No. 16-402

In the Supreme Court of the United States

TIMOTHY IVORY CARPENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's acquisition, pursuant to a court order issued under 18 U.S.C. 2703(d), of historical cell-site records created and maintained by a cellular-service provider violates the Fourth Amendment rights of the individual customer to whom the records pertain.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 819 F.3d 880. The opinion of the district court denying petitioner's motion to suppress (Pet. App. 34a-48a) is not published in the Federal Supplement but is available at 2013 WL 6385838.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2016. A petition for rehearing was denied on June 29, 2016 (Pet. App. 33a). The petition for a writ of certiorari was filed on September 26, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on six counts of aiding and abetting

Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and five counts of aiding and abetting the use or carrying of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 5a-6a. The district court sentenced petitioner to 1395 months in prison. *Id.* at 7a. The court of appeals affirmed. *Id.* at 1a-24a.

1. Between December 2010 and December 2012, petitioner and his co-conspirators committed a string of armed robberies at Radio Shack and T-Mobile stores in Ohio and Michigan. Pet. App. 3a, 6a; Presentence Investigation Report (PSR) ¶¶ 16-23. Petitioner organized most of the robberies, often supplied the guns, and typically acted as a lookout during the robberies. Pet. App. 5a. On petitioner's signal, a group of robbers "entered the store, brandished their guns, herded customers and employees to the back, and ordered the employees to fill the robbers' bags with new smartphones." *Ibid.* After each robbery, the team disposed of the guns and getaway vehicle and sold the stolen merchandise. *Ibid.*; PSR ¶¶ 17-23.

2. a. In April 2011, police arrested four of petitioner's co-conspirators, and one of them confessed that the group had robbed nine stores in Michigan and Ohio between December 2010 and March 2011. Pet. App. 3a. The robber who confessed to the crimes gave the Federal Bureau of Investigation (FBI) his cellular telephone number and the cell-phone numbers of other co-conspirators. *Ibid.* The FBI reviewed his call records and identified additional numbers he had called around the time of the robberies. *Ibid.*

In May and June 2011, the government applied to federal magistrate judges for three court orders pursuant to the Stored Communications Act (SCA),

18 U.S.C. 2701 *et seq.* See Pet. App. 3a, 49a-55a, 62a-68a; Gov't C.A. Br. 9. Those applications sought orders directing certain cellular-service providers, including MetroPCS and Sprint, to disclose specified records for 16 telephone numbers, including a cellphone number that petitioner was known to use. Pet. App. 3a-4a, 49a-55a, 62a-68a; Gov't C.A. Br. 9.

The SCA generally prohibits communications providers from disclosing certain records pertaining to their subscribers to a governmental entity, but permits the government to acquire such records in certain circumstances. 18 U.S.C. 2510(1), 2702(a), 2703, 2711(1). As relevant here, the government may obtain "a record or other information pertaining to a subscriber * * * (not including the contents of communications)" either through a warrant or through "a court order for such disclosure under [18 U.S.C. 2703(d)]." 18 U.S.C. 2703(c)(1)(A) and (B). To obtain a court order, the government must "offer[] specific and articulable facts showing that there are reasonable grounds to believe that * * * the records or other information sought[] are relevant and material to an ongoing criminal investigation." 18 U.S.C. 2703(d). The records that the government may obtain under such an order include a subscriber's name and address, "telephone connection records," and "records of session times and durations." 18 U.S.C. 2703(c)(2)(A)-(C).

The records that the government sought for petitioner's cell phone included "[a]ll subscriber information, toll records and call detail records including listed and unlisted numbers dialed or otherwise transmitted to and from [petitioner's] telephone[]." Pet. App. 4a (first set of brackets in original). The government also sought records known as historical

"cell-site" records, which show which cell towers a cell phone has connected with while in use. *Id.* at 4a-5a. Cellular-service providers create and retain cell-site records in the ordinary course of business for their own purposes, including to find weak spots in their cellular networks and to determine whether to charge customers roaming charges for particular calls. *Id.* at 5a, 7a, 10a.

In this case, the government sought "cell site information for [petitioner's] telephone[] at call origination and at call termination for incoming and outgoing calls." Pet. App. 4a. As an FBI expert testified, "cellphones work by establishing a radio connection with nearby cell towers (or 'cell sites')." *Id.* at 5a. "[I]ndividual towers project different signals in each direction or 'sector,'" with three or six sectors per tower, "so that a cellphone located on the north side of a cell tower will use a different signal than a cellphone located on the south side of the same tower." *Ibid.*; see *id.* at 14a. In an urban area like Detroit, the FBI expert explained, "each cell site covers 'typically anywhere from a half-mile to two miles.'" *Id.* at 5a. By requesting "historical" cell-site records, the government sought data pertaining only to past calls and did not seek to monitor the connections of petitioner's phone to cell towers in real time.

The magistrate judges granted the government's applications and issued the requested orders. Pet. App. 56a-61a, 69a-73a. Petitioner's wireless carrier, MetroPCS, then produced 127 days of historical cell-site records for petitioner's phone number, which MetroPCS had made in the ordinary course of business for billing and other business purposes. *Id.* at 7a, 10a; see Pet. 5 & n.2. In addition, Sprint produced

seven days of historical cell-site records for petitioner's phone number for early March 2011, when petitioner's cell phone was connecting to Sprint cellular towers in Warren, Ohio, pursuant to a roaming agreement between MetroPCS and Sprint. 12/13/13 Tr. (Tr.) 58-60; Pet. App. 88a; see Pet. 5.

