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CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF

(EIGHTH EDITION)
2020-2021 SUPPLEMENT

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Carolina Academic Press
2020

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TABLE OF CONTENTS

PAGE

CHAPTER ONE

NOTE: *Carpenter v. United States* 1

CHAPTER FOUR

NOTE: *Mitchell v. Wisconsin* 23

NOTE: *Collins v. Virginia* 25

CHAPTER FIVE

NOTE: *Kansas v. Glover* 27

CHAPTER THIRTEEN

NOTE: *Byrd v. United States* 29

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CHAPTER ONE

INSERT on p. 53, after the Notes and Questions following *Kyllo v. United States*:

CARPENTER v. UNITED STATES

United States Supreme Court
585 U.S. ____, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018)

Chief Justice ROBERTS delivered the opinion of the Court.

This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements.

I

A

There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people. Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called "cell sites." Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings. Cell sites typically have several directional antennas that divide the covered area into sectors.

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

Wireless carriers collect and store CSLI for their own business purposes, including finding weak spots in their network and applying "roaming" charges when another carrier routes data through their cell sites. In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years phone companies have also collected location information from the transmission of text messages and routine data connections. Accordingly, modern cell phones generate increasingly vast amounts of increasingly precise CSLI.

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B

In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T–Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies.

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. See 18 U.S.C. §§ 924(c), 1951(a). Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion.

At trial, seven of Carpenter's confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's phone near four of the charged robberies. In the Government's view, the location records clinched the case: They confirmed that Carpenter was "right where the ... robbery was at the exact time of the robbery." (closing argument). Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. 819 F.3d 880 (2016). . . . .

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II

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For much of our history, Fourth Amendment search doctrine was "tied to common-law trespass" and focused on whether the Government "obtains information by physically intruding on a constitutionally protected area." *United States v. Jones,* 565 U.S. 400, 405, 406, n. 3, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). . . . . In *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), we established that "the Fourth Amendment protects people, not places," and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith* [*v. Maryland*,] 442 U.S. [735,] 740 [(1979)] (internal quotation marks and alterations omitted).

Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll v. United States,* 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925). On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re,* 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948).

We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools. As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States,* 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). For that reason, we rejected in *Kyllo* a "mechanical interpretation" of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant's home was a search. *Id.,* at 35. Because any other conclusion would leave homeowners "at the mercy of advancing technology," we determined that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore what was happening within the home. *Ibid.*

Likewise in *Riley* [*v. California*, 573 U.S. ____ (2014)], the Court recognized the "immense storage capacity" of modern cell phones in holding that police officers must generally obtain a warrant before searching the contents of a phone. 573 U.S., at —— (slip op., at 17). We explained that while the general rule allowing warrantless searches incident

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to arrest "strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to" the vast store of sensitive information on a cell phone. *Id.,* at —— (slip op., at 9).

B

The case before us involves the Government's acquisition of wireless carrier cell-site records revealing the location of Carpenter's cell phone whenever it made or received calls. This sort of digital data—personal location information maintained by a third party—does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake.

The first set of cases addresses a person's expectation of privacy in his physical location and movements. In *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), we considered the Government's use of a "beeper" to aid in tracking a vehicle through traffic. . . . . The Court concluded that the "augment[ed]" visual surveillance did not constitute a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.,* at 281, 282. Since the movements of the vehicle and its final destination had been "voluntarily conveyed to anyone who wanted to look," Knotts could not assert a privacy interest in the information obtained. *Id.,* at 281.

. . . . The Court emphasized the "limited use which the government made of the signals from this particular beeper" during a discrete "automotive journey." *Id.,* at 284, 285. Significantly, the Court reserved the question whether "different constitutional principles may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible." *Id.,* at 283–284.

Three decades later, the Court considered more sophisticated surveillance of the sort envisioned in *Knotts* and found that different principles did indeed apply. In *United States v. Jones,* FBI agents installed a GPS tracking device on Jones's vehicle and remotely monitored the vehicle's movements for 28 days. The Court decided the case based on the Government's physical trespass of the vehicle. 565 U.S., at 404–405. At the same time, five Justices agreed that related privacy concerns would be raised by, for example, "surreptitiously activating a stolen vehicle detection system" in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone. *Id.,* at 426, 428 (Alito, J., concurring in judgment); *id.,* at 415 (Sotomayor, J., concurring). Since GPS monitoring of a vehicle tracks "every movement" a person makes in that vehicle, the concurring Justices concluded that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"—regardless whether those movements were disclosed to the public at large. *Id.,* at 430 (opinion of Alito, J.); *id.,* at 415 (opinion of Sotomayor, J.).

In a second set of decisions, the Court has drawn a line between what a person keeps

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to himself and what he shares with others. We have previously held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith,* 442 U.S., at 743–744. . . . . As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.

This third-party doctrine largely traces its roots to [*United States* v.] *Miller*[, 425 U.S. 35 (1976)]. While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a Fourth Amendment challenge to the records collection. For one, Miller could "assert neither ownership nor possession" of the documents; they were "business records of the banks." *Id.,* at 440. For another, the nature of those records confirmed Miller's limited expectation of privacy, because the checks were "not confidential communications but negotiable instruments to be used in commercial transactions," and the bank statements contained information "exposed to [bank] employees in the ordinary course of business." *Id.,* at 442. The Court thus concluded that Miller had "take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government." *Id.,* at 443.

