.
6 People can see you. Surveillance officers can
7 follow you. It seems to me that this is much
8 less private than -- than the case that Justice
9 Alito is discussing.

10 MR. WESSLER: Well, I -- I don't
11 agree, Your Honor, for the following reason:
12 When a person is engaged in a financial
13 transaction, passing a -- a check, a negotiable
14 instrument, that's an interpersonal transaction
15 where a person has full knowledge that they are
16 putting something into the stream of commerce
17 to transfer funds directed at their -- their
18 bank.

19 As the five concurring justices made
20 clear in Jones, although we may, when we step
21 outside, have a reasonable expectation that
22 someone may see where we go in a short period,
23 nobody has expected in -- in a free society
24 that our longer-term locations will be
25 aggregated and tracked in the way that they can

1 be here.

2 JUSTICE GINSBURG: You keep
3 emphasizing longer term.

4 JUSTICE KENNEDY: Yes, I was going to
5 ask about that.

6 JUSTICE GINSBURG: Now, suppose what
7 was sought here was the CSLI information for
8 the day of each robbery, just one day, the day
9 of each robbery. Does that qualify as short
10 term in your view that would not violate the
11 Fourth Amendment?

12 MR. WESSLER: So the -- Your Honor,
13 the -- the rule we proposed would be a single
14 24-hour period, contiguous 24-hour period.
15 Now, the only other court to address this
16 question is the --

17 JUSTICE SOTOMAYOR: I'm sorry, which
18 -- in which way are you talking about? What
19 rule?

20 MR. WESSLER: So -- sorry. So we
21 don't think the Court needs to -- to draw a
22 bright line here, to define exactly where the
23 line between short and long term is, but as we
24 -- as we pointed out in our reply brief --

25 JUSTICE SOTOMAYOR: But Justice

1 Ginsburg is not asking you about 24 hours or
2 anything else. She's asking you about a tower
3 dump. A crime happens at a bank, the teller
4 says or doesn't say that the robber -- she saw
5 the robber on the phone at some point.

6 Could the police just get a tower dump
7 of the cell site to see who was in that area at
8 that time?

9 MR. WESSLER: Justice Sotomayor, yes.
10 I -- I think that would not be affected at all
11 by -- by this case. That would be quite short
12 term.

13 JUSTICE SOTOMAYOR: So what's the
14 difference between a tower dump and targeting a
15 particular individual? Let's say an anonymous
16 call came in that said John X or John Doe was
17 at a particular -- was the robber.

18 Could the police then say to the
19 telephone company let me see the records of
20 John Doe for that hour or for that day or
21 whatever the -- the duration of the crime was?

22 MR. WESSLER: Yes. That would be
23 perfectly acceptable.

24 JUSTICE SOTOMAYOR: All right. So
25 differentiate that situation.

1 JUSTICE GINSBURG: Mr. Wessler, could
2 we go back to my question? You said 24 hours
3 roughly. So, if there were only one robbery,
4 we could get that information, but now there
5 are how many, eight? So we can't get it for
6 eight, but we can get it for the one?

7 MR. WESSLER: So, Your -- Your Honor,
8 we've suggested 24 hours. I think that the
9 most administrable line, if the Court wishes to
10 draw a bright line, would be a single 24-hour
11 period.

12 But this Court could -- could craft
13 other reasonable ways to -- to draw that
14 intentional line.

15 CHIEF JUSTICE ROBERTS: No, now --

16 JUSTICE GINSBURG: Well, what -- if
17 it's reasonable for one robbery, one day, why
18 wouldn't it be reasonable -- equally reasonable
19 for each other robbery?

20 MR. WESSLER: Well, I -- I think the
21 risk is a risk of circumvention of this Court's
22 rule from Jones and of whatever the durational
23 requirement is. With some types of crimes, it
24 would be quite easy to delineate a certain set,
25 limited set, of days that -- that information

1 might be worth getting. Others would be more
2 difficult.

3 Now, in -- in this case, it doesn't
4 matter to us, actually, where the Court draws
5 that line because 127 days of data --

6 JUSTICE KENNEDY: But the -- the
7 longer term is more corroborative perhaps of
8 innocence. Suppose he's in the area every day
9 for 120 days. That's because of where he shops
10 and so forth. So what difference?

11 MR. WESSLER: Well --

12 JUSTICE KENNEDY: It seems to me that
13 the -- the rule you're proposing might be --
14 avoid in -- exculpatory information.

15 MR. WESSLER: Well, Your Honor, we
16 would fully expect that if the government
17 obtained a short period of data that was --
18 appeared to be inculpatory, that would provide
19 probable cause for a warrant to gather a much
20 wider amount of data if -- if needed, or in the
21 pretrial process, the defendant, him or
22 herself, could obtain other records from the
23 carrier and use those as exculpatory evidence.

24 Though the concern here is with the
25 privacy invasion, which is quite severe over

1 the long term, over these more than four months
2 of data.

3 JUSTICE KAGAN: It would help me --

4 CHIEF JUSTICE ROBERTS: I want to
5 understand the -- the basis for the 24-hour,
6 however long you want it to be, exception. It
7 seems to me if there's going to be protection
8 extended to the information, it has to involve
9 some compromise of the third-party doctrine,
10 and if that is altered, I don't see why it
11 wouldn't also apply to, you know, one day of
12 information.

13 MR. WESSLER: So the -- the only other
14 court to address this question is the Supreme
15 Judicial Court of Massachusetts, which drew the
16 line at six hours. We have suggested 24 hours
17 because we --

18 CHIEF JUSTICE ROBERTS: Well, I don't
19 understand. What is the line we're drawing?
20 It seems to me the line is between information
21 to which the authorities have access and
22 information to which they don't. I don't know
23 why we're bothering about a line between six
24 hours, three weeks, whatever.

25 MR. WESSLER: Well, Your Honor,

1 certainly we would be perfectly happy with a
2 rule from this Court requiring a warrant as a
3 per se matter. What we are trying to advance
4 is a -- a suggestion to the Court that takes
5 into account the rationale of the concurrences
6 in Jones and that accords with people's
7 reasonable expectation that although police
8 could have gathered a limited set or span of
9 past locations traditionally by canvassing
10 witnesses, for example, never has the
11 government had this kind of a time machine that
12 allows them to aggregate a long period of
13 people's movements over time.

14 CHIEF JUSTICE ROBERTS: Well, another
15 thing the government's never had is the ability
16 to go back even for 24 hours and basically test
17 everybody, everybody in the whole community or
18 anyone who happened to be there.

19 So I don't know why that isn't a
20 consideration that cuts against preserving 24
21 hours two months ago.

22 The government didn't have the
23 capability of tracking a particular individual,
24 or every individual, and they find out later
25 that's the one they want, so I -- I don't

1 understand the coherence of your argument on
2 that point.

3 MR. WESSLER: Well, I -- I do think
4 that a different concern would be raised by the
5 -- the tower dump type situation that Justice
6 Sotomayor posited. That might involve concerns
7 about a dragnet search, sweeping in a large
8 number of innocent people.

9 That's not the same concern, I think,
10 directly before the Court here, which involves
11 --

12 JUSTICE SOTOMAYOR: But isn't that the
13 same concern here? And that's why I -- I'm
14 differentiating between incident-related
15 searches and basically dragnet searches when
16 you're looking at what a person is doing over
17 127, 30, 40, even 24 hours, which is it's not
18 related to any legitimate police need to invade
19 the privacy of a person over a 24-hour period,
20 unless there's a suggestion that the crime
21 occurred during that entire 24-hour period.

22 So that's why I asked you is there a
23 difference between saying if police have cause
24 to believe a crime has been committed, can they
25 ask for records related to that individual

1 crime, even if it happened on one day, a second
2 day, a fourth day, a 10th day, so long as
3 they're limiting their search as related to a
4 criminal activity, as opposed to a dragnet
5 sweep of everybody's intimate details?

6 Because right now we're only talking
7 about the cell sites records, but as I
8 understand it, a cell phone can be pinged in
9 your bedroom. It can be pinged at your
10 doctor's office. It can ping you in the most
11 intimate details of your life. Presumably at
12 some point even in a dressing room as you're
13 undressing.

14 So I am not beyond the belief that
15 someday a provider could turn on my cell phone
16 and listen to my conversations.

17 So I'm not sure where your 24-hour
18 rule comes from. Shouldn't your rule be based
19 on incident-related rather than the essence of
20 your complaint, which is that we're permitting
21 police to do a dragnet search of your life?

22 MR. WESSLER: Your Honor, first,
23 you're absolutely correct that today, in the
24 seven years that have elapsed since the data
25 was gathered in this case, network technology

1 has advanced quite markedly.

2 And today not only is data gathered
3 for phone calls but also text messages and data
4 connections, including when a phone is in a
5 pocket passively and automatically checking for
6 new e-mails or social media messages or weather
7 alerts, and today the government is able to
8 obtain historical cell site location
9 information that can locate a person as
10 precisely as half the size of this courtroom.

11 JUSTICE ALITO: Well, you know, Mr.
12 Wessler, I -- I agree with you that this new
13 technology is raising very serious privacy
14 concerns, but I need to know how much of
15 existing precedent you want us to overrule or
16 declare obsolete.

