No. 15-146

In the Supreme Court of the United States

QUARTAVIOUS DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. 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.

2. Whether the good-faith exception to the Fourth Amendment exclusionary rule applies when the government relies on a court order issued under 18 U.S.C. 2703(d) to obtain historical cell-site records from a cellular-service provider and when no binding appellate decision has held that such orders violate the Fourth Amendment.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-101a) is reported at 785 F.3d 498. The panel opinion of the court of appeals (Pet. App. 102a-136a) is reported at 754 F.3d 1205 (11th Cir. 2014).

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2015. The petition for a writ of certiorari was filed on July 29, 2014. 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 Southern District of Florida, petitioner was convicted on two counts of conspiracy to engage in Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); seven counts of Hobbs Act armed robbery, in

violation of 18 U.S.C. 1951(a); and seven counts of knowingly using or carrying a firearm in relation to a crime of violence, or possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). The district court sentenced petitioner to 1941 months in prison, to be followed by five years of supervised release. A panel of the court of appeals affirmed petitioner's conviction but vacated a portion of his sentence. Pet. App. 102a-136a. The en banc court of appeals granted rehearing and vacated the panel opinion. 573 Fed. Appx. 925. The en banc court subsequently issued an opinion affirming petitioner's conviction and reinstating the panel opinion with respect to all issues except those addressed in Parts I and II of that opinion. Pet. App. 2a; see *id.* at 1a-101a.

1. Between August 7, 2010, and October 1, 2010, petitioner and his accomplices committed seven armed robberies of businesses in South Florida. Pet. App. 3a. During each of the robberies, petitioner and his accomplices brandished firearms and pointed their guns at employees and customers, often ordering them to lie on the ground. Presentence Investigation Report (PSR) ¶¶ 3-16. After one of the robberies, a customer confronted petitioner and his accomplices as they fled the scene, and petitioner and the customer exchanged gunfire. PSR ¶ 13; Pet. App. 4a.

2. a. Petitioner was indicted in the United States District Court for the Southern District of Florida on two counts of conspiracy to engage in Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); seven counts of Hobbs Act armed robbery, in violation of 18 U.S.C. 1951(a); and seven counts of knowingly using and carrying a firearm in relation to a crime of violence,

and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Pet. App. 3a.

b. In February 2011, after petitioner's arrest, the government applied to a federal magistrate judge for a court order pursuant to the Stored Communications Act (SCA), 18 U.S.C. 2701 *et seq.*, directing certain communications providers, including MetroPCS, to disclose specified records for four telephone numbers for the period from August 1, 2010, through October 6, 2010. Those numbers included a MetroPCS cell-phone number that petitioner was known to use. Pet. App. 5a-9a, 143a-150a.

The SCA generally prohibits communication 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, 2703, 2711(1). As relevant here, the government may obtain "a record or other information pertaining to a subscriber to or customer of [an electronic communication service or a remote computing service] (not including the contents of communications)" either through a warrant or "a court order." 18 U.S.C. 2703(c)(1). 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 information that the government may obtain under such an order includes 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).

In this case, the records that the government sought for petitioner's cell phone included records indicating the "telephone numbers of calls made by and to [petitioner's] cell phone," "whether the call was outgoing or incoming," and "the date, time, and duration of the call." Pet. App. 8a. The government also sought records known as "historical cell-site" records. As a MetroPCS employee testified, "when a cellular phone user makes a call, the user's cell phone sends a signal to a nearby cell tower, which is typically but not always the closest tower to the phone." *Id.* at 9a-10a. "Each cell phone tower has a circular coverage radius, and the 'coverage pie' for each tower is further divided into either three or six parts, called sectors." *Id.* at 10a. The historical cell-site records that the government sought identified "the number assigned to the cell tower that wirelessly connected the calls from and to [petitioner]" and "the sector number associated with that tower." *Id.* at 8a.[1] (The term "historical" indicates that the government acquired only records of past calls; it did not monitor the connections of petitioner's phone to cell towers in real time.) Cellular-service providers create and retain cell-site records in the ordinary course of business for their own purposes. *Id.* at 26a, 28a, 32a-33a.