Three years later, *Smith* applied the same principles in the context of information conveyed to a telephone company. The Court ruled that the Government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search. Noting the pen register's "limited capabilities," the Court "doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial." 442 U.S., at 742. . . . . And at any rate, the Court explained, such an expectation "is not one that society is prepared to recognize as reasonable." *Ibid.* (internal quotation marks omitted). When Smith placed a call, he "voluntarily conveyed" the dialed numbers to the phone company by "expos[ing] that information to its equipment in the ordinary course of business." *Id.,* at 744 (internal quotation marks omitted). Once again, we held that the defendant "assumed the risk" that the company's records "would be divulged to police." *Id.,* at 745.

III

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.

At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. . . . .

We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third

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party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.[3]

A

A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz,* 389 U.S., at 351–352. A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Jones,* 565 U.S., at 430 (Alito, J., concurring in judgment); *id.,* at 415 (Sotomayor, J., concurring). Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." *Id.,* at 429 (opinion of Alito, J.). For that reason, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.,* at 430.

Allowing government access to cell-site records contravenes that expectation. . . . . Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." *Id.,* at 415 (opinion of Sotomayor, J.). . . . . And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.

In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts* or the car in *Jones,* a cell phone—almost a "feature of human anatomy," *Riley,* 573 U.S., at ____ (slip op., at 9)—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time.

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3. The parties suggest as an alternative to their primary submissions that the acquisition of CSLI becomes a search only if it extends beyond a limited period. As part of its argument, the Government treats the seven days of CSLI requested from Sprint as the pertinent period, even though Sprint produced only two days of records. Contrary to Justice Kennedy's assertion, *post,* at __, we need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.

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A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. Unlike with the GPS device in *Jones,* police need not even know in advance whether they want to follow a particular individual, or when.

Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

The Government and Justice Kennedy contend, however, that the collection of CSLI should be permitted because the data is less precise than GPS information. Not to worry, they maintain, because the location records did "not on their own suffice to place [Carpenter] at the crime scene"; they placed him within a wedge-shaped sector ranging from one-eighth to four square miles. Yet the Court has already rejected the proposition that "inference insulates a search." *Kyllo,* 533 U.S., at 36. From the 127 days of location data it received, the Government could, in combination with other information, deduce a detailed log of Carpenter's movements, including when he was at the site of the robberies. And the Government thought the CSLI accurate enough to highlight it during the closing argument of his trial. App. 131.

At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development." *Kyllo,* 533 U.S., at 36. While the records in this case reflect the state of technology at the start of the decade, the accuracy of CSLI is rapidly approaching GPS-level precision. As the number of cell sites has proliferated, the geographic area covered by each cell sector has shrunk, particularly in urban areas. In addition, with new technology measuring the time and angle of signals hitting their towers, wireless carriers already have the capability to pinpoint a phone's location within 50 meters. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 12 (describing triangulation methods that estimate a device's location inside a given cell sector).

Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical

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movements.

B

The Government's primary contention to the contrary is that the third-party doctrine governs this case. . . . .

The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley,* 573 U.S., at ____ (slip op., at 16). *Smith* and *Miller,* after all, did not rely solely on the act of sharing. Instead, they considered "the nature of the particular documents sought" to determine whether "there is a legitimate 'expectation of privacy' concerning their contents." *Miller,* 425 U.S., at 442. *Smith* pointed out the limited capabilities of a pen register; as explained in *Riley,* telephone call logs reveal little in the way of "identifying information." *Smith,* 442 U.S., at 742; *Riley,* 573 U.S., at ____ (slip op., at 24). *Miller* likewise noted that checks were "not confidential communications but negotiable instruments to be used in commercial transactions." 425 U.S., at 442. In mechanically applying the third-party doctrine to this case, the Government fails to appreciate that there are no comparable limitations on the revealing nature of CSLI.

. . . . [T]his case is not about "using a phone" or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*.

Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley,* 573 U.S., at ____ (slip op., at 9). Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates

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CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[ ] the risk" of turning over a comprehensive dossier of his physical movements. *Smith,* 442 U.S., at 745.

We therefore decline to extend *Smith* and *Miller* to the collection of CSLI. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection. The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

* * **

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. . . . .

IV

Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. . . . .

The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U.S.C. § 2703(d). That showing falls well short of the probable cause required for a warrant. . . . . Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant.

Justice Alito contends that the warrant requirement simply does not apply when the Government acquires records using compulsory process. . . . . Justice Alito argues that the compulsory production of records is not held to the same probable cause standard. . . . .

But this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. . . . .

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. . . .

If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement. . . . .

This is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.

Further, even though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. [The Court then highlighted the possible applicability of the recognized exception for "exigent circumstances."]

As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.

* * *

As Justice Brandeis explained in his famous dissent, the Court is obligated—as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government"—to ensure that the "progress of science" does not erode Fourth Amendment protections. *Olmstead v. United States,* 277 U.S. 438, 473–474, 48 S.Ct. 564, 72 L.Ed. 944 (1928). Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent. *Di Re,* 332 U.S., at 595.

We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of the cell-site records here was a search under that Amendment.