17 And if I could, I'd just like to take
18 you back briefly to -- to Miller and ask on
19 what grounds that can be distinguished. You
20 don't say we should overrule it, and you had --
21 you said the information here is more
22 sensitive. We maybe could agree to disagree
23 about that. I don't know.

24 But what else? What -- on what other
25 ground can Miller possibly be distinguished?

1 MR. WESSLER: So both Miller and Smith
2 identified at least two factors to take into
3 account in the reasonable expectation of
4 privacy analysis: the nature of the records or
5 their sensitivity and whether they're
6 voluntarily conveyed.

7 And I think here there is also a great
8 distinction on voluntariness. Unlike a
9 negotiable instrument passed into commerce or,
10 for that matter, a phone number punched into a
11 touch tone phone, people when they make or
12 receive a phone call, receive a text message,
13 and certainly when their phone is automatically
14 making a data connection, do not provide their
15 location information to the carrier.

16 JUSTICE ALITO: Well, I mean, that's a
17 debatable empirical point whether people
18 realize what's -- what's going on, and there's
19 reason to think maybe they do.

20 I mean, people know, there -- there
21 were all these commercials, "can you hear me
22 now," our company has lots of towers
23 everywhere. What do they think that's about?

24 The contract, the standard MetroPCS
25 contract seems to say -- and I guess we don't

1 have the actual contract in the record here --
2 does seem to say that -- advise the customer
3 that we can disclose this information to the --
4 to the government if we get a court order.

5 So I don't know whether that will hold
6 up. And even if it were to hold up today, what
7 will happen in the future if people --
8 everybody begins to realize that this is --
9 this is provided? If you have enough police TV
10 shows where this is shown, then everybody will
11 know about it, just like they know about CSI
12 information.

13 MR. WESSLER: Three points, Your
14 Honor. First, in the empirical scholars'
15 amicus brief at pages 3 through 4, they run
16 through a result of a survey that I think quite
17 strongly shows that a strong majority of
18 Americans do not understand that this
19 information is even accessible to, much less
20 retained by the service providers.

21 Second, I agree that the MetroPCS
22 contract in -- in effect in 2010 and the other
23 company's privacy policies today do disclose
24 that location information can be obtained, but
25 I actually think the disclosures more broadly

1 in those documents accrue to our favor.

2 I'll explain why that is in one
3 moment, although I -- I think I should caution
4 the Court that -- that relying too heavily on
5 those contractual documents in either direction
6 here would, to -- to paraphrase the Court in
7 Smith, threaten to make a crazy quilt of the
8 Fourth Amendment because we may end up with a,
9 you know, hinging constitutional protections on
10 the happenstance of companies' policies. But
11 those -- those contractual documents to a
12 company restate and contractualize the
13 protections of the Telecommunications Act and
14 quite strongly promise people that their
15 information will remain private without
16 consent.

17 And lastly --

18 JUSTICE ALITO: Except as provided by
19 law.

20 JUSTICE GINSBURG: As to -- as to
21 other -- as to other private persons, not as to
22 the government.

23 MR. WESSLER: That's right. There --
24 there's a provision to disclose, as required by
25 law, those four words need to be read in -- in

1 context and in compliance with the
2 Constitution. So if -- if there is a
3 reasonable expectation of privacy in these
4 records, then a warrant is required.

5 But even looking at the statutory
6 framework itself, the government points to the
7 Stored Communications Act as the -- the law
8 requiring disclosure. But when Congress
9 amended that statute in 1994, it provided two
10 mechanisms for access to records: a 2703(d)
11 order, as used here, and a warrant under
12 Section 2703(c)(1)(A).

13 And I think a person looking at that
14 statute would be quite reasonable and right to
15 assume that the reason there's a warrant prong
16 is to deal with records like these in which
17 there's a strong privacy interest.

18 JUSTICE KENNEDY: But your argument,
19 as I understood it from the brief and I'm
20 hearing it today, makes the Stored
21 Communications Act and the 20 -- is it 2703(d)
22 order irrelevant. You don't even talk about
23 it.

24 In an area where we're searching for a
25 compromise, where it's difficult to draw a

1 line, why shouldn't we give very significant
2 weight to the Congress's determination that
3 there should be and will be some judicial
4 supervision over this -- over -- over these
5 investigations?

6 MR. WESSLER: Justice Kennedy,
7 Congress enacted the Stored Communications Act
8 in 1986 and amended it in relevant part in
9 1994. Three-tenths of 1 percent of Americans
10 had cell phones in 1986, only 9 percent in
11 1994.

12 There were about 18,000 cell towers in
13 1994. Today there are over 300,000.

14 And --

15 JUSTICE KENNEDY: Well, you mean --
16 you mean the Act was more necessary when there
17 were fewer cell phones?

18 MR. WESSLER: No, not -- not --

19 JUSTICE KENNEDY: It seems to me just
20 the opposite.

21 MR. WESSLER: Not at all, Your Honor.
22 My point is that Congress quite clearly was not
23 thinking about the existence of, and certainly
24 not law enforcement interest in, historical
25 cell site location information. There is

1 nothing in the historical legislative record
2 for -- for the members of the Court who would
3 look there to indicate any cognizance of these
4 kinds of records. So --

5 JUSTICE KENNEDY: Well, again, my
6 question is, you give zero weight in your
7 arguments to the fact that there is some
8 protection?

9 MR. WESSLER: Your Honor, we
10 acknowledge fully that there is some
11 protection, a touch more than a traditional
12 subpoena because a judge is involved, but we
13 think it is insufficient in the context of
14 records held by a third-party in which the
15 subject of the investigation --

16 JUSTICE GINSBURG: And yet you said, I
17 think you said in your brief, that in most of
18 the cases where you get one of these 2703(d)
19 orders, in the mine run of cases, you said
20 there was probably enough there to get a
21 warrant. So let's take this very case: A
22 confessed robber identifies his collaborators
23 and there are details about the collaborator.
24 Why isn't that enough to get a warrant?

25 MR. WESSLER: In this case, it -- it

1 is quite possible that the government could
2 have. Now, I -- I don't think they stated
3 probable cause on the face of their application
4 for the court order. Mr. Carpenter's name is
5 mentioned only once in a conclusory sentence at
6 the end. They did have a cooperating witness
7 at that point, a cooperating co-defendant. And
8 I -- I can't say whether, had they wanted to,
9 they could have made out probable cause. It's
10 entirely possible.

11 I -- I want to return, Justice Alito,
12 to your question because I think it's important
13 to -- to remember that Miller and Smith were
14 decided four decades ago. The Court could not
15 have -- have imagined the technological
16 landscape today. And accepting the
17 government's invitation to -- to, in my view,
18 radically extend those cases would place beyond
19 the protection of the Fourth Amendment not only
20 those locations records --

21 JUSTICE SOTOMAYOR: Are we -- are we
22 radically extending them? From the very
23 beginning, Smith, for example, basically said
24 the disclosure at issue doesn't disclose the
25 content of the conversation. As the dissent

1 pointed out, the provider had access to the --
2 to the content of the conversation.

3 Yet, we drew a line in saying cell
4 phone numbers -- telephone numbers are
5 disclosable because everybody knows that the
6 telephone company is keeping track of those
7 numbers. You get it in your phone bill at the
8 end of each month.

9 But we said people don't know or even
10 if they realize that the phone company can
11 listen in to their conversation, that there's a
12 reasonable expectation that the phone company
13 won't, absent some urgent circumstance, a death
14 threat, almost a special needs circumstance.

15 That suggests, as you started to say
16 earlier, that it never was an absolute rule,
17 the third-party doctrine. We limited it
18 when -- in Bond and Ferguson when we said
19 police can't get your medical records without
20 your consent, even though you've disclosed your
21 medical records to doctors at a hospital.

22 They can't touch your bag to feel
23 what's in your bag because an individual may
24 disclose his or her bag to the public. I think
25 one of my colleagues here said you can -- why

1 shouldn't people expect others to touch their
2 bag as well? Well, and the Court said no
3 because you expose what your bag looks like,
4 but you don't have an expectation that people
5 are going to touch your bag.

6 So is it really that far off to say,
7 yes, I can believe that my location at one
8 moment or other moments might be searched by
9 police, but I don't expect them to track me
10 down for 24 hours over 127 days?

11 MR. WESSLER: Absolutely, Your Honor.
12 We agree that the contents of electronic
13 communications should be protected, as I think
14 the government agrees in its -- its brief. But
15 in the digital age, content as a category is
16 both under-inclusive and unadministrable.

17 Certainly, I think that's one lesson
18 from Jones, from the concurrences. That was
19 not the content of communication. It was
20 location over time in public. But it was still
21 protected. And a great many highly sensitive
22 digital records like search queries entered
23 into Google, a person's complete web browsing
24 history showing everything we read on-line,
25 medical information or fertility tracking data

1 --

2 JUSTICE BREYER: All right --

3 MR. WESSLER: -- from a smartphone app
4 would -- would be vulnerable.

5 JUSTICE ALITO: Suppose that in this
6 -- suppose that in this case there was a
7 subpoena for the -- the numbers called from the
8 cell phone. Would there be a problem with that
9 in your opinion?

10 MR. WESSLER: No, Your Honor. I think
11 that would fall squarely within the -- the rule
12 of Smith. It would certainly be more
13 voluntary, and I think -- we can disagree, but
14 I think less sensitive.