In order to satisfy the legal standard for a court order under the SCA, the government provided to the magistrate judge a detailed summary of the evidence implicating petitioner in the seven armed robberies, including statements from two accomplices and DNA evidence that connected petitioner and his accomplices to two of the robberies. Pet. App. 7a, 144a-148a. The

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[1] MetroPCS made a record of incoming calls even when they were not answered. See Pet. App. 53a n.2 (Jordan, J., concurring).

magistrate judge granted the government's application and issued an order to MetroPCS. *Id.* at 7a-8a, 151a-153a. MetroPCS then produced the records for petitioner's phone number. *Id.* at 8a-9a.

From the historical cell-site records (as well as MetroPCS records identifying the location of its numbered towers), the government was able to infer the approximate location of petitioner's phone at the time it made and received calls, but the government could not "identify [its] location with pinpoint precision," Pet. App. 36a. As the MetroPCS employee testified, cell towers "generally have a coverage radius of about one to one-and-a-half miles," although the "density of cell towers in an urban area like Miami would make the coverage of any given tower smaller." *Id.* at 10a. The government ultimately determined that petitioner's cell phone communicated with cell towers in the general vicinity of the sites of six of the seven robberies around the times those robberies were committed. *Id.* at 5a.[2]

c. The case proceeded to trial. Petitioner moved to suppress the cell-site records obtained from MetroPCS on the ground that the government had obtained them in violation of the Fourth Amendment. Pet. App. 8a. In particular, petitioner argued that MetroPCS's production of its business records constituted a search of petitioner that could be conducted only pursuant to a search warrant supported by probable cause. *Id.* at 8a-9a. The district court denied the motion. *Id.* at 9a, 138a-139a.

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[2] The records also did not contain any cell-site information for text messages or for times when the cell phone was turned on but was not making or receiving a call. Pet. App. 8a.

At trial, two of petitioner's accomplices testified that petitioner was involved in each robbery and identified petitioner in surveillance videos showing four of the robberies. Pet. App. 4a-5a. Two eyewitnesses also testified about their encounters with petitioner during the robberies, and the government presented evidence that petitioner's DNA was recovered from a getaway car used in one of the robberies. *Id.* at 5a. In addition, the government presented MetroPCS's historical cell-site records that it had obtained under the SCA court order. *Id.* at 5a-6a, 9a-12a.[3]

The jury convicted petitioner on all counts, and the district court sentenced him to 1941 months in prison. Pet. App. 2a-4a.

3. A panel of the court of appeals affirmed petitioner's conviction but vacated a portion of his sentence. Pet. App. 102a-136a. As relevant here, the panel held that the government's acquisition of MetroPCS's historical cell-site records violated petitioner's Fourth Amendment rights. The court held first that a cell-phone user has a reasonable expectation of privacy in historical cell-site records that a cellular-service provider creates and maintains about the user's cell phone and therefore that the acquistion of historical cell-site records constitutes a Fourth Amendment search of the cell-phone user to whom they pertain. *Id.* at 107a-122a. Without separately analyzing whether the asserted search was neverthe-

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[3] Petitioner's arguments in the court of appeals did not address the government's acquisition of records pertaining to phone numbers used by his co-conspirators, Pet. App. 9a n.6, and he could not in any event have maintained a challenge based on a claimed violation of another person's Fourth Amendment rights, see *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978).

less reasonable, and so consistent with the Fourth Amendment on that basis, the panel concluded that the search violated the Fourth Amendment. *Id.* at 122a.

The panel affirmed the district court's denial of petitioner's suppression motion, however, based on the good-faith exception to the exclusionary rule. Pet. App. 122a-124a; see *United States* v. *Leon*, 468 U.S. 897, 922-924 (1984). In the panel's view, that exception applied both because the law-enforcement officers in this case relied in good faith on the magistrate judge's order and because the officers, prosecutors, and magistrate judge "all acted in scrupulous obedience to a federal statute, the Stored Communications Act." Pet. App. 123a-124a.