From the historical cell-site records as well as MetroPCS and Sprint records identifying the locations of their towers, the government was able to infer the approximate location of petitioner's phone at the time it made and received calls. Pet. App. 6a; Tr. 93-94.[1] Because the cell-site records "could do no better than locate [petitioner's] cellphone[] within a 120- (or sometimes 60-) degree wedge extending between one-half mile and two miles in length," however, the government could determine the location of petitioner's phone only "within a 3.5 million square-foot to 100 million square-foot area." Pet. App. 14a. The government ultimately determined that petitioner's cell phone communicated with cell towers in the general vicinity of the sites of four robberies between December 2010 and April 2011. *Id.* at 6a.

b. Petitioner was indicted on six counts of aiding and abetting Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and six counts of aiding and abetting the use or carrying of a firearm during and in relation to a federal crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 4a; D. Ct. Doc. 119 (June 18, 2013). Before trial, petitioner moved to suppress the historical cell-site records, alleging that the government had obtained them from MetroPCS and Sprint in violation

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[1] The records did not contain any cell-site information for text messages or for times when petitioner's cell phone was turned on but was not making or receiving a call. See Pet. App. 7a.

of the Fourth Amendment. Pet. App. 7a-8a. Petitioner argued that MetroPCS's and Sprint's production of their business records constituted a search of petitioner that could be conducted only pursuant to a search warrant supported by probable cause. *Ibid.*

The district court denied the motion to suppress. Pet. App. 34a-48a. The court observed that petitioner had "not directed the Court to a single decision by any United States Court of Appeals * * * that supports [his] position," and it concluded that "there is no legitimate expectation of privacy in cell site data." *Id.* at 38a. The district court ruled in the alternative that, even if a warrant were required to obtain historical cell-site data, "the evidence should not be suppressed * * * because the agents relied in good faith on the [SCA] in obtaining the evidence." *Id.* at 38a n.1.

c. The case proceeded to trial, where seven of petitioner's accomplices testified about petitioner's involvement in the robberies. Pet. App. 5a. The witnesses described how petitioner "organized most of the robberies and often supplied the guns." *Ibid.* The government also introduced videotapes and eyewitness testimony placing petitioner near the relevant robbery scenes. See Gov't C.A. Br. 45-47 (describing evidence). In addition, an FBI agent offered expert testimony about the cell-site data for petitioner's phone. Pet. App. 5a-6a. The agent presented maps showing that petitioner's phone was within a half-mile to two miles of the location of four of the robberies around the time those robberies occurred. *Id.* at 6a.

The jury convicted petitioner on all the Hobbs Act counts and all but one of the firearms counts. Pet. App. 6a. The district court sentenced petitioner to 1395 months in prison. *Id.* at 7a.

3. The court of appeals affirmed. Pet. App. 1a-24a.

a. As relevant here, the court of appeals rejected petitioner's Fourth Amendment challenge to the historical cell-site records, holding that the government's acquisition of those business records was not a Fourth Amendment "search" of petitioner. Pet. App. 8a-17a.

The court of appeals emphasized that petitioner "lack[s] any property interest in cell-site records created and maintained by [his] wireless carrier." Pet. App. 12a. As the court explained, MetroPCS and Sprint "gathered [the data] in the ordinary course of business" to be used for their own purposes, such as "to find weak spots in their network and to determine whether roaming charges apply." *Id.* at 10a.

The court of appeals further concluded that petitioner had no reasonable expectation of privacy in his cellular-service providers' records of their towers' connections with his cell phone. Pet. App. 7a-13a. The court observed that "federal courts have long recognized a core distinction" between "the content of personal communications," which "is private," and "the information necessary to get those communications from point A to point B," which "is not." *Id.* at 9a. Historical cell-site records "fall on the unprotected side of this line," the court concluded, "because they contain "routing information" and "say nothing about the content of any calls." *Id.* at 10a; see *id.* at 10a-12a.

The court of appeals observed that this Court's decision in *Smith* v. *Maryland*, 442 U.S. 735 (1979), "confirm[ed] the point" that "[t]he government's collection of business records containing [historical cell-site] data * * * is not a search." Pet. App. 11a. "[I]n *Smith*," the court explained, "th[is] Court held that

the police's installation of a pen register—a device that tracked the phone numbers a person dialed from his home phone—was not a search because the caller could not reasonably expect those numbers to remain private." *Id.* at 9a-10a. Because "Smith 'voluntarily conveyed numerical information to the telephone company and exposed that information to its equipment in the ordinary course of business," the "numerical information was not protected under the Fourth Amendment." *Id.* at 12a (quoting 442 U.S. at 744) (internal quotation marks omitted). The court concluded that the same result should apply "to the locational information here" because cell-phone users voluntarily convey that data to their cellular-service providers "as a means of establishing communication" when they place or receive calls. *Ibid.* (quoting *Smith*, 442 U.S. at 741).

The court of appeals distinguished this Court's decision in *United States* v. *Jones*, 132 S. Ct. 945 (2012), which held that the government's installation of a Global-Positioning-System (GPS) tracking device on a vehicle constituted a "search" under the Fourth Amendment, *id.* at 949. See Pet. App. 13a-15a. The court of appeals emphasized that "the government action in this case"—namely, "government collection of business records"—"is very different from the government action in *Jones*." *Id.* at 13a, 14a. The court further observed that the historical cell-site data here was "as much as 12,500 times less accurate than the GPS data in *Jones*" and so could not provide the same level of detail about petitioner's location and movements. *Id.* at 14a.