15 JUSTICE ALITO: You think the numbers
16 called, the people that somebody is calling is
17 -- is less -- that's less sensitive than the
18 person's location?

19 MR. WESSLER: I certainly --

20 JUSTICE ALITO: How -- how are we
21 going to judge the sensitivity of -- of
22 information like this?

23 MR. WESSLER: Well, I -- I think that
24 the -- the concurring opinions in -- in Jones,
25 Your Honor, already judge the sensitivity of

1 this information. The Court need not address
2 every other context --

3 JUSTICE KENNEDY: Suppose law
4 enforcement officers had followed this person
5 for 127 days. That would be worse than if they
6 followed him for 24 hours?

7 MR. WESSLER: Well, as the
8 concurrences made clear in Jones, that would be
9 a highly unlikely endeavor, but even more
10 unlikely here because this is not real-time.

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

18 MR. WESSLER: No, I think, you know,
19 people's normal expectation is that that
20 typically won't happen, but if it does, the
21 Fourth Amendment does not protect against that.
22 Now, here --

23 JUSTICE KENNEDY: Well, frankly, if --
24 if we're going to talk about normal
25 expectations and we have to make the judgment,

1 it seems to me there's a much more normal
2 expectation that businesses have your cell
3 phone data. I think everybody, almost
4 everybody, knows that. If I know it, everybody
5 does.

6 (Laughter.)

7 JUSTICE KENNEDY: But I -- I don't
8 think there's an expectation that people are
9 following you for 127 days.

10 MR. WESSLER: Well, I -- I agree, but
11 there's --

12 JUSTICE KENNEDY: Which is my
13 hypothetical.

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

25 That is a categorically new power that

1 is made possible by these perfect tracking
2 devices that 95 percent of Americans carry in
3 their pockets.

4 JUSTICE KAGAN: Mr. Wessler, can I ask
5 you about your understanding of the state of
6 the technology now? Because the government
7 represents in -- in its briefs, and it has
8 those pictures in its briefs, suggesting that
9 you -- you -- that the information that's
10 gleaned from this is -- is very -- it's sort of
11 general, it's vague, it doesn't pinpoint
12 exactly where you are, and in order to make
13 effective use of it, it has to be combined with
14 many other pieces of information.

15 And, you know -- you know, A, do you
16 agree with that, but, B, what is your view of
17 -- of the relevance of the fact that
18 information may not be useful in itself but may
19 be useful in combination with other
20 information? Does that make a difference?

21 MR. WESSLER: Justice Kagan, so on the
22 first point, we agree that, as of 2010 and 2011
23 where the records in this case come from, they
24 were generally less precise than the GPS data
25 in Jones, but we don't think that that makes a

1 difference for the Fourth Amendment rule for a
2 few reasons.

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

15 Now, in the intervening seven years,
16 the data has become markedly more precise. The
17 proliferation of small cells which can have a
18 broadcast radius as small as 10 meters, about
19 half the size of this -- this courtroom, the
20 ability now of providers to estimate the actual
21 location of the phone based on the time and
22 angle that the signal from the phone reaches
23 the towers, and the just skyrocketing amount of
24 data usage by normal smartphone users means
25 that even the large traditional cell towers are

1 much closer together in urban and dense
2 suburban areas, so the distance between them is
3 less, so they are significantly -- the location
4 information is more precise.

5 It's also more voluminous because now
6 data connections create location information.
7 And so the -- the 101 data points per day on
8 average in this case pale in comparison to what
9 --

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

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

24 That is -- that capability is related
25 to the -- the capability that is relatively

1 newer to estimate the actual location of the
2 phone based on time and angle of the signal,
3 historically, coming in.

4 But there's -- there's no data
5 retention mandate for these historical cell
6 phone location records.

7 JUSTICE BREYER: Are --

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

14 MR. WESSLER: No, I -- I don't think
15 there is any reason. This Court's Fourth
16 Amendment decisions involving grand jury
17 subpoenas has held on to the same Fourth
18 Amendment standard as any other subpoena.

19 Now, a grand jury subpoena is not at
20 issue here, but -- but we think it would be
21 held to the same standard as any other subpoena
22 or subpoena-like request for these highly
23 sensitive records.

24 JUSTICE BREYER: Since I'm seeing your
25 argument, it -- it -- it starts with a place

1 where I completely agree. The village snoop
2 had a fallible memory and didn't follow people
3 for 127 days.

4 The electronic information is
5 infallible. You can follow them forever.
6 That's a big change. So, I agree that that
7 change is there. It's there in many aspects of
8 life, not just location.

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

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

1 know they were giving it or they certainly
2 didn't consent to it.

3 And that is basically the reason.
4 Maybe we throw a few other things in there to
5 get an exception from Miller. That will be
6 taken immediately to the lower courts, and
7 eventually here, and people will say: Well,
8 what about financial information, i.e., credit
9 card purchases where the most intimate credit
10 card purchases, wherever they are, are
11 immediately records, and what about -- and
12 they'll think of five others -- I can only
13 think of one or two, but, believe me, the legal
14 profession and those interested in this
15 understand it very well.

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

22 MR. WESSLER: Justice Breyer, I think
23 in -- in future cases in the lower courts and
24 perhaps back before Your Honors, it would be
25 relatively straightforward to define discrete

1 categories of information that may be
2 protected.

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

18 CHIEF JUSTICE ROBERTS: One --

19 MR. WESSLER: -- clarity will emerge.

20 JUSTICE BREYER: You want to add one
21 --

22 CHIEF JUSTICE ROBERTS: One thing --
23 I'm sorry. Please.

24 JUSTICE BREYER: Maybe you want to add
25 one thing, because I suspect you'll hear in a

1 minute that all the imperfections of Miller,
2 given your answer, and what I'm thinking, too,
3 I quite agree with you, this is an open box.
4 We know not where we go. Unadministrable, et
5 cetera.

6 Anything else you want to add?

7 MR. WESSLER: Well, Your Honor, lower
8 courts have been struggling mightily to apply
9 Miller and Smith to highly sensitive digital
10 age records.

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

19 CHIEF JUSTICE ROBERTS: A lot of what
20 you're talking about and a lot of what the
21 questions concern, I think, is addressed under
22 the question whether a warrant should issue as
23 opposed to whether a warrant is required.

24 Under current practice, when you're
25 getting a warrant, it makes a difference if you

1 go in and say I want to search the entire house
2 for anything I can find and if you say I want
3 to search the drawers for business records that
4 we think are related to blah, blah, blah.

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

15 MR. WESSLER: Your Honor, we certainly
16 think that the -- the probable cause and
17 particularity requirements of a warrant will --
18 will do a lot of work to -- to focus
19 investigations.

20 In an investigation like this, perhaps
21 127 days or 152, as the original request was,
22 would not all be appropriate. Maybe under a
23 warrant a two or three-day span around each of
24 the robberies would actually be particularly
25 relevant to the probable cause determination.

1 But -- but our basic submission is
2 that a warrant is required in this context
3 because it's unlike the other subpoena cases
4 that the government has identified. In the
5 normal subpoena case, this Court has identified
6 two factors that weigh on -- on the
7 reasonableness categorically of subpoenas:
8 first that the recipient complies with it, they
9 -- they select the responsive records and
10 provide them to the government, which is --
11 poses less of a risk of -- of abuse, and,
12 second, that there is notice and an opportunity
13 for pre-compliance review.

14 Neither of those obtained here, where
15 the subpoena goes to a third-party, but the
16 subject of the investigation receives no notice
17 and has no opportunity to --

18 JUSTICE GINSBURG: Can you tell me
19 what is the difference between the 2703(d)
20 order and a warrant? What are situations where
21 you could get the order but not a warrant?

22 MR. WESSLER: So the -- the standard
23 for issuance of the order is lower. Some lower
24 courts have -- have likened it to a reasonable
25 suspicion standard. I think it's probably a

1 touch above pure reasonableness, but it's
2 certainly short of probable cause.

3 It also lacks a requirement for a
4 sworn statement. There's no affidavit. It's
5 -- it's placed before a magistrate judge by a
6 prosecutor.

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

13 You have 127 days here, 221 days in
14 Graham from the Fourth Circuit, with a cert
15 petition currently pending. That is a quite
16 extraordinary amount of time.

17 If I could, I'd like to reserve the
18 balance of my time.

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

25 So say -- say a thief broke into

1 T-Mobile, stole this information and sought to
2 make economic value of it. Would you have a
3 conversion -- would your client have a
4 conversion claim, for example, under state law?
5 Have you explored that at all?

6 MR. WESSLER: So I -- I think it's
7 possible. And I think conversion is the -- the
8 closest --

9 JUSTICE GORSUCH: Uh-huh.

10 MR. WESSLER: -- sort of tort analog
11 to what we have here. But we -- we placed the
12 source of the property right here in federal
13 law, not state law.

14 JUSTICE GORSUCH: No, I understand
15 222. I've got that argument. I'm just
16 wondering have you -- have state courts
17 developed this at all?

18 MR. WESSLER: State -- state courts
19 have not, to my knowledge. I think in roughly
20 analogous contexts, like trade secrets --

21 JUSTICE GORSUCH: Right.

22 MR. WESSLER: -- certainly conversion
23 applies --

24 JUSTICE GORSUCH: Right.

25 MR. WESSLER: -- but not directly

1 here.