4. The court of appeals granted rehearing en banc and vacated the panel opinion. See Pet. App. 1a-43a.[4]

a. i. The court of appeals first held that petitioner had no reasonable expectation of privacy in MetroPCS's business records of its towers' connections with his cell phone and therefore that the government's acquisition of those records was not a Fourth Amendment "search" of him. Pet. App. 16a-38a.

The court of appeals began by observing that "[t]he government routinely issues subpoenas to third parties to produce a wide variety of business records, such as credit card statements, bank statements, hotel bills, purchase orders, and billing invoices." Pet. App. 15a. The legal effect of the SCA, the court explained, is to "rais[e] the bar from an ordinary subpoena to one

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[4] The en banc court of appeals later reinstated the sections of the panel opinion that did not address the historical cell-site issues. See Pet. App. 2a.

with additional privacy protections." *Ibid.* By requiring the government to "present to a judge specific and articulable facts showing reasonable grounds to believe the records are relevant and material to an ongoing criminal investigation," the court continued, the "SCA goes above and beyond the constitutional requirements regarding compulsory subpoena process." *Id.* at 14a-15a.

The court of appeals then rejected petitioner's argument that he enjoys a Fourth Amendment privacy interest in MetroPCS's historical cell-site records. The court explained that under this Court's precedents, "individuals have no reasonable expectation of privacy in certain business records owned and maintained by a third-party business." Pet. App. 18a-19a. The court relied on this Court's decision in *United States* v. *Miller*, 425 U.S. 435 (1976), which held that a bank customer has no Fourth Amendment privacy interest in records of his financial transactions created by his bank, to which he voluntarily conveyed that information, Pet. App. 19a, and *Smith* v. *Maryland*, 442 U.S. 735 (1979), which "held that telephone users have no reasonable expectations of privacy in dialed telephone numbers recorded through pen registers and contained in the third-party telephone company's records," Pet. App. 20a. Those decisions rested on the Court's longstanding view 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." *Miller*, 425 U.S. at 443.

The court of appeals concluded that "like the bank customer in *Miller* and the phone customer in *Smith*,

[petitioner] has no subjective or objective[ly] reasonable expectation of privacy in MetroPCS's business records showing the cell tower locations that wirelessly connected his calls." Pet. App. 27a; see *id.* at 26a-30a. "As to the subjective expectation of privacy," the court explained, "cell users know that they must transmit signals to cell towers within range, that the cell tower functions as the equipment that connects the calls, that users when making or receiving calls are necessarily conveying or exposing to their service provider their general location within that cell tower's range, and that cell phone companies make records of cell-tower usage." *Id.* at 27a (citing *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 613-614 (5th Cir. 2013)). With respect to whether users have an objectively reasonable expectation of privacy, the court determined that the "longstanding third-party doctrine [applied in *Smith* and *Miller*] plainly controls the disposition of this case." Pet. App. 27a, 29a. The court added that "[i]n certain respects, [petitioner] has an even less viable claim than the defendant in *Miller*," because in that case "the bank was *required by law* to maintain the records," whereas in this case MetroPCS's records were created and preserved voluntarily as part of its ordinary business operations. *Id.* at 28a.

ii. The court of appeals held in the alternative that even if petitioner had a Fourth Amendment privacy interest in MetroPCS's records pertaining to his calls, the government's acquisition of those records pursuant to an SCA order was constitutionally reasonable and therefore consistent with the Fourth Amendment. Pet. App. 39a-43a. "At most," the court explained, petitioner would have had "only a diminished expecta-

tion of privacy in MetroPCS's records." *Id.* at 40a. And "any intrusion on [that] alleged privacy interest * * * was minimal" because "there was no overhearing or recording of any *conversations*" or "GPS real-time tracking of precise movements of a person or vehicle," and the order was issued consistently with the privacy protections of the SCA. *Id.* at 40a-41a. On the other side of the reasonableness balance, the court found that "[t]he stored telephone records produced in this case, and in many other criminal cases, serve compelling governmental interests" by "help[ing] to build probable cause against the guilty, deflect suspicion from the innocent, aid in the search for truth, and judicially allocate scarce investigative resources." *Id.* at 41a-42a.