The judgment of the Court of Appeals is reversed, and the case is remanded for

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further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

This case involves new technology, but the Court's stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent.

. . . .

The Court has twice held that individuals have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976); *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). This is true even when the records contain personal and sensitive information. . . . .

In this case petitioner challenges the Government's right to use compulsory process to obtain a now-common kind of business record: cell-site records held by cell phone service providers. The Government acquired the records through an investigative process enacted by Congress. . . . .

Cell-site records . . . are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process.

. . . .

In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other. . . . .

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I

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The location information revealed by cell-site records is imprecise, because an

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individual cell-site sector usually covers a large geographic area. . . . . By contrast, a Global Positioning System (GPS) can reveal an individual's location within around 15 feet.

. . . .

Cell-site records . . . can serve an important investigative function, as the facts of this case demonstrate. . . . .

. . . .

From Carpenter's primary service provider, MetroPCS, the Government obtained records from between December 2010 and April 2011, based on its understanding that nine robberies had occurred in that timeframe. The Government also requested seven days of cell-site records from Sprint, spanning the time around the robbery in Warren, Ohio. It obtained two days of records.

These records confirmed that Carpenter's cell phone was in the general vicinity of four of the nine robberies, including the one in Ohio, at the times those robberies occurred.

II

. . . .

A

Miller and *Smith* hold that individuals lack any protected Fourth Amendment interests in records that are possessed, owned, and controlled only by a third party. . . . . [T]he defendants [in *Miller* and *Smith*] had no reasonable expectation of privacy in information they "voluntarily conveyed to the [companies] and exposed to their employees in the ordinary course of business." *Miller, supra,* at 442; see *Smith,* 442 U.S., at 744. Rather, the defendants "assumed the risk that the information would be divulged to police." *Id.,* at 745.

. . . .

Katz did not abandon reliance on property-based concepts. . . . .

Miller and *Smith* set forth an important and necessary limitation on the *Katz* framework. They rest upon the commonsense principle that the absence of property law analogues can be dispositive of privacy expectations. . . . . The defendants could make no argument that the records were their own papers or effects. The records were the business entities' records, plain and simple. The defendants had no reason to believe the records were owned or controlled by them and so could not assert a reasonable expectation of privacy in the records.

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The second principle supporting *Miller* and *Smith* is the longstanding rule that the Government may use compulsory process to compel persons to disclose documents and other evidence within their possession and control. . . . .

. . . . Persons with no meaningful interests in the records sought by a subpoena, like the defendants in *Miller* and *Smith,* have no rights to object to the records' disclosure—much less to assert that the Government must obtain a warrant to compel disclosure of the records.

. . . .

B

. . . .

. . . . Cell-site records, like all the examples just discussed, are created, kept, classified, owned, and controlled by cell phone service providers, which aggregate and sell this information to third parties. As in *Miller,* Carpenter can "assert neither ownership nor possession" of the records and has no control over them. 425 U.S., at 440.

. . . .

Because Carpenter lacks a requisite connection to the cell-site records, he also may not claim a reasonable expectation of privacy in them. He could expect that a third party—the cell phone service provider—could use the information it collected, stored, and classified as its own for a variety of business and commercial purposes.

. . . .

III

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[Justice Kennedy then criticized the majority's effort to "sidestep *Miller* and *Smith* by framing the case as "following" from *Knotts* and *Jones* before explaining why, in his view, reliance on those two decisions was misguided in this situation.]

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B

The Court continues its analysis by misinterpreting *Miller* and *Smith,* and then it reaches the wrong outcome on these facts even under its flawed standard.

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[The Court's reading of *Miller* and *Smith* as establishing a "balancing test" that involves weighing of the privacy interests at stake is "untenable."] As already discussed, the fact that information was relinquished to a third party was the entire basis for concluding that the defendants in those cases lacked a reasonable expectation of privacy. *Miller* and *Smith* do not establish the kind of category-by-category balancing the Court today prescribes.

. . . . [T]he Court errs, in my submission, when it concludes that cell-site records implicate greater privacy interests—and thus deserve greater Fourth Amendment protection—than financial records and telephone records.

Indeed, the opposite is true. A person's movements are not particularly private. . . . . Today expectations of privacy in one's location are, if anything, even less reasonable than when the Court decided *Knotts* over 30 years ago. Millions of Americans choose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media.

And cell-site records, as already discussed, disclose a person's location only in a general area. The records at issue here, for example, revealed Carpenter's location within an area covering between around a dozen and several hundred city blocks. . . . .

By contrast, financial records and telephone records do "'revea[l] . . . personal affairs, opinions, habits and associations.'" *Miller,* 425 U.S., at 451 (Brennan, J., dissenting); see *Smith,* 442 U.S., at 751 (Marshall, J., dissenting). . . . . The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records.

Still, the Court maintains, cell-site records are "unique" because they are "comprehensive" in their reach; allow for retrospective collection; are "easy, cheap, and efficient compared to traditional investigative tools"; and are not exposed to cell phone service providers in a meaningfully voluntary manner. *Ante,* at ____, ____, ____. But many other kinds of business records can be so described. Financial records are of vast scope. Banks and credit card companies keep a comprehensive account of almost every transaction an individual makes on a daily basis. "With just the click of a button, the Government can access each [company's] deep repository of historical [financial] information at practically no expense." *Ante,* at ____. And the decision whether to transact with banks and credit card companies is no more or less voluntary than the decision whether to use a cell phone. Today, just as when *Miller* was decided, "'it is impossible to participate in the economic life of contemporary society without maintaining a bank account.'" 425 U.S., at 451 (BRENNAN, J., dissenting). But this Court, nevertheless, has held that individuals do not have a reasonable expectation of privacy in financial records.