The court of appeals also observed that, in enacting the SCA, Congress "struck a balance that it thinks

reasonable," Pet. App. 16a, by requiring the government to "offer[] specific and articulable facts showing that there are reasonable grounds to believe that" historical cell-site records "are relevant and material to an ongoing criminal investigation," 18 U.S.C. 2703(d). The court stated that "Congress is usually better equipped than courts are to answer the empirical questions that [new] technologies present." Pet. App. 17a. The court concluded that "[t]hese concerns favor leaving undisturbed the Congressional judgment" reflected by the SCA's "middle ground [approach] between full Fourth Amendment protection and no protection at all." *Id.* at 15a, 17a.[2]

b. Judge Stranch filed an opinion concurring in the judgment on the Fourth Amendment issue. Pet. App. 24a-32a.

Judge Stranch believed that the government's acquisition of the historical cell-site records "raise[d] Fourth Amendment concerns." Pet. App. 24a; see *id.* at 25a-29a. She "f[ound] it unnecessary to reach a definitive conclusion on the Fourth Amendment issue," however, because she concluded that the motion to suppress was properly denied under the good-faith exception to the exclusionary rule. *Id.* at 25a; see *id.* at 29a-31a. She observed that no evidence "suggest[ed] that the FBI agents who obtained the

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[2] Because the court of appeals concluded that the government's acquisition of petitioner's historical cell-site data did not constitute a search, it did not reach the government's alternative arguments that (i) any search that occurred was constitutionally reasonable, see Gov't C.A. Br. 37-40; (ii) the good-faith exception to the exclusionary rule applies here, see *id.* at 40-42; and (iii) any error in admitting the historical cell-site data was harmless, see *id.* at 44-47.

[cell-site data] * * * pursuant to the SCA engaged in intentional misconduct." *Id.* at 31a. Because "[s]uppressing the [cell-site data] at trial would not have the requisite deterrent effect on future unlawful conduct," she concluded that the district court correctly denied the motion to suppress. *Ibid.*

ARGUMENT

Petitioner renews his claim (Pet. 10-34) that the government's acquisition of MetroPCS's and Sprint's historical cell-site records pursuant to three SCA court orders violated his Fourth Amendment rights. Petitioner further asserts (Pet. 21-26) that the lower courts are divided on the Fourth Amendment question. Those claims lack merit. The court of appeals correctly concluded that the Fourth Amendment permits the government to obtain historical cell-site data under the standard set forth in the SCA, and no conflict exists on that question. This Court has recently denied other petitions for a writ of certiorari raising Fourth Amendment challenges to the government's acquisition of historical cell-site data pursuant to SCA court orders,[3] and no reason exists for a different result here.

In any event, this case would be an unsuitable vehicle to address the Fourth Amendment question because, as the district court held and as Judge Stranch concluded in her opinion concurring in the judgment, the relevant evidence was admissible under the good-faith exception to the exclusionary rule. In addition, any error in the admission of the historical cell-site data was harmless because other evidence

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[3] See *Davis* v. *United States*, 136 S. Ct. 479 (2015) (No. 15-146); *Guerrero* v. *United States*, 135 S. Ct. 1548 (2015) (No. 14-7103).

conclusively established petitioner's guilt. Petitioner thus could not benefit from a ruling in his favor on the Fourth Amendment question. Further review of that question is unwarranted.

1. The court of appeals correctly held that the government's acquisition of MetroPCS's and Sprint's cell-site records pursuant to court orders authorized by the SCA did not violate petitioner's Fourth Amendment rights. Petitioner has no Fourth Amendment interest in those business records. And even if he did have such an interest, the SCA procedure is constitutionally reasonable.

a. A person has no Fourth Amendment interest in records created by a communications-service provider in the ordinary course of business that pertain to the individual's transactions with the service provider.

i. The Fourth Amendment's prohibition on unreasonable searches was originally understood to be "tied to common-law trespass." *United States* v. *Jones*, 132 S. Ct. 945, 949 (2012). Since this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), however, the Court has held that a Fourth Amendment search may also "occur[] when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo* v. *United States*, 533 U.S. 27, 33 (2001).

The Fourth Amendment permits the government to obtain business records through a subpoena, without either a warrant or a showing of probable cause. See *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 194-195 (1946); see also *United States* v. *Miller*, 425 U.S. 435, 445-446 (1976). In its decisions in *Miller* and *Smith* v. *Maryland*, 442 U.S. 735 (1979), this Court further concluded that the acquisition of a busi-

ness's records does not constitute a Fourth Amendment "search" of an individual customer even when the records reflect information pertaining to that customer.

In *Miller*, the government had obtained by subpoena records of the defendant's accounts from his banks, including copies of his checks, deposit slips, financial statements, and other business records. 425 U.S. at 436-438. The banks were required to keep those records under the Bank Secrecy Act, 12 U.S.C. 1829b(d). 425 U.S. at 436, 440-441. The Court held that the government's acquisition of those records was not an "intrusion into any area in which [the defendant] had a protected Fourth Amendment interest." *Id.* at 440. The Court explained that the defendant could "assert neither ownership nor possession" of the records; rather, they were "business records of the banks." *Ibid.* The Court further rejected the defendant's argument that he had "a reasonable expectation of privacy" in the records because "they [were] merely copies of personal records that were made available to the banks for a limited purpose." *Id.* at 442. As the Court explained, it had "held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose." *Id.* at 443. Because the records obtained from the bank "contained only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business," the Court concluded that the defendant had "take[n] the risk, in revealing his affairs to another,

that the information w[ould] be conveyed by that person to the Government." *Id.* at 442, 443.