2 JUSTICE GORSUCH: Okay. Thank you.

3 MR. WESSLER: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE RESPONDENT

9 MR. DREEBEN: Mr. Chief Justice, and
10 may it please the Court:

11 The technology here is new, but the
12 legal principles that this Court has
13 articulated under the Fourth Amendment are not.

14 The cell phone companies in this case
15 function essentially as witnesses being asked
16 to produce business records of their own
17 transactions with customers.

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

1 not a government mandate.

2 They make decisions based on their own
3 business needs about what they're going to
4 retain. And when the government comes and asks
5 them to produce it, it is doing the same thing
6 that it did in Smith. It is doing the same
7 thing that it did in Miller. It is asking a
8 business to provide information about the
9 business's own transactions with a customer.

10 And under the third-party doctrine,
11 that does not implicate the Fourth Amendment
12 rights of the customer.

13 JUSTICE SOTOMAYOR: But asking --

14 CHIEF JUSTICE ROBERTS: This is not
15 simply created by the company, though. It's a
16 joint venture with the individual carrying the
17 phone. That person helps the company create
18 the record by being there and sending out the
19 pings or whatever.

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

1 information to route the call.

2 Here, the cell phone provider gets
3 information from the phone about where the
4 phone is so that it can route calls to the
5 phone and that it can route calls from the
6 phone.

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

11 Somebody has to engage in banking
12 transactions through a bank. They write a
13 check. They give the check to the bank. The
14 bank uses it to carry out the bank's business.

15 JUSTICE SOTOMAYOR: No, they don't
16 give it to the bank. They give it to a person,
17 who gives it to the bank. It's a big
18 difference.

19 MR. DREEBEN: Well, Justice Sotomayor,
20 I think that there are a zillion different ways
21 to carry out financial transactions, including
22 some that involve giving a check to a person.
23 Many involve going to the bank directly and
24 having the bank conduct the financial
25 transaction.

1 Anybody who writes a check understands
2 that the check will be submitted to the bank so
3 that the bank can pay.

4 JUSTICE SOTOMAYOR: Mr. Dreeben, why
5 is it not okay, in the way we said about
6 beepers, to plant a beeper in somebody's
7 bedroom, but it's okay to get the cell phone
8 records of someone who I -- I don't, but I know
9 that most young people have the phones in the
10 bed with them.

11 (Laughter.)

12 JUSTICE SOTOMAYOR: All right? I know
13 people who take phones into public restrooms.
14 They take them with them everywhere. It's an
15 appendage now for some people.

16 If it's not okay to put a beeper into
17 someone's bedroom, why is it okay to use the
18 signals that phone is using from that person's
19 bedroom, made accessible to law enforcement
20 without probable cause?

21 MR. DREEBEN: So, Justice Sotomayor, I
22 will answer the question about cell phone
23 location in a house, but I think it's important
24 that the Court understand that this case
25 involves very generalized cell sector

1 information --

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

5 MR. DREEBEN: Well, I think Justice
6 Sotomayor --

7 JUSTICE SOTOMAYOR: You -- we can beep
8 phones in a bedroom now.

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

16 JUSTICE SOTOMAYOR: Well, this is no
17 different than a telephone company having
18 access to your telephone conversations. But we
19 protected those --

20 MR. DREEBEN: No, I think --

21 JUSTICE SOTOMAYOR: -- in Smith.

22 MR. DREEBEN: -- it's -- it's very
23 different from it. The expectations of privacy
24 about the contents of a one-to-one
25 communication or a one-to-many communication

1 are quite different. They grow out of the
2 bedrock understanding that a letter mailed
3 through the mail, the routing information is
4 available to the government, the address of
5 where it's going --

6 JUSTICE SOTOMAYOR: Yeah, but -- but
7 an -- in an envelope, you seal the envelope.
8 You can -- you can yourself control the public
9 disclosure.

10 But with telephones, the telephone
11 company could have plugged in and listened to
12 your conversation just as easily as these
13 telecommunications companies can read your
14 e-mails if they choose. Yet, we've said we
15 would protect e-mail content.

16 MR. DREEBEN: That is true. And I
17 think that that is because there is a different
18 between content and routing information that
19 the Court recognized in Smith itself.

20 We're dealing here with routing
21 information. We're not dealing with the
22 contents of communications. I agree with you
23 that Katz makes clear that incidental access of
24 a provider to the contents of a communication
25 when the -- when the provider is functioning as

1 an intermediary doesn't vitiate Fourth
2 Amendment protection.

3 We're not here to argue that it does.
4 We're here to argue that routing information of
5 the sort that was available in Smith and the
6 sort that's available here functions as a
7 business record because the business is using
8 it in its transaction with the customer to
9 route the calls.

10 The content information is being
11 provided through a provider as an intermediary
12 so that somebody can communicate with another
13 person. And --

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

24 So how is it different from that?

25 MR. DREEBEN: I think it's

1 fundamentally different, Justice Kagan, because
2 this involves acquiring the business records of
3 a provider which has determined to keep these
4 records of the cell site information.

5 Jones involved government
6 surveillance. It involved attaching a GPS
7 device to the car. Five members of the Court
8 regarded that as a trespassory search. Five
9 other members of the Court were prepared to
10 analyze that under reasonable expectations of
11 privacy. But in both cases, it was direct
12 surveillance of the suspect in the crime.

13 JUSTICE KAGAN: So the question is why
14 that should make more of a difference than the
15 obvious similarity between this case and Jones?
16 And the obvious similarity is that, in both
17 cases, you have reliance on a new technology
18 that allows for 24/7 tracking.

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

1 when.

2 MR. DREEBEN: So the -- the people who
3 are watching in this case are the phone
4 companies because people have decided to sign
5 up for cellular service in which it is a
6 necessity of the service that your phone
7 communicate with a tower and a business record
8 is generated.

9 People who dial phone numbers on calls
10 know that they're being routed through a cell
11 phone or a landline provider. Those records
12 can be made available to the government. They
13 could be made available for quite extensive
14 periods of time.

15 I think in many ways it's far more
16 revealing to know who a person is calling than
17 to know the generalized cell sector where their
18 phone is located. The cell site information
19 doesn't tell you the person was with the phone;
20 it doesn't tell you --

21 JUSTICE SOTOMAYOR: Mr. Dreeben, what
22 do you do with the survey mentioned by your
23 opposing colleague that says that most
24 Americans, I still think, want to avoid Big
25 Brother. They want to avoid the concept that

1 government will be able to see and locate you
2 anywhere you are at any point in time.

3 Is it -- do you really believe that
4 people expect that the government will be able
5 to do that without probable cause and a
6 warrant?

7 MR. DREEBEN: I don't --

8 JUSTICE SOTOMAYOR: The -- the
9 Constitution protects the rights of people to
10 be secure. Isn't it a fundamental concept,
11 don't you think, that that would include the
12 government searching for information about your
13 location every second of the day --

14 MR. DREEBEN: So, in instances like
15 this, Justice Sotomayor --

16 JUSTICE SOTOMAYOR: -- for months and
17 months at a time?

18 MR. DREEBEN: -- involving rapidly
19 changing technology and privacy expectations
20 that are being measured here by surveys, the
21 proper body to address that is Congress.

22 And Congress has been active in this
23 area. This is not an instance of political
24 failure --

25 JUSTICE SOTOMAYOR: Well, the question

1 is, was it -- the fact that Congress recognized
2 how sensitive this information is, is quite
3 laudatory, but did it understand the measure of
4 the constitutional requirement of what
5 protections should be given to that?

6 I mean, I -- I can defer to Congress's
7 understanding of the privacy needs, but does
8 that create an obligation for me to defer to
9 their judgment of what protections the
10 Constitution requires?

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

21 That's not a new standard. That's an
22 old standard.

23 MR. DREEBEN: But the new standard
24 here would be saying that the business records
25 of a third party, when acquired by the

1 government, constitute a --

2 JUSTICE SOTOMAYOR: But we have --

3 MR. DREEBEN: -- search of --

4 JUSTICE SOTOMAYOR: -- we have said --
5 you know, we have made exceptions all the time,
6 Ferguson, Bond, even in creating Smith and
7 Miller, we created an exception. People
8 disclose the content of telephone calls to
9 third parties. But we said the government
10 can't intrude without a warrant in that
11 situation.

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

21 That was the basic framework that led
22 the Court in Katz to conclude that what you
23 maintain privately in your house or in the
24 content of your phone calls requires special
25 process.

1 JUSTICE GORSUCH: Mr. Dreeben, I'd
2 like to -- I'd like to drill down on that and
3 return to Justice Kagan's question. You know,
4 the facts here wind up looking a lot like
5 Jones.

6 One thing Jones -- Jones taught us is
7 -- and reminded us, really, is that the
8 property-based approach to privacy also has to
9 be considered, not just the reasonable
10 expectation approach.

11 So, if we put aside the reasonable
12 expectation approach for just a moment, Katz,
13 Miller, Smith, and ask what is the property
14 right here, let's say there is a property
15 right. Let's say I have a property right in
16 the conversion case I posited with your
17 colleague, so that if someone were to steal my
18 location information from T-Mobile I'd have a
19 conversion claim, for example, against them for
20 the economic value that was stolen.