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C

The Court says its decision is a "narrow one." *Ante,* at ____. But its reinterpretation of *Miller* and *Smith* will have dramatic consequences for law enforcement, courts, and society as a whole.

Most immediately, the Court's holding that the Government must get a warrant to obtain more than six days of cell-site records limits the effectiveness of an important investigative tool for solving serious crimes. As this case demonstrates, cell-site records are uniquely suited to help the Government develop probable cause to apprehend some of the Nation's most dangerous criminals: serial killers, rapists, arsonists, robbers, and so forth. . . . .

The Court's decision also will have ramifications that extend beyond cell-site records to other kinds of information held by third parties, yet the Court fails "to provide clear guidance to law enforcement" and courts on key issues raised by its reinterpretation of *Miller* and *Smith*. *Riley v. California,* 573 U.S. ____, ____ (2014) (slip op., at 22).

First, the Court's holding is premised on cell-site records being a "distinct category of information" from other business records. *Ante,* at ___. But the Court does not explain what makes something a distinct category of information. . . . .

Second, the majority opinion gives courts and law enforcement officers no indication how to determine whether any particular category of information falls on the financial-records side or the cell-site-records side of its newly conceived constitutional line. The Court's multifactor analysis—considering intimacy, comprehensiveness, expense, retrospectivity, and voluntariness—puts the law on a new and unstable foundation.

Third, even if a distinct category of information is deemed to be more like cell-site records than financial records, courts and law enforcement officers will have to guess how much of that information can be requested before a warrant is required. The Court suggests that less than seven days of location information may not require a warrant. See *ante,* at ___, n. 3; see also *ante,* at ____ (expressing no opinion on "real-time CSLI," tower dumps, and security-camera footage). But the Court does not explain why that is so, and nothing in its opinion even alludes to the considerations that should determine whether greater or lesser thresholds should apply to information like IP addresses or website browsing history.

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In short, the Court's new and uncharted course will inhibit law enforcement and "keep defendants and judges guessing for years to come." *Riley,* 573 U.S., at ____ (slip op., at 25) (internal quotation marks omitted).

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Justice THOMAS, dissenting.

This case should not turn on "whether" a search occurred. *Ante,* at ___. It should turn, instead, on *whose* property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of "*their* persons, houses, papers, and effects." (Emphasis added.) In other words, "*each* person has the right to be secure against unreasonable searches ... in *his own* person, house, papers, and effects." *Minnesota v. Carter,* 525 U.S. 83, 92, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Scalia, J., concurring). . . . .

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The more fundamental problem with the Court's opinion . . . is its use of the "reasonable expectation of privacy" test, which was first articulated by Justice Harlan in *Katz v. United States,* 389 U.S. 347, 360–361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (concurring opinion). The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence. I respectfully dissent.

I

[Justice Thomas then described the development of the *Katz* doctrine.]

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II

Under the *Katz* test, a "search" occurs whenever "government officers violate a person's 'reasonable expectation of privacy.'" *Jones, supra,* at 406. The most glaring problem with this test is that it has "no plausible foundation in the text of the Fourth Amendment." *Carter,* 525 U.S., at 97 (opinion of Scalia, J.). The Fourth Amendment, as relevant here, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." By defining "search" to mean "any violation of a reasonable expectation of privacy," the *Katz* test misconstrues virtually every one of these words.

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[Justice Thomas then asserted that "the *Katz* test distorts the original meaning of "searc[h]"—the word in the Fourth Amendment that it purports to define."]

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The *Katz* test strays even further from the text by focusing on the concept of "privacy." The word "privacy" does not appear in the Fourth Amendment (or anywhere else in the Constitution for that matter). Instead, the Fourth Amendment references "[t]he right of the people to be secure." It then qualifies that right by limiting it to "persons" and three specific types of property: "houses, papers, and effects." By connecting the right to be secure to these four specific objects, "[t]he text of the Fourth Amendment reflects its close connection to property." *Jones, supra,* at 405. "[P]rivacy," by contrast, "was not part of the political vocabulary of the [founding]. Instead, liberty and privacy rights were understood largely in terms of property rights." Cloud, Property Is Privacy: Locke and Brandeis in the Twenty–First Century, 55 Am.Crim. L.Rev. 37, 42 (2018).

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C

In shifting the focus of the Fourth Amendment from property to privacy, the *Katz* test also reads the words "persons, houses, papers, and effects" out of the text. At its broadest formulation, the *Katz* test would find a search "*wherever* an individual may harbor a reasonable 'expectation of privacy.' " *Terry* [*v. Ohio*]*,* 392 U.S. [1], at 9 [(1968)] (emphasis added). . . . .

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. . . . [T]he Founders would be confused by this Court's transformation of their common-law protection of property into . . . a vague inquiry into "reasonable expectations of privacy."