In *Smith*, the Court applied the same principles to records created by a telephone company. There, the police requested that the defendant's telephone company install a pen register at its offices to record the numbers dialed from the defendant's home phone. 442 U.S. at 737. The defendant argued that the government's acquisition of the records of his dialed numbers violated his reasonable expectation of privacy and therefore qualified as a Fourth Amendment search. *Id.* at 741-742. The Court rejected that contention, concluding both that the defendant lacked a subjective expectation of privacy and that any such expectation was not objectively reasonable. *Id.* at 742-746.

The *Smith* Court first expressed "doubt that people in general entertain any actual expectation of privacy in the numbers they dial," given that "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through the telephone company switching equipment that their calls are completed." 442 U.S. at 742. The Court further emphasized that "the phone company has facilities for recording this information" and "does in fact record this information for a variety of legitimate business purposes." *Id.* at 743.

The *Smith* Court went on to explain that "even if [the defendant] did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not one that society is prepared to recognize as reasonable." 442 U.S. at 743 (citation and internal quotation marks omitted). That was because "a person has no legitimate expectation of privacy in information he voluntarily turns over to

third parties." *Id.* at 743-744 (citing, *inter alia*, *Miller*, 425 U.S. at 442-444). "When [the defendant] used his phone," the Court continued, he "voluntarily conveyed numerical information to the telephone company and exposed that information to its equipment in the ordinary course of business." *Id.* at 744 (internal quotation marks omitted). The Court found no more persuasive the defendant's argument that he reasonably expected the local numbers he dialed to remain private because "telephone companies, in view of their present billing practices, usually do not record local calls" or include those numbers on their customers' monthly bills. *Id.* at 745. Because the defendant "voluntarily conveyed to [the phone company] information that it had facilities for recording and that it was free to record," the Court concluded that he had "assumed the risk that the information would be divulged to police." *Ibid.*

ii. The principles set forth in *Miller* and *Smith* resolve this case. See Pet. App. 11a-12a, 14a.

Petitioner lacks any subjective expectation of privacy in phone-company records of historical cell-site data because they are business records that MetroPCS and Sprint create for their own purposes. See Pet. App. 7a, 10a. As with the bank records in *Miller*, petitioner "can assert neither ownership nor possession" of the cell-site records. 425 U.S. at 440. Rather, the providers created the records for their own business purposes as part of the process of providing telephone service to customers. See Pet. App. 5a-7a, 10a.

As in *Smith*, moreover, cell-phone users presumably understand that their phones emit signals that are conveyed to their service providers, through facilities

close to the area of the phone's use, as a necessary incident of making or receiving calls. See, *e.g.*, *United States* v. *Davis*, 785 F.3d 498, 511 (11th Cir.) (en banc), cert. denied, 136 S. Ct. 479 (2015); *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 613 (5th Cir. 2013) (*Fifth Circuit In re Application*); Pet. App. 12a. "[A]ny cellphone user who has seen her phone's signal strength fluctuate must know that, when she places or receives a call, her phone 'exposes' its location to the nearest cell tower and thus to the company that operates the tower." Pet. App. 12a. That is why, for example, cell phones often cannot receive a signal in sparsely populated areas or underground. See *Fifth Circuit In re Application*, 724 F.3d at 613. "Although subjective expectations cannot be scientifically gauged," cell-phone users, like landline users, do not have a "general expectation" that data generated when they use telephone-company equipment "will remain secret." *Smith*, 442 U.S. at 743.

Additionally, any subjective expectation of privacy in information transmitted to a cellular-service provider by engaging its cellular network would not be objectively reasonable because "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith*, 442 U.S. at 743-744. Just as a person who dials a number into a phone "voluntarily convey[s] numerical information to the telephone company and expose[s] that information to its equipment in the ordinary course of business," *id.* at 744 (internal quotation marks omitted), a cell-phone user must reveal his general location to a cell tower in order for the cellular service provider to connect a call. And a cell-

phone user thus "takes the risk, in revealing his affairs to [the cellular-service provider], that the information" he transmits in engaging the cellular network "will be conveyed by [the cellular-service provider] to the Government." *Miller*, 425 U.S. at 443. Because petitioner "voluntarily conveyed to [his cellular-service providers] information that [they] had facilities for recording and that [they] w[ere] free to record," he "assumed the risk that the information would be divulged to police." *Smith*, 442 U.S. at 745. The court of appeals therefore correctly concluded that the government's acquisition of the historical cell-site data did not constitute a Fourth Amendment search.

iii. Petitioner's arguments to the contrary (Pet. 26-32) lack merit.

Petitioner seeks to avoid (Pet. 28-29) the principles set forth in *Miller* and *Smith* by contending that cell-phone users do not voluntarily convey cell-site data to their service providers. But "[a] cell phone user voluntarily enters an arrangement with his service provider in which he knows that he must maintain proximity to the provider's cell towers in order for his phone to function." *United States* v. *Graham*, 824 F.3d 421, 430 (4th Cir.) (en banc), petitions for cert. pending, No. 16-6308 (filed Sept. 26, 2016), and No. 16-6694 (filed Oct. 27, 2016). Petitioner chose to carry a cell phone for the purpose of having his wireless provider route calls to and from him whenever he was in range of a cell tower. By "expect[ing] his phone to work," he "permitt[ed]—indeed, request[ed]—his service provider to establish a connection between his phone and a nearby cell tower," and he thus "voluntarily convey[ed] the information necessary for his ser-

vice provider to identify the [historical cell-site data] for his calls." *Ibid.*