iii. The court of appeals agreed with the original panel that the good-faith exception to the exclusionary rule applies here. See Pet. App. 43a n.20; see also *id.* at 122a-124a. The court explained that "the prosecutors and officers here acted in good faith and therefore * * * the district court's denial of the motion to suppress did not constitute reversible error." *Id.* at 43a n.20.

b. Three judges filed concurring opinions. Judge William Pryor joined the majority opinion in full and filed a concurring opinion explaining that the conclusion that petitioner "had no legitimate expectation of privacy in the information he conveyed to MetroPCS follows from a straightforward application of the third-party doctrine, completely aside from the additional protections of the Stored Communications Act." Pet. App. 45a; see *id.* at 44a-49a. Judge Jordan filed a concurring opinion, which Judge Wilson joined, stating that he would "leave the broader expectation of

privacy issues for another day" and "hold that the government satisfied the Fourth Amendment's reasonableness requirement by using the procedures set forth in [the SCA] to obtain a court order for [petitioner's] cell site records." *Id.* at 51a; see *id.* at 50a-56a; see also *id.* at 43a n.21. Judge Rosenbaum filed a concurring opinion concluding that "*Smith* (and therefore, the third-party doctrine) inescapably governs the outcome of this case," *id.* at 74a, but stating her view that "reliance on the third-party doctrine must be limited to those cases involving alleged privacy interests that do not implicate a more specific historically recognized reasonable privacy interest," *id.* at 58a; see *id.* at 57a-74a.

c. Judge Martin filed a dissenting opinion, which Judge Jill Pryor joined, stating that she disagreed with the majority's Fourth Amendment analysis and believed that the government must obtain a warrant in order to acquire historical cell-site records. Pet. App. 75a-101a. Judge Martin agreed, however, that the good-faith exception applied and provided a basis for affirming petitioner's conviction. *Id.* at 75a n.1.

ARGUMENT

Petitioner contends (Pet. 14-35) that the government's acquisition, pursuant to an SCA court order, of MetroPCS's historical cell-site records violated his Fourth Amendment rights. The holding of the court of appeals, however, follows from settled Fourth Amendment principles set out by this Court in *United States* v. *Miller*, 425 U.S. 435 (1976), and *Smith* v. *Maryland*, 442 U.S. 735 (1979). Although a divided panel of the Fourth Circuit recently held that the acquisition of cell-site records spanning an extended period of time without a warrant violates the Fourth

Amendment, see *United States* v. *Graham*, 796 F.3d 332, 342-361 (2015); *id.* at 378-390 (Motz, J., dissenting in part and concurring in the judgment), the government has filed a petition for rehearing en banc in that circuit, and the Fourth Circuit has called for a response. The only other court of appeals to consider the question has agreed with the en banc Eleventh Circuit. See *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 613 (5th Cir. 2013) (*In re Application*). The Fourth Amendment question therefore does not warrant this Court's review.

In any event, this would be an unsuitable case to address the Fourth Amendment question, because the en banc court of appeals, like the original panel, correctly (and unanimously) held that the relevant evidence was admissible under the good-faith exception to the exclusionary rule. Petitioner thus could not benefit from a ruling in his favor on the Fourth Amendment question. Although petitioner briefly challenges the court of appeals' good-faith ruling, his argument is unfounded and has not been adopted by any court of appeals. Accordingly, further review is not warranted.[5]

1. The court of appeals correctly held that the government's acquisition of MetroPCS's cell-site records pursuant to an SCA court order did not violate petitioner's Fourth Amendment rights both because petitioner has no Fourth Amendment interest in MetroPCS's business records and because, even if he did, the SCA procedure is constitutionally reasonable.

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[5] This Court recently denied another petition for a writ of certiorari raising the same issue See *Guerrero* v. *United States*, 135 S. Ct. 1548 (2015) (No. 14-7103).

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, 950 (2012). But since this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), the Court has held that "[a] search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Maryland* v. *Macon*, 472 U.S. 463, 469 (1985).