III

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Because the *Katz* test is a failed experiment, this Court is dutybound to reconsider it. Until it does, I agree with my dissenting colleagues' reading of our precedents. Accordingly, I respectfully dissent.

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JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

I share the Court's concern about the effect of new technology on personal privacy, but I fear that today's decision will do far more harm than good. The Court's reasoning fractures two fundamental pillars of Fourth Amendment law, and in doing so, it guarantees a blizzard of litigation while threatening many legitimate and valuable investigative practices upon which law enforcement has rightfully come to rely.

First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today's decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent. . . . .

Second, the Court allows a defendant to object to the search of a third party's property. This also is revolutionary. The Fourth Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects" (emphasis added), not the persons, houses, papers, and effects of others. Until today, we have been careful to heed this fundamental feature of the Amendment's text. This was true when the Fourth Amendment was tied to property law, and it remained true after *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), broadened the Amendment's reach.

By departing dramatically from these fundamental principles, the Court destabilizes long-established Fourth Amendment doctrine. We will be making repairs—or picking up the pieces—for a long time to come.

I

Today the majority holds that a court order requiring the production of cell-site records may be issued only after the Government demonstrates probable cause. See *ante,* at __. That is a serious and consequential mistake. The Court's holding is based on the premise that the order issued in this case was an actual "search" within the meaning of the Fourth Amendment, but that premise is inconsistent with the original meaning of the Fourth Amendment and with more than a century of precedent.

A

The order in this case was the functional equivalent of a subpoena for documents, and there is no evidence that these writs were regarded as "searches" at the time of the founding. . . . .

[Justice Alito then described in detail the historical development of subpoenas for

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documents.]

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B

Talk of kings and common-law writs may seem out of place in a case about cell-site records and the protections afforded by the Fourth Amendment in the modern age. But this history matters, not least because it tells us what was on the minds of those who ratified the Fourth Amendment and how they understood its scope. That history makes it abundantly clear that the Fourth Amendment, as originally understood, did not apply to the compulsory production of documents at all.

The Fourth Amendment does not regulate all methods by which the Government obtains documents. Rather, it prohibits only those "searches and seizures" of "persons, houses, papers, and effects" that are "unreasonable." Consistent with that language, "at least until the latter half of the 20th century" "our Fourth Amendment jurisprudence was tied to common-law trespass." *United States v. Jones,* 565 U.S. 400, 405, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). So by its terms, the Fourth Amendment does not apply to the compulsory production of documents, a practice that involves neither any physical intrusion into private space nor any taking of property by agents of the state. . . . .

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General warrants and writs of assistance were noxious not because they allowed the Government to acquire evidence in criminal investigations, but because of the *means* by which they permitted the Government to acquire that evidence. Then, as today, searches could be quite invasive. Searches generally begin with officers "mak[ing] nonconsensual entries into areas not open to the public." *Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 414, 104 S.Ct. 769, 78 L.Ed.2d 567 (1984). Once there, officers are necessarily in a position to observe private spaces generally shielded from the public and discernible only with the owner's consent. Private area after private area becomes exposed to the officers' eyes as they rummage through the owner's property in their hunt for the object or objects of the search. If they are searching for documents, officers may additionally have to rifle through many other papers—potentially filled with the most intimate details of a person's thoughts and life—before they find the specific information they are seeking. See *Andresen v. Maryland,* 427 U.S. 463, 482, n. 11, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). If anything sufficiently incriminating comes into view, officers seize it. *Horton v. California,* 496 U.S. 128, 136–137, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Physical destruction always lurks as an underlying possibility; "officers executing search warrants on occasion must damage property in order to perform their duty." *Dalia v. United States,* 441 U.S. 238, 258, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979).

Compliance with a subpoena *duces tecum* requires none of that. . . . .

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C

Of course, our jurisprudence has not stood still since 1791. We now evaluate subpoenas *duces tecum* and other forms of compulsory document production under the Fourth Amendment, although we employ a reasonableness standard that is less demanding than the requirements for a warrant. . . . .

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. . . . When it comes to "the production of corporate or other business records," . . . the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Oklahoma Press* [*Publishing Company v. Walling*, 327 U.S. 186,] 208 [(1946)]. . . . [A] showing of probable cause was not necessary so long as "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.,* at 209.

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As a matter of original understanding, the Fourth Amendment does not regulate the compelled production of documents at all. Here the Government received the relevant cell-site records pursuant to a court order compelling Carpenter's cell service provider to turn them over. That process is thus immune from challenge under the original understanding of the Fourth Amendment.

As a matter of modern doctrine, this case is equally straightforward. As Justice Kennedy explains, no search or seizure of Carpenter or his property occurred in this case. But even if the majority were right that the Government "searched" Carpenter, it would at most be a "figurative or constructive search" governed by the *Oklahoma Press* standard, not an "actual search" controlled by the Fourth Amendment's warrant requirement.

And there is no doubt that the Government met the *Oklahoma Press* standard here. Under *Oklahoma Press,* a court order must "'be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'" *Lone Steer, Inc., supra,* at 415. Here, the type of order obtained by the Government almost necessarily satisfies that standard. [Justice Alito then explained why the obtainment of the documents under the standard of the Stored Communications Act in this case was fully

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consistent with the *Oklahoma Press* standard.]