21 Wouldn't that, therefore, be a search
22 of my paper or effect under the property-based
23 approach approved and reminded us in Jones?

24 MR. DREEBEN: I suppose that if you
25 are insisting that I acknowledge that it's a

1 property right, some consequences are going to
2 follow --

3 JUSTICE GORSUCH: Right.

4 MR. DREEBEN: -- from that.

5 JUSTICE GORSUCH: Okay.

6 MR. DREEBEN: I don't think you can --

7 JUSTICE GORSUCH: But let's just --
8 let's --

9 MR. DREEBEN: I don't think you can
10 make that assumption.

11 JUSTICE GORSUCH: -- let's stick with
12 my hypothetical, counsel, okay? I know you
13 don't like it. I got that.

14 (Laughter.)

15 JUSTICE GORSUCH: But let's say that,
16 in fact, I've got positive law that indicates
17 it is a property right. Would you there --
18 therefore, agree that that's a search of my
19 paper and effect?

20 MR. DREEBEN: I wouldn't, and I --

21 JUSTICE GORSUCH: But why not?

22 MR. DREEBEN: Because it's not your
23 paper or your effect.

24 JUSTICE GORSUCH: If property law says
25 it is.

1 MR. DREEBEN: Well, I don't think
2 property law does say that it is. And I
3 think that --

4 JUSTICE GORSUCH: Well, that's
5 fighting the hypothetical, counsel. And I know
6 I -- I didn't like hypotheticals, too, when I
7 was a lawyer sometimes, but I'm asking you to
8 stick with my hypothetical.

9 MR. DREEBEN: Justice Gorsuch, I think
10 that the problem with the hypothetical is that
11 it creates a property interest --

12 JUSTICE GORSUCH: All right.

13 MR. DREEBEN: -- out of transfers of
14 information.

15 JUSTICE GORSUCH: Please -- please,
16 could you stick with my hypothetical and then
17 you can tell me why it's wrong.

18 MR. DREEBEN: All right.

19 JUSTICE GORSUCH: Under my
20 hypothetical, you have a property right in this
21 information.

22 Would it be a search of my paper and
23 effect? Yes or no.

24 MR. DREEBEN: I am not sure. And the
25 reason that I am not sure is there has never

1 been a property right recognized in information
2 that's conveyed to a business of this
3 character.

4 If we were talking about e-mail, as
5 Your Honor's opinion in Ackerman sought to
6 analogize to property, I think we would have a
7 more complex discussion about it. I'm not sure
8 that it would achieve any different result.

9 JUSTICE GORSUCH: You're not here to
10 deny that there might be a property interest
11 and, therefore, a search?

12 MR. DREEBEN: No, I am -- I'm here to
13 deny there's a property interest in cell site
14 information about e-mail --

15 JUSTICE GORSUCH: In my -- in my
16 hypothetical, if there were a property
17 interest, you're not here to deny that that
18 would be a search of my paper and effect?

19 MR. DREEBEN: I'm not here to concede
20 it either.

21 JUSTICE GORSUCH: Okay.

22 MR. DREEBEN: And the reason that --
23 (Laughter.)

24 MR. DREEBEN: The reason that I can't
25 concede it is it's a property right that

1 resembles no property right that's existed.

2 JUSTICE GORSUCH: I think you --

3 JUSTICE ALITO: Yeah, Mr. Dreeben,
4 along those lines, I was trying to think of an
5 example of a situation in which a person would
6 have a property right in information that the
7 person doesn't ask a third-party to create, the
8 person can't force the third-party to create it
9 or to gather it. The person can't prevent the
10 company from gathering it. The person can't
11 force the company to destroy it. The person
12 can't prevent the company from destroying it.

13 And according to Petitioner, the
14 customer doesn't even have a right to get the
15 information.

16 MR. DREEBEN: So, Justice Alito, those
17 are a lot of good reasons on why this should
18 not be recognized as a property interest. I
19 can't think of anything that would be
20 characterized as a property interest with those
21 traits. And it would be a -- really a
22 watershed change in the law to treat
23 transferred information as property.

24 JUSTICE GORSUCH: Well, what does
25 Section 222 do, other than declare this

1 customer proprietary network information --

2 MR. DREEBEN: So that --

3 JUSTICE GORSUCH: -- that the carrier
4 cannot disclose?

5 MR. DREEBEN: It -- it does that in
6 conjunction with a provision that it shall be
7 disclosed as required by law.

8 JUSTICE GORSUCH: So -- so, but let me
9 ask you that. So -- so the government can
10 acknowledge a property right but then strip it
11 of any Fourth Amendment protection. Is that
12 the government's position?

13 MR. DREEBEN: No, no, but I think that
14 the --

15 JUSTICE GORSUCH: And so -- so could
16 we also say maybe that they also get this
17 property right subject to having a non-Article
18 III judge decide the case, or quartering of
19 troops in your home? Could we strip your
20 property interests of all constitutional
21 protection?

22 MR. DREEBEN: Well, those are pretty
23 far afield. I -- I think what's going on
24 here --

25 JUSTICE GORSUCH: Are they?

1 MR. DREEBEN: -- is that Congress has
2 set up a regime to protect privacy interests in
3 information. I think this is also an
4 illustration of why this Court does not have to
5 leap ahead with the Fourth Amendment to
6 constitutionalize interests in property.

7 And Congress has calibrated under what
8 circumstances that privacy -- privacy interest
9 shall be protected. It yields in the face of
10 legal statutes that Congress has also passed --

11 JUSTICE GORSUCH: But does Congress's
12 determination also yield in the face of the
13 Fourth Amendment, Mr. Dreeben?

14 MR. DREEBEN: It does not. But --

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

17 MR. DREEBEN: But what interests the
18 statute --

19 JUSTICE GORSUCH: In the government's
20 -- in the government's view. Is that -- is
21 that right? The statute trumps the Fourth
22 Amendment?

23 MR. DREEBEN: I think I said the
24 opposite.

25 JUSTICE GORSUCH: Oh, good. All

1 right. I hoped so.

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

4 JUSTICE GORSUCH: So the Fourth
5 Amendment controls, not -- not what the statute
6 says --

7 MR. DREEBEN: Well --

8 JUSTICE GORSUCH: -- with respect to
9 the disclosure of the information?

10 MR. DREEBEN: -- the Fourth Amendment
11 applies once the Court has identified what
12 interest the statute creates.

13 JUSTICE GORSUCH: Right. The statute
14 creates customer proprietary information --

15 MR. DREEBEN: Well, it --

16 JUSTICE GORSUCH: -- in Section 222
17 and then the Fourth Amendment will determine
18 when it can be revealed. Right?

19 MR. DREEBEN: No. The statute
20 actually creates --

21 JUSTICE GORSUCH: Why does the statute
22 control the Constitution? I think you are
23 saying the statute controls the Constitution.

24 MR. DREEBEN: No, I think that the
25 interests that the statute creates have to be

1 looked at as a whole. And this Court has been
2 very careful to --

3 JUSTICE GORSUCH: So the bitter -- the
4 bitter with the sweet.

5 MR. DREEBEN: Yeah, I know the Court
6 has rejected that in the due process context,
7 but here we are looking at what interests
8 Congress has sought to protect and --

9 JUSTICE GORSUCH: So -- so why --

10 CHIEF JUSTICE ROBERTS: Mr. Dreeben --

11 JUSTICE GORSUCH: -- why -- why -- why
12 couldn't Congress also say you don't get an
13 Article III judge to determine this issue?

14 MR. DREEBEN: That seems so
15 non-germane to what Congress was trying to do.
16 In Section 222, what Congress was trying to do
17 was to say, look, the -- the companies are
18 collecting a large amount of information.

19 We recognize that there are privacy
20 interests in this. We want to give recognition
21 to those privacy interests. We do not want to
22 hamper legitimate law enforcement. So the
23 interests --

24 JUSTICE ALITO: Yeah, Mr. Dreeben, I
25 would read the -- the -- the phrase "customer

1 proprietary information" to mean that it is
2 proprietary to the cell phone company and,
3 therefore, not to the customer. It's customer
4 information, but it's proprietary information
5 about the cell phone company because, if you
6 got that information in the aggregate, you
7 could tell a lot about the company's operation.

8 I assume that -- that that kind of
9 information would be available to the FCC. And
10 so, if the FCC obtained it, they would have to
11 treat it as proprietary information of the
12 company.

13 MR. DREEBEN: Justice Alito --

14 JUSTICE ALITO: Am I wrong in that?

15 MR. DREEBEN: I am not sure that that
16 is the way that Congress intended it, but I
17 think that what is significant is not the label
18 but what actual underlying rights were created.

19 JUSTICE ALITO: Well, if it were
20 proprietary to the customer, in what sense is
21 it proprietary to the customer, since it has
22 all of those attributes that I mentioned?

23 MR. DREEBEN: That's precisely my
24 point. As a label to indicate that Congress
25 wanted to show some respect for privacy

1 interests, when people interact with
2 telecommunications companies, it provided
3 certain nondisclosure rules.

4 It also made clear that it --

5 JUSTICE SOTOMAYOR: Could the
6 government say to telecommunications providers,
7 you cannot use this kind of information, you
8 can't keep it?