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 Pub. Co.* v. *Walling*, 327 U.S. 186, 194-195 (1946); see also *Miller*, 425 U.S. at 445-446. In its decisions in *Miller* and *Smith*, this Court considered whether, when a business's records pertain to an individual customer, the acquisition of those records constitutes a Fourth Amendment "search" of that individual.

In *Miller*, the government had obtained by subpoena records of the defendant's checks and other records from his banks. 425 U.S. at 436, 437-438. The banks were required to keep those records under the Bank Secrecy Act of 1970, 12 U.S.C. 1829b(b). 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 "[o]n their face, the documents subpoenaed here are not [the defendant's] private

papers." *Ibid.* (internal quotation marks omitted). He could "assert neither ownership nor possession" of the records; rather, they were "business records of the banks." *Ibid.*

The defendant nevertheless argued that "he ha[d] a Fourth Amendment interest in the records kept by the banks because they [were] merely copies of personal records that were made available to the banks for a limited purpose and in which he ha[d] a reasonable expectation of privacy." 425 U.S. at 442. The Court rejected that argument, explaining that "[a]ll of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Ibid.* "This Court," it continued, "has 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 (citing *United States* v. *White*, 401 U.S. 745, 751-752 (1971); *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966); and *Lopez* v. *United States*, 373 U.S. 427 (1963)). The Court added that, "even if the banks could be said to have been acting solely as Government agents" in light of the fact that the Bank Secrecy Act required the banks to maintain the records, that would not change the Fourth Amendment analysis. *Miller*, 425 U.S. at 443.

The Court applied the same principles in *Smith* to a record created by the telephone company. In *Smith*, 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 a record of his dialed numbers violated his reasonable expectation of privacy and therefore qualified as a Fourth Amendment search. *Id.* at 741-742. As in *Miller*, the Court rejected that argument. The Court explained that for the Fourth Amendment to apply to the government's acquisition of such information, two requirements must be met: (i) an individual must "by his conduct * * * exhibit[] an actual (subjective) expectation of privacy" in the information; and (ii) that "subjective expectation of privacy," when "viewed objectively," must be "one that society is prepared to recognize as reasonable." *Id.* at 740 (internal quotation marks omitted).

The Court determined that the defendant's asserted expectation of privacy in the numbers dialed from his phone satisfied neither the subjective nor the objective requirement. The Court first expressed "doubt that people in general entertain any actual expectation of privacy in the numbers they dial," 442 U.S. at 742, since "[t]elephone users * * * typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes," *id.* at 743. And the Court rejected the defendant's contention that he had an idiosyncratic expectation of privacy in the number he dialed. See *ibid.* The 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 reasona-

ble." *Ibid.* (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 he used his phone," the Court continued, the defendant "voluntarily conveyed numerical information to the telephone company and exposed that information to its equipment in the ordinary course of business." *Id.* at 744.

ii. The court of appeals correctly held that the principles set forth in *Miller* and *Smith* resolve this case. See Pet. App. 18a-22a, 26a-30a. As with the bank records in *Miller*, petitioner "can assert neither ownership nor possession" of the records at issue here; they are MetroPCS's own "business records" that MetroPCS created for its own purposes. *Miller*, 425 U.S. at 440; see Pet. App. 26a. Indeed, unlike in *Miller*, the records at issue here are not even copies of documents that petitioner submitted to MetroPCS, and the government did not require MetroPCS to keep the records. See *Miller*, 425 U.S. at 442. They are records that MetroPCS created for its own business purposes as part of the process of providing telephone service to customers. See Pet. App. 26a ("Like the security camera surveillance images introduced into evidence at his trial, MetroPCS's cell tower records were not [petitioner's] to withhold."). Petitioner could not have created those records himself because he did not choose—and likely did not even know—the location of the cell tower to which his phone connected.

Petitioner essentially objects to the fact that law-enforcement officers could *infer* from MetroPCS's records that petitioner was within a particular radius

of a cell tower (and, with sector information, within a particular "pie slice" of that area). But "an inference is not a search." *Kyllo* v. *United States*, 533 U.S. 27, 36 n.4 (2001). 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 from a key-card entry log his 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.