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Against centuries of precedent and practice, all that the Court can muster is the observation that "this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." *Ante,* at ___. Frankly, I cannot imagine a concession more damning to the Court's argument than that. As the Court well knows, the reason that we have never seen such a case is because—until today—defendants categorically had no "reasonable expectation of privacy" and no property interest in records belonging to third parties. . . . .

Not only that, but even if the Fourth Amendment permitted someone to object to the subpoena of a third party's records, the Court cannot explain why that individual should be entitled to *greater* Fourth Amendment protection than the party actually being subpoenaed. . . . .

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"To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence." [*United States v.*] *Nixon,* 418 U.S. [683,] 709 [(1974)]. For over a hundred years, we have understood that holding subpoenas to the same standard as actual searches and seizures "would stop much if not all of investigation in the public interest at the threshold of inquiry." *Oklahoma Press, supra,* at 213. Today a skeptical majority decides to put that understanding to the test.

II

Compounding its initial error, the Court also holds that a defendant has the right under the Fourth Amendment to object to the search of a third party's property. This holding flouts the clear text of the Fourth Amendment, and it cannot be defended under either a property-based interpretation of that Amendment or our decisions applying the reasonable-expectations-of-privacy test adopted in *Katz,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. By allowing Carpenter to object to the search of a third party's property, the Court threatens to revolutionize a second and independent line of Fourth Amendment doctrine.

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The desire to make a statement about privacy in the digital age does not justify the consequences that today's decision is likely to produce.

[The dissenting opinion of JUSTICE GORSUCH, criticizing the interpretations of the *Katz* doctrine reflected in *Smith* and *Miller*, criticizing *Katz* itself (although not necessarily advocating abolition of the *Katz* doctrine), and proposing a return to the "original understanding" of the words of the Fourth Amendment and a restoration to the "traditional approach" to threshold "search" questions—an approach that "asked if a house, paper, or effect was *yours* under law"—has been omitted.]

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CHAPTER FOUR

INSERT on p. 270, after note (4):

(5) In *Mitchell v. Wisconsin*, 588 U.S. ____, 139 S. Ct. 2525, 204 L. Ed. 2d 1040 (2019), a plurality of four Justices concluded that the exigent circumstances doctrine "almost always" allows a warrantless blood test "[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test." A warrant is required only "in an unusual case" in which a driver is "able to show that his blood would not have been drawn if police had not been seeking BAC [(blood alcohol concentration)] information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties."

According to the plurality, "highway safety is a vital public interest," and, to safeguard that interest, "there clearly is a 'compelling need' for a blood test of drunk-driving suspects whose condition deprives officials of a reasonable opportunity to conduct a [standard evidentiary] breath test. The . . . question . . . is whether this compelling need justifies a warrantless search because there is . . . '"no time to secure a warrant."'" *Missouri v. McNeely* held that "the constant dissipation of BAC evidence *alone* does not create an exigency." However, "exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." Both of these conditions were satisfied in *Schmerber v. California*, 384 U.S. 757 (1966), because a suspected drunk driver had been involved in an accident and "'time had to be taken to bring the [suspect] to a hospital and to investigate the scene of the accident.'" The officer "could 'reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.'" Similarly, "[b]oth conditions are met when a drunk-driving suspect is unconscious." A driver's "unconsciousness does not just create pressing needs; it is *itself* a medical emergency. . . . . Just as the ramifications of a car accident pushed *Schmerber* over the line into exigency, so does the condition of an unconscious driver bring his blood draw under the exception." Therefore, "when a driver is unconscious, the general rule is that a warrant is not needed."

Justice Thomas rejected the plurality's "difficult-to-administer rule," but concurred in the Court's judgment based on "'the *per se* rule'" he had endorsed in his dissent in *McNeely*. In his view, "regardless of whether [a] driver is conscious," the destruction of evidence caused by blood alcohol dissipation justifies a warrantless blood test of any driver who officers have probable cause to believe is drunk.

In a dissent joined by Justices Ginsburg and Kagan, Justice Sotomayor asserted that "[t]he reasons the Court gave for rejecting a categorical exigency exception in *McNeely*

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apply with full force when the suspected drunk driver is (or becomes) unconscious. . . . . In many cases, even when the suspect falls unconscious, police officers will have sufficient time to secure a warrant—meaning that the Fourth Amendment requires that they do so." The plurality's "*de facto* categorical exigency exception" for unconscious drivers was unjustified, and the state did not claim that the facts gave rise to an exigency justifying the failure to obtain a warrant in this case.

Justice Gorsuch dissented separately. Because "the application of the exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed," he "would have dismissed this case . . . and waited for a case presenting the exigent circumstances question."

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INSERT on p. 285, between notes (2) and (3):

(2a) *Collins v. Virginia*, 584 U.S. ____, 138 S. Ct. 1663, 201 L. Ed. 2d 9 (2018), raised the issue of whether a vehicle parked in the curtilage of a home could be searched without a warrant under the "automobile exception." An eight-Justice majority concluded that the exception did *not* permit the warrantless entry of the curtilage that was needed to gain access to the vehicle.