Petitioner also errs in suggesting (Pet. 29) that *Smith* and *Miller* are inapplicable because the records at issue in this case are "exceedingly sensitive and private in ways that were not at issue in [those decisions]."[4] Petitioner provides no support for his contention that records of the cell towers to which a phone connected when placing or receiving a call are more private than, for example, the financial information contained in the "checks, deposit slips, * * * financial statements, and * * * monthly statements" the government acquired in *Miller*. 425 U.S. at 438. Although the records in *Miller* were "copies of personal records that were made available to the banks for a limited purpose," this Court nevertheless concluded that no Fourth Amendment search had occurred because the records "contain[ed] only information voluntarily conveyed to the banks and

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[4] Petitioner's reliance for this point (Pet. 29-30) on *United States* v. *Karo*, 468 U.S. 705 (1984), and *Kyllo*, *supra*, is misplaced. In *Karo*, this Court concluded that police officers conducted a Fourth Amendment search when they used a beeper device to monitor the location of a container within a private residence. 468 U.S. at 714. Similarly, in *Kyllo*, this Court held that the use of a thermal imaging device "that is not in general public use[] to explore details of the home that would previously have been unknowable without physical intrusion" is a Fourth Amendment search. 533 U.S. at 40. In each case, the use of the device in question permitted the authorities to obtain information from inside a house that had not already been exposed to the public. See *id.* at 34-40; *Karo*, 468 U.S. at 714-716. In this case, however, petitioner had already exposed the information necessary to create the cell-site records to MetroPCS and Sprint, and the government obtained that information from MetroPCS and Sprint through lawful process.

exposed to their employees in the ordinary course of business." *Id.* at 442. That analysis applies with even greater force here because, unlike in *Miller*, the records at issue here are not even copies of documents that petitioner submitted to the cellular-service providers, and the government did not require the providers to keep those records. See *ibid.* Petitioner's argument also overlooks the "core distinction" between "the content of personal communications" and "the information necessary to get those communications from point A to point B." Pet. App. 9a. "The business records here fall on the unprotected side of this line" because they "say nothing about the content of any calls" but instead contain only "routing information." *Id.* at 10a.

Petitioner essentially objects to the fact that law-enforcement officers could *infer* from MetroPCS's and Sprint's records that petitioner was within a particular radius of a cell tower. But "an inference is not a search." *Kyllo*, 533 U.S. at 33 n.4. Law-enforcement investigators regularly deduce facts about a person's movements or conduct from information gleaned from third parties. Indeed, that is a central feature of criminal investigations. See *Donaldson* v. *United States*, 400 U.S. 517, 522 (1971) (explaining that the lack of Fourth Amendment protection for third-party business records was "settled long ago"); *id.* at 537 (Douglas, J., concurring) ("There is no right to be free from incrimination by the records or testimony of others."). For example, law-enforcement officers can infer from an eyewitness statement that a suspect was in a particular location at a particular time, from a credit-card slip that she regularly dines at a particular restaurant and was there at a particular time, and from a key-

card entry log her routine hours at a gym. But merely because facts about a person can be deduced from records or other information in the possession of third parties does not make the acquisition of that information a Fourth Amendment search of the person. Indeed, the pen-register records in *Smith* allowed a far more specific inference about the defendant's whereabouts—his presence in his home—but the Court nevertheless concluded that no Fourth Amendment search had occurred.

Petitioner suggests (Pet. 16-18, 27-28) that the Fourth Amendment principles recognized in *Smith* and *Miller* should not apply to new technologies. Although petitioner relies (Pet. 16-18) on *Jones* and *Riley* v. *California*, 134 S. Ct. 2473 (2014), those decisions did not address—much less disavow—this Court's precedents recognizing that an individual does not have a Fourth Amendment interest in a third party's records pertaining to him or in information that he voluntarily conveys to third parties. In *Jones*, the Court held that the warrantless installation and use of a GPS tracking device on a vehicle to continuously monitor its movements over the course of 28 days constituted a Fourth Amendment search. 132 S. Ct. at 948-949. In reaching that conclusion, the Court relied on the fact that the government had "physically intrud[ed] on a constitutionally protected area"—the suspect's automobile—to attach the device. *Id.* at 950 n.3. In this case, by contrast, petitioner does not contend that any such physical occupation occurred. Because the Court in *Jones* concluded that the attachment of the device constituted "a classic trespassory search," *id.* at 954, it did not reach the *Katz* inquiry or hold that tracking a person's vehicle

on public streets violates a reasonable expectation of privacy, which would represent a significant qualification of the Court's prior holding in *United States* v. *Knotts*, 460 U.S. 276, 281-282 (1983). See *Jones*, 132 S. Ct. at 953-954.

This Court's decision in *Riley* likewise does not aid petitioner's argument. *Riley* held that a law-enforcement officer generally must obtain a warrant to search the contents of a cell phone found on an arrestee. 134 S. Ct. at 2485. No question existed in *Riley* that the review of the contents of a cell phone constitutes a Fourth Amendment search; the question was whether that search fell within the traditional search-incident-to-arrest exception to the warrant requirement. See *id.* at 2482 ("The two cases before us concern the reasonableness of a warrantless search incident to a lawful arrest."); see also *id.* at 2489 n.1 (noting that "[b]ecause the United States and California agree that these cases involve *searches* incident to arrest, these cases do not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances"). *Riley* thus presented no occasion for this Court to reconsider its longstanding view that an individual has no Fourth Amendment interest in records pertaining to an individual that are created by third parties or in information he voluntarily conveys to third parties.