It is true that MetroPCS could not have created the cell-site records if petitioner (or someone holding petitioner's cell phone) had not made or received a call at a particular time and place. But petitioner did not have a reasonable expectation of privacy in the information that was conveyed by each of those events—that someone using petitioner's cell phone wanted to engage MetroPCS's cellular network to make a call or that the phone received an incoming call. Like the dialed phone numbers in *Smith*, that information was voluntarily provided to MetroPCS. As in *Smith*, "[a]l-

though subjective expectations cannot be scientifically gauged," *Smith*, 442 U.S. at 743, cell-phone users presumably understand that their phones emit signals that are conveyed to 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.*, *In re Application*, 724 F.3d at 613. That is why, for example, cell phones often cannot receive a signal in sparsely populated areas or underground. See *ibid.*[6]

But more critically, any subjective expectation of privacy in information transmitted to a 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," and thus "assume[s] the risk that the company [will] reveal to the police the numbers he dial[s]," *id.* at 744 (internal quotation marks omitted), a cell-phone user "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

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[6] Moreover, as the court of appeals explained, the evidence in this case demonstrates that petitioner was aware that information about his use of the phone would be provided to MetroPCS. Petitioner registered his cell phone under a fictitious name, Pet. App. 9a, suggesting that he knew that MetroPCS would be collecting potentially incriminating information about his phone, including cell-site information, and thus he took steps to prevent those records from being linked to him. See *id.* at 27a.

[the cellular-service provider] to the Government," *Miller*, 425 U.S. at 443.

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. 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 for its own business purposes.

iii. Petitioner contends (Pet. 14-16, 32-33) that several decisions of this Court support his position, but none of the cited decisions addressed, much less disavowed, the basic principle 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.

Petitioner cites two decisions about searching the interior of a person's home, but they are both inapposite. In *United States* v. *Karo*, 468 U.S. 705 (1984), 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. *Id.* at 714. Similarly, in *Kyllo*, *supra*, 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 *Karo*, 468 U.S. at 714-716; *Kyllo*, 533 U.S. at 34-40. In

this case, however, petitioner had already exposed the information necessary to create the cell-site records to MetroPCS, and the government obtained that information from MetroPCS through lawful process. The relevant analogy to that acquisition is not the inside-the-home techniques of surveillance in *Karo* or *Kyllo*, but rather the interview of a witness about the interior of a defendant's home, which has never been understood to qualify as a Fourth Amendment "search" of the home.

Petitioner also cites (Pet. 15, 32-33) *United States* v. *Jones*, 132 S. Ct. 945 (2012), in which this Court held that the warrantless installation and use of a Global Positioning System (GPS) tracking device on a vehicle to continuously monitor its movements over the course of 28 days constituted a "search" under the Fourth Amendment. *Id.* at 949. As petitioner acknowledges (Pet. 32), the holding of *Jones* does not apply here. 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. Because the Court concluded that the attachment of the device constituted "a classic trespassory search," it did not even reach the *Katz* standard, let alone hold that tracking a person's vehicle on public streets violates a reasonable expectation of privacy, which would represent a significant qualification of its prior holding in *United States* v. *Knotts*, 460 U.S. 276, 281-282 (1983). See *Jones*, 132 S. Ct. at 953-954. In this case, by contrast, petitioner does not contend that any such physical occupation occurred. And, while the concurring opinions in *Jones* would have found a search based on the *Katz* expectation-of-privacy test, see *id.* at 954-956 (So-

tomayor, J., concurring); *id.* at 962-964 (Alito, J., concurring in the judgment), the Court did not.

Petitioner likewise errs in suggesting (Pet. 14-15, 33) that the decision below is in tension with *Riley* v. *California*, 134 S. Ct. 2473 (2014). *Riley* held that a law-enforcement officer generally must obtain a warrant to search the contents of a cell phone found on an arrestee. *Id.* at 2485. There was no question 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."). *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 the 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 the concurrences by Justice Alito and Justice Sotomayor in *Jones*) 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." 132 S. Ct. at 948. The information 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.