The defendant parked a motorcycle beside a home where his girlfriend lived and where he "stayed . . . a few nights per week." The state did "not dispute" that he had "Fourth Amendment standing" to object to a search of the home. An officer "walked onto the residential property and up to the top of the driveway where the motorcycle was parked," removed a tarp, "ran a search of the license plate and vehicle identification numbers, [and] . . . confirmed that the motorcycle was stolen." He arrested the defendant after he "admitted . . . . that he had bought" the motorcycle "without title." The Virginia Supreme Court held that because the officer had probable cause to believe the motorcycle was stolen before searching, "the automobile exception" justified "the warrantless search."

Significantly, the majority first made it clear that the warrant requirement applies to official intrusions into the curtilage that surrounds dwellings. A physical intrusion upon "curtilage to gather evidence, a search within the meaning of the Fourth Amendment[,] . . . is presumptively unreasonable absent a warrant." The Court next decided that the driveway enclosure where the motorcycle was parked qualified as curtilage and that it was not on the path visitors would follow when walking up to the home's front door. The officer "not only invaded" the defendant's privacy interest "in the item searched," he "also invaded [his] . . . Fourth Amendment interest in the curtilage of his home." To expand "the scope" of the "automobile exception" to include not only a vehicle search but also the entry of "a home or its curtilage to access a vehicle" would both "undervalue" the privacy protection afforded homes and curtilage and untether the exception from its two justifications—ready mobility and pervasive regulation.

The majority found support in two other lines of Fourth Amendment doctrine. The first was the plain view doctrine which allows the warrantless seizure of an object that an officer has probable cause to seize, but does not allow the officer to enter private premises to effectuate such a seizure without first obtaining a warrant. The second was the doctrine pertaining to felony arrests. An officer may arrest a suspected felon in a public place without a warrant based on probable cause, but an entry of private premises to effectuate such an arrest is impermissible without a warrant. Similarly, a warrantless entry of curtilage to search a vehicle parked there is not authorized by the automobile exception because it involves "not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage. . . . . The automobile exception does not afford the necessary lawful right to access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial interest in his home and curtilage." The balance of interests reflected in the automobile exception does not

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take into account "the distinct privacy interest in one's home or curtilage. To allow an officer to rely on the automobile exception to gain entry into a home or its curtilage for the purpose of conducting a vehicle search would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection . . . extend[ed] to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application. Indeed, its name alone should make all this clear enough: It is, after all, an exception for automobiles." For these reasons, the majority "conclude[d] that the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle there."

Justice Thomas concurred, agreeing that the search was not justified by the automobile exception. He wrote separately, however, and at some length, to explain that he had "serious doubts about" and was "skeptical of this Court's authority to impose the exclusionary rule on the States."

Justice Alito dissented, opining that the officer's conduct "in this case was entirely reasonable." In his view, the justifications for the authority to conduct warrantless searches of vehicles based on probable cause supported any additional intrusion involved in entering the curtilage to gain access to the motorcycle. The motorcycle was no "less mobile" by virtue of its location and there were no "greater privacy interests at stake" than those implicated by the search of a vehicle on a public street. The "tarp-covered motorcycle parked in the driveway could have been uncovered and ridden away in a matter of seconds," and the officer's "brief walk up the driveway [of the home] impaired no real privacy interests." Justice Alito did observe that if a vehicle "were located inside a house" a warrantless search might not be constitutional because "the intrusion on privacy would be far greater."

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CHAPTER FIVE

INSERT on p. 483, between notes (6) and (7):

(6a) In *Kansas v. Glover*, 589 U.S. ____, 140 S. Ct. 1183, 206 L. Ed. 2d 412 (2020), the simple question was "whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license." An 8-1 majority held "that when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable."

According to the Kansas Supreme Court, based on the facts of *Glover*, the officer had no more than a "hunch" that criminal activity was occurring. The Justices disagreed, concluding that the "three facts" known to the officer—that "an individual [was] operating a 1995 Chevrolet 1500 pickup truck with" a particular license plate number, "that the registered owner of the truck had a revoked license[,] and that the model of the truck matched the observed vehicle"—allowed the officer to draw "the commonsense inference" that the owner "was likely the driver of the vehicle." The facts and the inference "provided more than reasonable suspicion to initiate the stop."

"The fact that the registered owner of a vehicle is not always the driver . . . does not negate the reasonableness of" an inference that he or she is the driver on a particular occasion because "[t]he reasonable suspicion inquiry 'falls considerably short' of 51% accuracy." In addition, the fact that a registered owner has a "revoked license does not render [the] inference" that he is the driver "unreasonable" because both "[e]mpirical studies and "common experience" show that "[d]rivers with revoked licenses frequently continue to drive and . . . pose safety risks to other motorists and pedestrians." According to the majority, although "common sense suffice[d] to justify th[e] inference" that an owner with a revoked license is driving, "Kansas law" pertaining to license revocation "reinforce[d] that it is reasonable to infer that an individual with a revoked license may continue driving." The "license-revocation scheme" that was in effect "cover[ed] drivers who ha[d] already demonstrated a disregard for the law or [were] categorically unfit to drive. . . . . The concerns motivating the State's various grounds for revocation len[t] further credence to the inference that a registered owner with a revoked . . . driver's license might be the one driving the vehicle."