Even putting aside the specific holdings of *Jones* and *Riley*, the broader privacy concerns raised in those cases (and discussed in the concurrences by Justice Alito and Justice Sotomayor in *Jones*, see 132 S. Ct. at 954-956 (Sotomayor, J., concurring); *id.* at 962-964 (Alito, J., concurring in the judgment)) do not

justify creating a novel Fourth Amendment rule here. The GPS tracking device in *Jones* allowed law-enforcement officers to use "signals from multiple satellites" to continuously track the movements of the defendant's vehicle over the course of 28 days, accurate to "within 50 to 100 feet." *Id.* at 948 (majority opinion). The information the government acquired in this case, by contrast, consisted of records indicating which of the cellular-service provider's antennas communicated with petitioner's phone only when the phone was making or receiving calls, not continuously. See Pet. App. 4a, 6a-7a. And although these records contained historical cell-site information for a 127-day period, the information revealed only that petitioner was somewhere within the specified sector of a cell tower when he made or received calls. *Id.* at 7a, 14a. According to the court of appeals' calculations, that information was "as much as 12,500 times less accurate than the GPS data in *Jones*." *Id.* at 14a-15a. This case thus presents no occasion to consider the legal implications of technology capable of "secretly monitor[ing] and catalog[ing] every single movement" an individual makes continuously "for a very long period." *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment); see *id.* at 955 (Sotomayor, J., concurring).

Likewise, this case does not touch on a central concern in *Riley*: that cell phones may contain "vast quantities of personal information" that could be used to discern "[t]he sum of an individual's private life," including information about the user's health, family, religion, finances, political and sexual preferences, and shopping habits, as well as GPS records of the user's "specific movements down to the minute, not

only around town but also within a particular building." 134 S. Ct. at 2485, 2489, 2490. As explained, the historical cell-site records obtained in this case revealed only that petitioner (or someone using his phone) was in "a 3.5 million square-foot to 100 million square-foot area" when placing or receiving a call. Pet. App. 14a. The records did not (and could not) reveal any information stored on petitioner's phone or permit law-enforcement officers to learn the sort of detailed personal facts that the Court identified in *Riley*.

Petitioner essentially seeks a rule that he has a personal Fourth Amendment interest in the record of his transaction with a business from which his location can be approximately inferred. No recognized Fourth Amendment doctrine supports that contention.[5] The court of appeals therefore correctly held that under this Court's precedents, petitioner has no valid Fourth Amendment interest in records of his calls created by MetroPCS and Sprint for their own business purposes.

b. Even if petitioner could establish that he has a novel Fourth Amendment interest in the records created and held by MetroPCS and Sprint, the govern-

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[5] Petitioner cites (Pet. 26-27) a variety of cases that did not involve the third-party doctrine to support his contention that privacy interests may survive even when "another person has access to or control over private records." None of those cases involved business records created by a third party based on information voluntarily conveyed to the business. For example, *Ferguson* v. *City of Charleston*, 532 U.S. 67 (2001), involved urine tests conducted by state hospital staff that "were indisputably searches within the meaning of the Fourth Amendment." *Id.* at 76. The other cited cases are equally inapposite.

ment's acquisition of those records was reasonable and therefore complied with the Fourth Amendment.

"As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Maryland* v. *King*, 133 S. Ct. 1958, 1969 (2013) (citation omitted). A "warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 653 (1995). In deciding whether a warrantless search is permissible, this Court "balance[s] the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *King*, 133 S. Ct. at 1970 (citation omitted). In addition, in a case that challenges a federal statute under the Fourth Amendment, this Court applies a "strong presumption of constitutionality" to the statute, "especially when it turns on what is 'reasonable'" within the meaning of the Fourth Amendment. *United States* v. *Watson*, 423 U.S. 411, 416 (1976) (citation omitted). In light of those principles, even if the acquisition of MetroPCS's and Sprint's records pertaining to petitioner's calls qualified as a Fourth Amendment search, that acquisition would be constitutionally reasonable. That follows for two independently sufficient reasons.

First, as discussed above, this Court has held that subpoenas for records do not require a warrant based on probable cause, even when challenged by the party to whom the records belong. See *Miller*, 425 U.S. at 446 (reaffirming the "traditional distinction between a search warrant and a subpoena"); see also *Oklahoma*

Press Publ'g Co., 327 U.S. at 209. It follows that the SCA procedure for obtaining the business records at issue here is constitutionally reasonable, because the SCA provides more substantial privacy protections than an ordinary judicial subpoena. See *Davis*, 785 F.3d at 505-506 (describing SCA privacy-protection provisions). In particular, the SCA "raises the bar" for obtaining historical cell-site records, *id.* at 505, by requiring the government to establish "*specific and articulable facts* showing that there are reasonable grounds to believe that * * * the records or other information sought[ ] are relevant and material to an ongoing criminal investigation," 18 U.S.C. 2703(d) (emphasis added). In contrast, an ordinary subpoena requires only a "court's determination that the investigation is authorized by Congress, [that it] is for a purpose Congress can order, [that] the documents sought are relevant to the inquiry," and that the "specification of the documents to be produced [is] adequate, but not excessive, for the purposes of the relevant inquiry." *Oklahoma Press Publ'g Co.*, 327 U.S. at 209. Given that "[a] legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way," *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment), Congress's considered effort in the SCA to augment the privacy protections that this Court has found sufficient for judicial subpoenas complies with the Fourth Amendment. See Pet. App. 15a-17a.