Pet. App. 8a. And although these records contained historical cell-site information for a 67-day period, the information revealed only that petitioner was somewhere within the specified sector of a cell tower when he made or received calls. See *id.* at 10a. 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 the general vicinity of six robberies around the time that those robberies occurred. They 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*.

b. Even if petitioner could establish that he has a novel Fourth Amendment interest in the records created and held by MetroPCS, the government'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) (internal quotation marks 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 (internal quotation marks 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). In light of those principles, even if the acquisition of MetroPCS's records pertaining to petitioner's calls qualifies 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 Pub. Co.*, 327 U.S. at 209. Rather, as this Court explained in *Miller*, "the Fourth Amendment, if appli-

cable to subpoenas for the production of business records and papers, at 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." 425 U.S. at 445-446 (internal quotation marks omitted). Given that, to the extent that a person who does not own or possess the records and did not create them has any Fourth Amendment interest in them at all, he could not be entitled to greater protection than the party that created and owns the records.

It follows that the SCA procedure is constitutionally reasonable, because, as the court of appeals explained, the SCA provides more substantial privacy protections than an ordinary judicial subpoena. See Pet. App. 15a-16a (describing SCA privacy-protection provisions); Gov't C.A. En Banc Br. 46-48 (same). In particular, the SCA "raises the bar" for obtaining historical cell-site records, Pet. App. 15a, 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(c) and (d) (emphasis added). In contrast, an ordinary subpoena requires only a "court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and 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 Pub. 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 to augment the privacy protections that this Court has found sufficient for judicial subpoenas complies with the Fourth Amendment.

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. 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. 40a-41a (discussing these factors); Gov't C.A. En Banc Br. 49-53 (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." Pet. App. 41a. 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.

Accordingly, the court of appeals correctly held that "a traditional balancing of interests amply supports the reasonableness of the [SCA] order at issue here." Pet. App. 42a.

2. Petitioner contends (Pet. 22-28) that federal courts of appeals and state courts of last resort 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. No conflict warranting this Court's review currently exists.

a. As petitioner notes in his supplemental filing, since the filing of the petition, a divided panel of the Fourth Circuit issued an opinion holding that the acquisition of historical cell-site records spanning an extended period of time constitutes a Fourth Amendment search and is unconstitutional without a warrant.

Graham, 796 F.3d at 344-361; see *id.* at 378-390 (Motz, J., dissenting in part and concurring in the judgment). On September 18, 2015, the government filed a petition for rehearing en banc in *Graham*, and the Fourth Circuit called for a response, which was filed on October 6. Because the law in the Fourth Circuit has not yet been finally determined, the conflict between the panel decision in *Graham* and the decision below does not provide an appropriate basis for granting further review at this time.

b. The decision below does not conflict with any other decision of another circuit. As petitioner acknowledges (Pet. 24-25), the court of appeals' holding is consistent with the Fifth Circuit's decision in *In re Application*, *supra*, in which that court held that cell-phone users lack a reasonable expectation of privacy in the cell-site information that they convey to their cellular-service providers. 724 F.3d at 609-615.

Petitioner asserts (Pet. 21, 24-26) that the Third Circuit's decision in *In re Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d 304 (2010), conflicts with the decision below. But the Third Circuit addressed only the *statutory* standard for obtaining cell-site records under the SCA and held that such records may be acquired without "the traditional probable cause determination" necessary to secure a warrant under the Fourth Amendment. *Id.* at 313. Although the court stated that "it is unlikely that cell phone customers are aware that their cell phone providers collect and store historical location information," *id.* at 317 (emphasis omitted), a factual premise the Fifth and Elev-

enth Circuits have rejected,[7] the court did so only to note the possibility that the government's acquisition of such information could implicate the Fourth Amendment "if it would disclose location information about *the interior of a home*," *ibid.* (emphasis added); see *id.* at 320 (Tashima, J., concurring in the judgment). 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 into conflict with the Fifth and Eleventh Circuits, and the increased experience and sophistication of cell-phone users may prompt the Third Circuit to revisit its empirical assumptions from five years ago if the issue should be squarely presented.[8]

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[7] Pet App. 27a ("[C]ell users know that they must transmit signals to cell towers within range, that the cell tower functions as the equipment that connects the calls, that users when making or receiving calls are necessarily conveying or exposing to their service provider their general location within that cell tower's range, and that cell phone companies make records of cell-tower usage."); *In re Application*, 724 F.3d at 613 ("Cell phone users, therefore, understand that their service providers record their location information when they use their phones at least to the same extent that the landline users in *Smith* understood that the phone company recorded the numbers they dialed.").