The defendant and the dissent proffered "two arguments as to why [the officer] lacked reasonable suspicion." The majority found both unpersusasive. The first contention was that the officer's "inference was unreasonable because it was not grounded in his law enforcement training or experience." The majority asserted that the Fourth Amendment does not require that the inferences supporting a reasonable suspicion be "based on knowledge gained *only* through law enforcement training and experience." (Emphasis added.) Both *Navarette* and *Wardlow* endorsed reasonable suspicion findings that were

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grounded not in such training and experience, but in "common sense." Similarly, "[t]he inference that the driver of a car is its registered owner does not require any specialized training; rather it is a reasonable inference made by ordinary people on a daily basis." The majority observed that it was "in no way minimiz[ing] the significant role that specialized training and experience routinely play in law enforcement investigations." It was "simply hold[ing] that such experience is not *required* in every instance."

The second argument was that a finding that there was a constitutionally sufficient basis for the stop in this case "would eviscerate the need for officers to base reasonable suspicion on 'specific and articulable facts' particularized to the individual" and would allow officers to "rely exclusively on probabilities." The Court found "little force" in this argument. First, "officers, like jurors, *may* rely on probabilities in the reasonable suspicion context." (Emphasis added.) Furthermore, the officer here "did not rely exclusively on probabilities. He knew that the license plate was linked to a truck matching the observed vehicle and that the registered owner . . . had a revoked license. Based on these minimal facts, he used common sense to form a reasonable suspicion that a specific individual wa potentially engaged in specific criminal activity—driving with a revoked license." The officer's combination of "database information and common sense judgments in this context [was] fully consonant" with precedent. "To alleviate any doubt" that "reasonable suspicion" could be "'based on nothing more than a demographic profile,'" the majority "reiterate[d] that the Fourth Amendment require[d]," and the officer in this case "had, an individualized suspicion that a particular citizen was engaged in a particular crime."

Finally, the Court "emphasize[d] the narrow scope of [the] holding" in *Glover*. Because the "totality of the circumstances" must be taken into account in reasonable suspicion inquiries, "the presence of additional facts might dispel reasonable suspicion" that could otherwise be supported by facts such as those in this case. An officer, for example, might observe attributes of a vehicle's driver—possibly age or gender—that do not match the features of the registered owner. Such "exculpatory information" might be "sufficient . . . to rebut the reasonable inference" that a registered owner is driving a vehicle on a particular occasion.

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CHAPTER THIRTEEN

INSERT on p. 1101, between *Rakas v. Illinois* and note (1):

In *Byrd v. United States*, 584 U.S. ____, 138 S. Ct. 1518, 200 L. Ed. 2d 805 (2018), the Supreme Court addressed whether "a driver of a rental car [has] a reasonable expectation of privacy in the car when he or she is not listed as an authorized driver on the rental agreement[.]" The Justices unanimously held "that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy."

The Court's opinion opened by observing that "[f]ew protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures," pointing out that this right is "explicit in the Bill of Rights" because of the Framers' "experience with the indignities and invasions of privacy wrought by 'general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.'" As a result, "practices that permit 'police officers unbridled discretion to rummage at will among a person's private effects'" have been disfavored.

The Court's "resolution" of the case was primarily "guide[d]" by the assertion in *Rakas v. Illinois* that "'one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude" others. The Justices rejected the government's contention "that drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the . . . lack of authorization alone"—put otherwise, that "only authorized drivers of rental cars have expectations of privacy." They also rejected the petitioner's contention that "the sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control." The government's argument reflected "too restrictive a view of the Fourth Amendment's protections," while the petitioner's argument was somewhat too broad, including "thieves and others" without reasonable expectations of privacy.

The government's position rested on a misreading of *Rakas* as holding that "passengers cannot have an expectation of privacy in automobiles." Moreover, this case involved not "a passenger," but a "driver and sole occupant" who had "lawful possession and control and the attendant right to exclude others." This right to exclude gave rise to a protected privacy expectation that was not eliminated by the violation of the rental agreement. The violated provision pertaining to unauthorized drivers—which, like other provisions in rental car agreements, allocated risk between the parties—had "little to do with whether one would have a reasonable expectation of privacy . . . if . . . he or she . . . has lawful possession an control over the car."

The government contended that the petitioner "should have no greater expectation of privacy than a car thief because he intentionally used a third party as a strawman in a

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calculated plan to mislead the rental company from the outset, all to aid him in committing a crime." This "argument" was "premised on the . . . inference that Byrd knew he would not have been able to rent the car on his own" based on his "criminal record," and on his enlistment of the renter, who did not intend to use the car herself, "to procure the car for him to transport heroin." The Court deemed it "unclear whether [these] allegations, if true, would constitute a criminal offense in the acquisition of the rental car," acknowledging that "it *may be* that there is no reason" to "distinguish between" obtaining a vehicle by "subterfuge of the type" alleged and "outright" theft. (Emphasis added.) Because it had not been raised in the lower courts, the Court did not resolve the government's contention. Instead, it remanded the issue. In addition, because the Court of Appeals had not reached the question of whether there was probable cause justifying the car search, the Court remanded that issue as well.

Finally, the Court declined to address a claim that the petitioner had failed to make in the lower courts. He contended that as a "second bailee" he had a sufficient property interest in the rental car to entitle him to object to the search under the *Jones-Jardines* "'property-based'" standard for determining when the government has infringed upon an individual's Fourth Amendment interests.