Second, traditional standards of Fourth Amendment reasonableness independently confirm that a Section 2703(d) court order is a reasonable mechanism for obtaining a cellular-service provider's historical

cell-site records. As discussed above, under traditional Fourth Amendment standards, petitioner had no legitimate expectation of privacy in the third-party business records at issue here. But even if this Court were to depart from that settled framework and hold that an individual can assert a Fourth Amendment interest in records created by a third party that pertain to a transaction he engaged in with the third party, petitioner could at most assert only a diminished expectation of privacy in those records. That is a factor that this Court has said "may render a warrantless search or seizure reasonable." *King*, 133 S. Ct. at 1969 (citation omitted). And any invasion of petitioner's assumed privacy interest was minimal, given the imprecise nature of the location information that could be inferred from the historical cell-site records at issue here, which could not have enabled law-enforcement officers to pinpoint petitioner's location and could not have revealed other personal facts about him. See Pet. App. 14a-15a (discussing these factors); *Davis*, 785 F.3d at 516 (same).

On the other side of the reasonableness balance, the government has a compelling interest in obtaining historical cell-site records using a Section 2703(d) court order, rather than a warrant, because, like other investigative techniques that involve seeking information from third parties about a crime, this evidence is "particularly valuable during the early stages of an investigation, when the police [may] lack probable cause and are confronted with multiple suspects." *Davis*, 785 F.3d at 518. Society has a strong interest in both promptly apprehending criminals and exonerating innocent suspects as early as possible during an investigation. See *United States* v. *Salerno*, 481 U.S.

739, 750-751 (1987); *King*, 133 S. Ct. at 1974. In addition, the SCA ensures judicial scrutiny of the government's basis for obtaining an order, so the government may obtain such orders only in circumstances where the asserted governmental interest in acquiring the records has been examined by a neutral magistrate.

In short, "a traditional balancing of interests amply supports the reasonableness of the [SCA] order[s] at issue here." *Davis*, 785 F.3d at 518.

2. Petitioner contends (Pet. 21-26) that lower courts are divided over whether the Fourth Amendment requires the government to obtain a warrant before acquiring a cellular-service provider's historical cell-site records pertaining to a particular user. That is incorrect. The decision below does not conflict with any other decision of another circuit or state high court.

a. All courts of appeals to have considered the question presented have concluded, in accordance with the Sixth Circuit below, that no Fourth Amendment violation occurs when the government acquires historical cell-site data pursuant to an SCA order. See *Graham*, 824 F.3d at 425-438 (4th Cir.); *Davis*, 785 F.3d at 506-516 (11th Cir.); *Fifth Circuit In re Application*, 724 F.3d at 609-615 (5th Cir.); Pet. App. 17a.[6]

b. Petitioner asserts (Pet. 14, 22-23) that the decision below conflicts with the Third Circuit's decision in *In re Application of the U.S. for an Order Direct-*

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[6] Petitions for a writ of certiorari from the Fourth Circuit's decision in *Graham* are currently pending. See Nos. 16-6308 (filed Sept. 26, 2016) and 16-6694 (filed Oct. 27, 2016). Those petitions raise a similar Fourth Amendment challenge to the government's acquisition of historical cell-site data.

ing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't, 620 F.3d 304 (2010) (*Third Circuit In re Application*). But the Third Circuit addressed only the *statutory* standard for obtaining cell-site records under the SCA. *Id.* at 308-319. The Third Circuit "h[eld] that [historical cell-site data] from cell phone calls is obtainable under a [Section] 2703(d) order and that such an order does not require the traditional probable cause determination." *Id.* at 313. The court further interpreted the SCA to grant judges discretion "to require a warrant showing probable cause" pursuant to Section 2703(c)(1)(A), although the court stated that such an option should "be used sparingly because Congress also included the option of a [Section] 2703(d) order." *Id.* at 319. But the court did not consider—let alone adopt—petitioner's proposed rule that the Fourth Amendment *requires* the government to obtain a warrant to acquire historical cell-site data.

Petitioner emphasizes (Pet. 22-23) the Third Circuit's statement that "[a] cell phone customer has not 'voluntarily' shared his location information with a cellular provider in any meaningful way." *Third Circuit In re Application*, 620 F.3d at 317. But the Third Circuit made that observation simply to support its interpretation of the SCA. And while the court noted "the possibility" that the disclosure of historical cell-site data could "implicate the Fourth Amendment * * * if it would disclose location information about the interior of a home," *ibid.*, that suggestion would not aid petitioner here, because the evidence he sought to suppress did not (and could not) disclose anything about the interior of his home. In any event, the Third Circuit's suggestion does not amount to a

constitutional holding that would place it in conflict with the Fourth, Fifth, Sixth, and Eleventh Circuits.[7]

c. Petitioner also contends (Pet. 24-26) that the court of appeals' decision conflicts with the D.C. Circuit's decision in *United States* v. *Maynard*, 615 F.3d 544 (2010), aff'd in part on other grounds *sub nom. United States* v. *Jones*, 132 S. Ct. 945 (2012). But *Maynard* involved the government's installation and use of a GPS tracking device on the defendant's car, not the acquisition of records that a third party had created and stored for its own business purposes. See *id.* at 555. Indeed, *Maynard* specifically recognized the continuing validity of the principles applied in *Smith*. See *id.* at 561; see also *Reporters Comm. for Freedom of the Press* v. *American Tel. & Tel. Co.*, 593 F.2d 1030, 1043 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979).

d. Petitioner further errs in contending that "state high courts are divided" on the question presented in this case. Pet. 21 (capitalization omitted).[8] Petitioner

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[7] The Third Circuit recently heard oral argument in a case that involves a Fourth Amendment challenge to the government's acquisition of historical cell-site data pursuant to an SCA order under Section 2703(d). See *United States* v. *Stimler*, Nos. 15-4053, 15-4094, and 15-4095 (argued Jan. 25, 2017). That case may provide the Third Circuit with an opportunity to revisit its empirical assumption from six years ago that "it is unlikely that cell phone customers are aware that their cell phone providers collect and store historical location information." *Third Circuit In re Application*, 620 F.3d at 317 (emphasis omitted).