9 MR. DREEBEN: Yes, I'm sure that in
10 regulating that telephone companies are given a
11 broad range --

12 JUSTICE SOTOMAYOR: So what's the
13 difference between that and saying, if you want
14 to create this information, you are taking this
15 information from customers and it's the
16 customer's information? You can't disclose it
17 without the customer saying yea or nay.

18 MR. DREEBEN: Congress --

19 JUSTICE SOTOMAYOR: Isn't what that
20 Congress did?

21 MR. DREEBEN: No, because Congress
22 provided that it shall be disclosed as required
23 by law. And the same Congress that passed --

24 JUSTICE SOTOMAYOR: Well, but then we
25 -- then you're begging the question, which is

1 Justice Gorsuch's question, which is: What's
2 the -- what does the law, the Fourth Amendment,
3 require in those circumstances?

4 MR. DREEBEN: So this Court has been
5 --

6 JUSTICE SOTOMAYOR: You're -- you're
7 saying Congress can set the level of what the
8 Constitution requires, but I don't know that
9 that's true.

10 MR. DREEBEN: Well, I think it's
11 definitely not true. This Court is the arbiter
12 of the Fourth Amendment, but it has already
13 decided that question.

14 It has decided two things: One, under
15 the third-party doctrine, business information
16 that is obtained from a company in the ordinary
17 course of its business --

18 JUSTICE SOTOMAYOR: But that's --

19 MR. DREEBEN: -- is not a search of
20 the customer.

21 JUSTICE SOTOMAYOR: But that's begging
22 the question. Is it the third-party's
23 information when Congress says it's customer
24 information?

25 MR. DREEBEN: Well, Congress can say a

1 lot of things, and I think that the important
2 thing that this Court has said as a corollary
3 to my point about what the third-party doctrine
4 is, is the Court has made clear that state laws
5 that provide additional enhanced privacy
6 protection do not alter Fourth Amendment
7 baselines.

8 It said that in Greenwood. It said
9 that in Moore. It said it most recently in
10 Quon, where it confronted a claim that the
11 Stored Communications Act, the same law that's
12 at issue here, created some sort of an
13 expectation of privacy above and beyond what
14 the Fourth Amendment required, and the Court
15 said: We don't measure Fourth Amendment rules
16 about privacy expectations in text messaging by
17 what Congress has provided in the context of
18 the Stored Communications Act.

19 And I think it, in fact, illustrates
20 that Congress's efforts to provide enhanced
21 protection above and beyond what the Fourth
22 Amendment requires do not alter the content of
23 the Fourth Amendment.

24 JUSTICE KAGAN: Mr. -- Mr. Dreeben,
25 can I --

1 CHIEF JUSTICE ROBERTS: Justice --
2 Justice Breyer.

3 JUSTICE BREYER: I just want your
4 reaction to what I asked the other side. I
5 agree with you that the law is at the moment
6 third-party information is third-party, with a
7 few exceptions, but it may be that here another
8 exception should exist for the reason that the
9 technology, since the time those cases have --
10 has changed dramatically to the point where you
11 get the cell phone information, the tower
12 information, and put it together in a way that
13 tracks a person's movement for 274 days or
14 whatever, is an unreasonable thing for the
15 government to do. Assume that's so.

16 Now, one thing that is bothering me
17 about that line is what I said before. I would
18 like your reaction as to how to draw such a
19 line, if we draw it.

20 MR. DREEBEN: So I don't think there
21 --

22 JUSTICE BREYER: Because -- wait,
23 there are other things, and I want to -- I'll
24 be very specific about them through. I said,
25 and I didn't have much basis in your brief for

1 saying it, is it true that it's quite frequent
2 or, at least, not abnormal for the government,
3 when faced with reason to believe that there
4 are securities violations, white-collar crime
5 violations, terrorism financing violations, all
6 kinds of things like that, that they do go to
7 banks and they do ask for purchase information
8 or to the credit card companies, et cetera,
9 without a warrant, just reasonable? Now --

10 MR. DREEBEN: Yes.

11 JUSTICE BREYER: -- therefore, you
12 don't want that interfered with.

13 MR. DREEBEN: No.

14 JUSTICE BREYER: No. But -- but it
15 may not worry you so much that -- that they
16 can't track a -- a person's physical, which is
17 like his body, you know, where it is, and the
18 technology has changed dramatically there. So
19 maybe it's an unfair question to ask you --

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

21 JUSTICE BREYER: -- but how would you
22 draw that line because that's the problem
23 that's --

24 MR. DREEBEN: I'm not going to draw,
25 Justice Breyer --

1 JUSTICE BREYER: All right.

2 JUSTICE SOTOMAYOR: How would -- how
3 would you like to lose?

4 (Laughter.)

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

7 JUSTICE BREYER: Well, why not just
8 say what he said on the other side? Say what's
9 wrong with that? What we say is, look, what we
10 have here is many, many days of the government
11 taking previously unavailable tower information
12 at the time of Miller, et cetera, now putting
13 it together in order to track where this human
14 being has been for a long period of time,
15 something that never could have been gotten
16 before, and to do that without some probable
17 cause is an unreasonable thing. What's wrong
18 with that as an exception welded onto the basic
19 rule?

20 MR. DREEBEN: It doesn't have a
21 coherent principle that will explain why a
22 similar rule shouldn't be applied to credit
23 card records or debit card records or records
24 of one's travel through Uber or through a
25 myriad of other kinds of digital records that

1 are created.

2 JUSTICE BREYER: Or, well -- well,
3 maybe it does have a principle. Maybe the
4 principle is that look at the exception they've
5 made for diagnostic hospital records. That is
6 an exception. And it has to do with physical
7 bodies, and it has to do with the private
8 information related to those physical bodies.

9 And here, if, in fact, there are
10 similar things in similar circumstances of
11 highly private information, you draw, you know,
12 several -- you draw several factors there and
13 -- and you have it over here, if you had the
14 similar thing, all those factors are met in
15 these other cases, so be it.

16 MR. DREEBEN: So, Justice Breyer,
17 there is a significant difference between the
18 kinds of cases you're talking about involving
19 direct governmental searching activity and
20 governmental acquisition of information from
21 businesses.

22 The government is not monitoring the
23 movements of this person by attaching a device
24 to their person or by surveilling them, an
25 issue that I think itself raises difficult

1 questions since it does not appear that
2 Petitioner objects to tailing somebody in
3 multiple cars, even over 127 days.

4 What we're talking about here is the
5 distinction between the government going and
6 getting information from an individual and the
7 government going to a business and asking the
8 business to serve as a witness.

9 And I think Your Honor's point about
10 how investigations proceed is exactly right.
11 What the government does at the early stages of
12 an investigation is reach out to third parties
13 because it may not have enough information
14 about whether a crime has been committed or
15 whether a particular individual is culpable for
16 that crime. It goes to third-party providers
17 who have information that allows them to narrow
18 the field, to find out what's going on.

19 JUSTICE KENNEDY: If -- if there -- if
20 there's a shooting into a house, someone is
21 killed, and witnesses say the shooter was
22 running away with a cell phone, and the police
23 ask the company to release all information
24 about cell phones in that area, you don't have
25 to go to the -- to get a 2703(d) order?

1 MR. DREEBEN: No, we do have to get a
2 2703(d) order. And, in fact, we used that --

3 JUSTICE KENNEDY: You do even -- even
4 for --

5 MR. DREEBEN: Yes.

6 JUSTICE KENNEDY: -- a blanket search?

7 MR. DREEBEN: Well, for -- I think
8 what Justice Sotomayor described earlier is
9 getting tower information. We used exactly
10 that technique when a bullet was fired through
11 the window of a federal judge --

12 JUSTICE KENNEDY: Right.

13 MR. DREEBEN: -- in Florida, and the
14 government did not have a clear idea of who the
15 suspects would be. It attempted to narrow down
16 the field by figuring out --

17 JUSTICE KENNEDY: But you did need an
18 order?

19 MR. DREEBEN: Yes, we did need an
20 order and we got an order. And I think this is
21 another answer to your concern, Justice Breyer.
22 Not only are we going to less sensitive sources
23 of information at the early stages of an
24 investigation to gather information and figure
25 out what the criminal activity is and who might

1 be inculpated in it, but we also are operating
2 under a statutory regime that requires us to
3 make a particularized showing.

4 It's not the case that we can just
5 walk in and get --

6 JUSTICE KAGAN: Right. But, Mr.
7 Dreeben, that could go away tomorrow. The
8 question here is the constitutional question,
9 not the statutory one. So can I take you back
10 to what, it seems to me, is the essential
11 identity between the factual circumstances here
12 and in Jones, which is that the government is
13 getting 24/7 information.

14 I mean, in some ways, you could say
15 this is more. Jones was just about a car; this
16 is about every place that you are, whether
17 you're in a car or not. And you said to me
18 that what makes it different is that you've
19 given the information to another person. But I
20 recall that when you were here in the Jones
21 case, your theory for why that was permissible
22 was essentially that you had given that
23 information to the entire public; in other
24 words, just by being in the world, everybody
25 sees you, everybody watches you, and you've

1 lost your expectation of privacy in that way.

2 Now, we pretty conclusively rejected
3 that argument. Why is it different when it's
4 giving it to one person, the same information,
5 this 24/7 tracking, than we said it was when
6 you give it to the entire world?

7 MR. DREEBEN: So I -- I think that it
8 is fundamentally different in the means that we
9 chose to employ in Jones versus this case, and
10 it's also different in what information we're
11 acquiring. We did not acquire, in this case,
12 24/7 tracking of the precise movements of an
13 individual everywhere he went. We acquired
14 information of the cell tower where a call
15 started --

16 JUSTICE KAGAN: But let's assume you
17 could. Let's assume Mr. Wessler is right that
18 the -- the technology keeps on getting better
19 and better, more and more precise, it's not 10
20 football fields anymore; it's half of this
21 courtroom. Next month, it may be an eighth of
22 this courtroom.

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

1 MR. DREEBEN: So I would say that the
2 third-party doctrine doesn't change. I also
3 think that this Court could disagree and draw a
4 line on more precise information that involves
5 24/7 tracking.

6 This information is just simply far
7 more similar to what was going on in the Smith
8 case, where we got dialed phone numbers that
9 would reveal a much more precise location where
10 the dialed phone number came from and the
11 person that was being spoken to.

12 This case does not present the Court
13 with the opportunity to decide the kind of
14 granularity that Petitioner posits may happen
15 in the future. And if it does happen in --

16 JUSTICE KAGAN: Would it be
17 permissible for the government to ask a cell
18 phone company for lifetime information?

19 MR. DREEBEN: Not under the current
20 statutory regime and --

21 JUSTICE KAGAN: No, under your view of
22 the Constitution.

23 MR. DREEBEN: I think it would be
24 highly questionable under the Constitution, and
25 here's why: Providers, which are hardly shy

1 about asserting Fourth Amendment rights, have
2 protections against unduly broad subpoenas that
3 this Court has recognized in a line of cases
4 summed up in *Donovan versus Lone Steer* and
5 summarized in our -- in our brief. There has
6 to be a showing of --

7 JUSTICE KAGAN: Where is the line?

8 MR. DREEBEN: There has to be a
9 showing of relevance. There has to be a
10 showing of congressional authorization. There
11 has to be a showing of specificity. And it
12 cannot be unduly broad so as to be unduly
13 burdensome. So the --

14 CHIEF JUSTICE ROBERTS: Well, all
15 those protections are available in the
16 magistrate's decision whether to issue the
17 warrant, right? I -- I mean, you can --

18 MR. DREEBEN: Yes. But -- but we --
19 we have to demand this information somehow. If
20 we assume that the statute went away, which for
21 reasons that I'd like to come back to, I think
22 the Court could decide the case based on the
23 statute's compliance with the Constitution,
24 even if you assume that there's a privacy
25 interest at stake, but if there's no statute

1 and we're going just under a subpoena, there is
2 a long-standing recognition in this Court's
3 cases that unduly broad subpoenas are subject
4 to being squashed -- quashed under Fourth
5 Amendment principles.

6 And the principles that are considered
7 in that context are raised by the provider.
8 They can include the sensitivity of the
9 information. This Court, in Footnote 6 of the
10 Miller decision, expressly said: Look, we
11 understand there's a lot of sensitive banking
12 information that's going on here. There are
13 other protections besides abolishing the
14 third-party doctrine. They include the First
15 Amendment and they include objections to the
16 overbreadth of a request.

17 So, in response to your question,
18 could the government just walk in with a
19 subpoena and get a lifetime of this
20 information, no, I don't think that we could,
21 and I do not think that we would.

22 We are still limited by basic Fourth
23 Amendment principles that apply even to
24 subpoenas where there's not additional
25 statutory protection.

1 JUSTICE ALITO: Now, yeah, Mr.
2 Dreeben, in order to understand the issue here
3 and to see the difference between this case and
4 Jones, isn't it necessary to go back to old
5 Supreme Court cases that describe -- that
6 explain how the Fourth Amendment applies to a
7 subpoena?

8 Asking another -- asking a party or
9 ordering a party to produce documents is not a
10 search in the literal sense of the word, nor is
11 it a seizure in the literal sense of the word,
12 but cases going back to Boyd, and Hale versus
13 Henkel, old cases say that it's a -- it's a
14 constructive search. But in the situation
15 where there's this constructive search, then
16 the Fourth Amendment standards that apply to a
17 literal search, what the Court called an actual
18 search, are different. Isn't that -- so it's a
19 fundamentally --

20 MR. DREEBEN: Yes.

21 JUSTICE ALITO: -- different
22 framework.

23 MR. DREEBEN: It is a completely
24 different framework because of both a lesser
25 degree of intrusion, because the government is

1 not going in itself and conducting search
2 activity, and because there's an opportunity
3 for pre-compliance judicial review.

4 JUSTICE BREYER: All right. Maybe
5 you've got the answer to -- right there. You
6 say how do we distinguish this case from all
7 the cases where you wanted to get the
8 commercial information.

9 In respect to the commercial
10 information, banking and, you know, all the
11 things for white-collar crime, it's commercial
12 information. And you have the subpoenas and
13 you can perhaps have the protections there that
14 -- that you were talking about here, but this
15 is highly personal information on a -- on a
16 line, you say, it's somewhat closer to the
17 diagnostic testing than it is to purely
18 commercial information.

19 Now, I could imagine writing a
20 paragraph like that and saying leaving the
21 other for the future. Does that work or does
22 --

23 MR. DREEBEN: No. It --

24 JUSTICE BREYER: Now, I know you'd say
25 no --

1 MR. DREEBEN: It doesn't -- doesn't
2 work.

3 JUSTICE BREYER: -- but I need to know
4 the reason.

5 (Laughter.)

6 MR. DREEBEN: Well, let me -- the
7 basic principle here in the Fourth Amendment is
8 how the government acquires information
9 matters, not the sensitivity of the
10 information.

11 I have to disagree, Justice Breyer,
12 that medical information is given heightened
13 protection under the Fourth Amendment. This --

14 JUSTICE BREYER: But the diagnostic --
15 the diagnostic test to the hospital.

16 MR. DREEBEN: Well, no. The Ferguson
17 case, which I think --

18 JUSTICE BREYER: Yeah.

19 MR. DREEBEN: -- you're referring
20 to --

21 JUSTICE BREYER: Yeah, I am.

22 MR. DREEBEN: -- involved a compelled
23 search by the government, a urine test that the
24 Court assumed was given without informed
25 consent, so it was a government search by

1 government hospital personnel that acquired the
2 urine --

3 JUSTICE BREYER: All right.

4 MR. DREEBEN: -- for law enforcement
5 purposes. That's the government search. I
6 think this also answers Justice Sotomayor's
7 question about acquiring GPS information under
8 E911 from a handset. The government reaches
9 into the phone, pulls out information. That, I
10 would concede, is a search.

11 What we're doing here is not going to
12 the individual and extracting information from
13 him. We're getting information from a
14 third-party provider, relying on the line of
15 cases that Justice Alito alluded to, that allow
16 us to use subpoenas.

17 JUSTICE KAGAN: But -- but, Mr.
18 Dreeben, that line of cases was developed in a
19 period in which third parties did not have this
20 kind of information, valid --

21 MR. DREEBEN: Not this kind
22 specifically, Justice Kagan, but in -- in the
23 dissenting opinion in Smith, Justice Stewart
24 warned that you're getting incredibly intimate
25 information when you get the phone numbers of

1 people who you have called.

2 And I would submit that if the Court
3 thinks about it, the information you get if you
4 know who you are calling and the inferences you
5 can draw about what kinds of conversations
6 people are having are extremely sensitive with
7 --

8 JUSTICE KAGAN: Yeah, but if --

9 MR. DREEBEN: -- dialed phone numbers.

10 JUSTICE KAGAN: -- I understand what
11 you're saying, you're basically saying, well,
12 because the government is going to a
13 third-party here and doing it by subpoena, it
14 doesn't matter how sensitive the information
15 is. It doesn't matter whether there's really a
16 lack of voluntariness on the individual's part
17 in terms of conveying that information to the
18 third-party.

19 And we could go on and we could give,
20 you know, other factors that you might think in
21 a sensible world would matter to this question.
22 And you're saying that all of that is trumped
23 by the fact that the government is doing this
24 by subpoena, rather than by setting up its own
25 cell towers.

1 MR. DREEBEN: I don't think I did say
2 that, Justice Kagan, because there is an
3 element here of voluntariness in deciding to
4 contract with a cell company, just like there's
5 an element of voluntariness in getting a
6 landline phone and making calls, and there's an
7 element of voluntariness in signing up for a
8 bank account and using a debit card to purchase
9 --

10 CHIEF JUSTICE ROBERTS: That --

11 MR. DREEBEN: -- everything in your
12 life.

13 CHIEF JUSTICE ROBERTS: -- that sounds
14 inconsistent with our decision in Riley,
15 though, which emphasized that you really don't
16 have a choice these days if you want to have a
17 cell phone.

18 MR. DREEBEN: Well, and not -- not in
19 a practical sense, I agree with you, Chief
20 Justice Roberts, that Riley did point out that
21 cell phones were necessities. The dissents in
22 Smith and Miller pointed out that a private
23 telephone has become a necessity of business
24 and personal life, and a bank account is a
25 necessity of carrying out financial

1 transactions.