[8] Petitioner also cites (Pet. 14, 23) a decision from the Indiana Court of Appeals, but that decision was recently vacated when the Supreme Court of Indiana granted discretionary review. See *Zanders* v. *State*, 58 N.E.3d 254, vacated and transfer granted, 62 N.E.3d 1202 (Ind. 2016). In any event, a conflict with a decision of

cites (Pet. 23-24) two decisions in which state courts of last resort required warrants to obtain cell-site records, but both of those decisions relied expressly on state law. See *Commonwealth* v. *Augustine*, 4 N.E.3d 846, 858, 865-866 (Mass. 2014) (Massachusetts Declaration of Rights); *State* v. *Earls*, 70 A.3d 630, 644 (N.J. 2013) (New Jersey Constitution). In addition, petitioner cites (Pet. 23-24) the Florida Supreme Court's decision in *Tracey* v. *State*, 152 So. 3d 504 (2014), but that case involved the use of prospective, "*real time* cell site location information," and the court made clear that its decision did not encompass historical cell-site records like those at issue here. *Id.* at 515, 525-526 (emphasis added). Petitioner also points to (Pet. 23-24) several state statutes, but those statutes do not reflect any judicial conflict over the meaning of the Fourth Amendment. To the contrary, they fortify the view that legislatures are best positioned to balance privacy interests and law-enforcement needs in light of new technologies, as Congress did in the SCA. See *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment); see Pet. App. 15a-17a.

3. In any event, this case is not a suitable vehicle to consider whether the government's acquisition of historical cell-site data violated the Fourth Amendment because the district court correctly denied the motion to suppress based on the good-faith exception to the exclusionary rule and because any error in admitting the cell-site data was harmless.

a. As this Court has explained, the exclusionary rule is a "judicially created remedy" that is "designed to deter police misconduct rather than to punish the

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an intermediate state appellate court does not warrant this Court's review.

errors of judges and magistrates." *United States* v. *Leon*, 468 U.S. 897, 906, 916 (1984). "As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced." *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987). The rule therefore does not apply "where [an] officer's conduct is objectively reasonable" because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 919. For that reason, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Ibid.* (citation omitted).

As the district court correctly held, Pet. App. 38a n.1, and as Judge Stranch recognized in her opinion concurring in the judgment, *id.* at 29a-31a, even if the government's collection of the historical cell-site data constituted a search in violation of the Fourth Amendment, the evidence was properly admitted at trial pursuant to the good-faith exception to the exclusionary rule. As Judge Stranch emphasized, "there is nothing to suggest that the FBI agents who obtained [the historical cell-site data] * * * pursuant to the SCA engaged in any intentional misconduct." *Id.* at 31a. This Court has held that the good-faith exception applies to "officer[s] acting in objectively reasonable reliance on a statute," later deemed unconstitutional, that authorizes warrantless administrative searches. *Krull*, 480 U.S. at 349; see *id.* at 342. It follows *a fortiori* that officers act reasonably in relying on a

statute that authorizes the acquisition of records only pursuant to an order issued by a neutral magistrate.

At the time the records were acquired in petitioner's case, moreover, no binding appellate decision (or holding of any circuit) had suggested, much less held, that the SCA was unconstitutional as applied to historical cell-site records. Given that, officers were entitled to rely on the presumption that acts of Congress are constitutional. Cf. *Davis* v. *United States*, 131 S. Ct. 2419, 2429 (2011) ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule."). Judge Stranch accordingly correctly concluded that "[s]uppressing the [historical cell-site data] at trial would not have the requisite deterrent effect on future unlawful conduct and application of the exclusionary rule is therefore inappropriate." Pet. App. 31a.

b. In addition, even if the historical cell-site data should have been suppressed, any error in admitting that evidence at trial was harmless. See *Neder* v. *United States*, 527 U.S. 1, 18 (1999) (observing that constitutional error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error"). The information provided by the historical cell-site data was merely cumulative of other uncontroverted evidence at trial that placed petitioner near the robbery scenes. See Gov't C.A. Br. 44-47 (describing evidence). That evidence included surveillance tape video showing petitioner near the site of one robbery, see *id.* at 45-46, as well as testimony from eyewitness accomplices who described petitioner's involvement in and presence at the scene of the other robberies, see

id. at 46-47; see also Pet. App. 5a (describing testimony from accomplices "that [petitioner] organized most of the robberies and often supplied the guns"). In light of the other evidence establishing petitioner's involvement in the robberies and his location at the relevant times, it is clear that the jury would have returned a guilty verdict even if the historical cell-site data had not been admitted at trial. Indeed, the jury convicted petitioner on two robbery counts for which the government had *not* introduced any historical cell-site data.

Because petitioner would not obtain relief even if this Court were to rule in his favor on the Fourth Amendment question, review of that question is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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