2 JUSTICE GINSBURG: Mr. Dreeben --

3 MR. DREEBEN: The fact that --

4 JUSTICE GINSBURG: -- what you do in
5 bringing up Riley with the distinction you made
6 between -- you say it's the means that the
7 government is using -- -

8 MR. DREEBEN: Uh-huh.

9 JUSTICE GINSBURG: -- we must be
10 concerned about, not the information it
11 obtains. But in Riley, it was the most
12 traditional means. It was a search incident to
13 an arrest.

14 MR. DREEBEN: Yes, it was a search.
15 And I think that that's the key point. The
16 Court in Footnote 1 of Riley actually reserved
17 whether acquiring aggregated information
18 through other means would be subject to a
19 different Fourth Amendment analysis.

20 JUSTICE GORSUCH: Mr. Dreeben, it
21 seems like your whole argument boils down to if
22 we get it from a third-party we're okay,
23 regardless of property interest, regardless of
24 anything else. But how does that fit with the
25 original understanding of the Constitution and

1 writs of assistance?

2 You know, John Adams said one of the
3 reasons for the war was the -- the use by the
4 government of third parties to obtain
5 information -- force them to help as their
6 snitches and snoops. Why -- why isn't this
7 argument exactly what the framers were
8 concerned about?

9 MR. DREEBEN: Well, I think that those
10 -- those were writs that allowed people acting
11 under governmental power to enter any place
12 they wanted to search for anything that they
13 wanted.

14 JUSTICE GORSUCH: Isn't that exactly
15 your argument here, that so long as a third
16 party's involved, we can get anything we want?

17 MR. DREEBEN: Well, I think the search
18 is being carried out under a writ of assistance
19 by a government agent, operating under
20 government authority; whereas here, we -- the
21 -- if there's a search in the acquisition of
22 cell site information, then it's the cell site
23 company that is acquiring that information
24 without governmental instigation, without --

25 JUSTICE GORSUCH: The subpoena --

1 MR. DREEBEN: -- governmental
2 agency --

3 JUSTICE GORSUCH: -- being, though,
4 the equivalent of a writ of assistance?

5 MR. DREEBEN: Oh, I don't think a
6 subpoena is an equivalent of a writ of
7 assistance. A writ of assistance allowed the
8 agent to go into any house, to rip open
9 anything looking for contraband --

10 JUSTICE GORSUCH: Yeah. And -- and
11 you can subpoena --

12 MR. DREEBEN: -- no limitations.

13 JUSTICE GORSUCH: -- anything that any
14 company has anywhere in the globe regardless of
15 any property rights, regardless of any privacy
16 interests, simply because it's a third-party?

17 MR. DREEBEN: So I -- I think that, as
18 Justice Alito was explaining, there is a
19 traditional understanding that dates back to
20 the time of the founding that subpoenas stand
21 on a different footing from search warrants.
22 And they do that because they are less
23 intrusive, since they do not require the
24 government going into private property and
25 searching itself.

1 CHIEF JUSTICE ROBERTS: Why does that

2 --

3 MR. DREEBEN: And --

4 CHIEF JUSTICE ROBERTS: -- why does
5 that make a difference? The subpoena tells the
6 person who gets it: this is what you have to
7 do.

8 MR. DREEBEN: Well, I think that most

9 --

10 CHIEF JUSTICE ROBERTS: Why is that
11 less intrusive? The whole question is whether
12 the information is accessible to the
13 government.

14 MR. DREEBEN: So I -- I think most
15 basically it makes a difference because this
16 Court's cases have said so from time
17 immemorial. And the reason why it has said so
18 is that if I go into your house to search, I
19 will expose a great deal of additional
20 information to government view beyond what is
21 sought by the terms of an authorization.

22 And so, if I could just complete the
23 answer.

24 CHIEF JUSTICE ROBERTS: Sure.

25 MR. DREEBEN: The -- the difference

1 here is that the government is operating under
2 court supervision with an order that provides
3 particularity. It provides the interposition
4 of a neutral magistrate between the government
5 and the acquisition of information. And it
6 does require a showing that is less than
7 probable cause but is above what a traditional
8 subpoena requires.

9 So even if the Court does think that
10 there is a search here, Congress has properly,
11 in our view, calibrated the balancing of
12 interests, and the Court should affirm it as a
13 constitutionally reasonable order.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Four minutes, Mr. Wessler.

17 REBUTTAL ARGUMENT OF NATHAN F. WESSLER
18 ON BEHALF OF PETITIONER

19 MR. WESSLER: Thank you, Mr. Chief
20 Justice.

21 If I could begin, I have several
22 points, but to begin on that subpoena point.
23 And, Justice Alito, to -- to your question
24 about the historical pedigree of the subpoena
25 doctrine, I think this Court made absolutely

1 clear in Riley that the historical pedigree of
2 older Fourth Amendment doctrines does not
3 automatically determine the outcome in the
4 digital age.

5 And as you yourself, Your Honor,
6 recognized in your concurrence there, the
7 search incident to arrest doctrine had its
8 origins at least a century before the -- the
9 framing of the Fourth Amendment, and yet it
10 yielded to a new understanding.

11 And I think that --

12 JUSTICE ALITO: That's certainly true,
13 but you'd want to -- so this is -- this would
14 be revolutionary, to fundamentally change the
15 understanding of the application of the Fourth
16 Amendment to subpoenas. Do you want us to do
17 that?

18 MR. WESSLER: Well, I -- I don't think
19 it's revolutionary at all. And I think the
20 reason that is, is the government's concession,
21 as I hear it, that the contents of electronic
22 communications should be protected.

23 Once we recognized that there is an
24 exception for the contents of e-mails, we've
25 already acknowledged that the subpoena doctrine

1 can't stand in its most severe form. And if --
2 if the contents of e-mails are to be protected,
3 it's not because they are sealed in transit,
4 as, Justice Sotomayor, you pointed out.

5 They're unlike, in a fundamental way,
6 the paper letters at issue in 1877 in Ex Parte
7 Jackson. They are actually accessible to and
8 accessed by the service providers, as the
9 government has argued in other cases, including
10 the Microsoft case to be heard later this --
11 this term.

12 So, if they're to be protected, it's
13 because of their sensitivity and because of
14 people's long-standing expectation that their
15 communications are highly sensitive and would
16 remain private.

17 And as the concurrences at least
18 recognized in Jones, also highly private and
19 sensitive are these kinds of longer-term
20 location records.

21 Second, I -- I just want to highlight
22 that the -- the government, Mr. Dreeben, as I
23 heard him, conceded that the precision of these
24 records doesn't matter at all to the
25 government's theory here.

1 They could be precise, I take it, to
2 within a single inch. And the fact that a
3 third party has custody of them would, in the
4 government's view, vitiate any expectation of
5 privacy, which we think would be a very
6 destructive rule.

7 Third, this is not an area where the
8 Court should pause and wait for Congress to --
9 to act. My colleague intimated that in an area
10 of rapidly changing technology, it's
11 appropriate to -- to perhaps abstain and let
12 Congress step in. We -- we are well over two
13 decades into the cell phone age. This is an
14 area where, as the Court recognized in Riley,
15 people's use of this technology is well settled
16 and only becoming more pervasive over time. We
17 know the -- the direction, the cases before the
18 Court now, and -- and it is crucial that the
19 Court act.

20 And, finally, to the property
21 principles, first one -- one statutory point,
22 Justice Alito, Section 222(c)(2) actually does
23 give the customer the right to obtain the
24 information. Now, as we pointed out in our
25 brief, the carriers have not reliably complied

1 with that, at least as of several years ago,
2 but --

3 JUSTICE ALITO: No, I understand that,
4 but you said in your brief that the -- that the
5 companies wouldn't comply.

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

18 Certainly, we acknowledge that the --
19 the provider itself has some property right,
20 maybe several of those sticks in the bundle,
21 but that doesn't eliminate some right on -- on
22 the part of -- of -- of the customer.

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

25 JUSTICE ALITO: Could I just ask you

1 this question: Is any of this going to do any
2 good for -- for Mr. Carpenter?

3 (Laughter.)

4 JUSTICE ALITO: Is he going to get
5 anything suppressed? Because under Illinois
6 versus Krull, if -- if a search is conducted in
7 reliance on a statute authorizing the search in
8 accordance with a certain procedure, the
9 exclusionary rule doesn't apply.

10 MR. WESSLER: May I answer? Thank
11 you.

12 So the -- that question is not before
13 this -- this Court.

14 JUSTICE ALITO: No, I understand that.
15 Just --

16 MR. WESSLER: It will be dealt with on
17 remand. I think that we have arguments on --
18 on both of the -- the types -- quite strong
19 arguments on both of the prongs of the good
20 faith exception.

21 On the statutory prong, the Stored
22 Communications Act provides two mechanisms, an
23 order and a warrant. And we think that that
24 makes this fundamentally different than other
25 statutes that may clearly provide a means.

1 And, second, on the court order, this
2 is unlike a warrant, and all of this Court's
3 cases on the good faith exception have dealt
4 with warrants based on affidavits from an
5 investigating officer, this is an unsworn
6 application from a prosecutor who we think
7 should know better.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

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

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