[8] Petitioner also contends (Pet. 26-28) 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 on other grounds, *sub nom.*, *Jones*, 132 S. Ct. 945. But that decision 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 continued validity of the principles applied in *Smith*. See *id.* at 561; see also *Reporters*

c. The court of appeals' decision in this case also does not conflict with decisions of state courts of last resort. In support of this claim, petitioner primarily relies (Pet. 22-23, 28) on the Florida Supreme Court's decision in *Tracey* v. *State*, 152 So. 3d 504 (2014), in which that court held that the use of prospective, "*real time* cell site location information" to continuously monitor an individual's movements requires a warrant under the Fourth Amendment. *Id.* at 515, 525-526 (emphasis added). The court made abundantly clear, however, that its holding did not encompass historical cell-site records—the types of records at issue here. See *id.* at 508 (deciding whether "real time cell site location information, *as distinguished from historical location information* derived from cell phone records, require[s] a warrant") (emphasis added); see also *id.* at 515 ("Nor are historical cell site location records at issue here."); *id.* at 516 ("We emphasize * * * that it is not historical cell-site location information that is at issue in this case."); *id.* at 526 ("[T]he use of his cell site location information emanating from his cell

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Comm. for Freedom of Press v. *American Tel. & Tel. Co.*, 593 F.2d 1030, 1043 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979). In his supplemental filing, petitioner also cites the decision in *In re Application for Telephone Information Needed for a Criminal Investigation*, No. 15-XR-90304 (N.D. Cal. July 29, 2015). An asserted conflict with a district-court decision, which has not been reviewed by the court of appeals, does not warrant this Court's review. That is especially true here, where the relevant circuit has recognized and applied the third-party doctrine to digital information. See, *e.g.*, *United States* v. *Forrester*, 512 F.3d 500, 509-511 (9th Cir.) (applying *Smith* to certain information related to email and Internet use that is conveyed to service providers), cert. denied, 555 U.S. 908 (2008).

phone in order to track him *in real time* was a search.") (emphasis added). Thus, the Florida Supreme Court expressly reserved, not decided, the issue resolved below. And accordingly, Florida residents are not "subject to disparate Fourth Amendment protections depending on whether they are investigated by state or federal agents" (Pet. 23) as a result of the decision below.

Petitioner cites (Pet. 23-24) two other decisions in which state courts of last resort required warrants to obtain cell-site records. 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). 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).

3. Even if the Fourth Amendment question that the petition presents warranted this Court's review, this would be an unsuitable vehicle to address it. Like the original panel, the en banc court of appeals held that the district court correctly denied petitioner's suppression motion because the good-faith exception to the exclusionary rule applied. See Pet. App. 43a n.20, 122a-124a. Petitioner therefore would not obtain relief even if this Court were to rule in his favor on the Fourth Amendment question.

Petitioner briefly challenges (Pet. 36-39) the court of appeals' good-faith holding and includes that issue as a second question presented (Pet. i). But petitioner does not contend that the courts of appeals are divided on that question, and the government is not aware of any circuit that has held that government officials may not act in good-faith reliance on a court order issued by a neutral magistrate under the SCA procedures established by Congress. Even the divided panel decision in *Graham*, which ruled against the government on the Fourth Amendment question, held that the good-faith exception applied, explaining that "the government relied on the procedures established in the SCA and on two court orders issued by magistrate judges in accordance with the SCA." 796 F.3d at 362; see *id.* at 361-363. That echoed the analysis of the original panel in this case and the unanimous view of the en banc Eleventh Circuit. See Pet. App. 123a-124a ("Here, the law enforcement officers, the prosecution, and the judicial officer issuing the order, all acted in scrupulous obedience to a federal statute" at a time when "there was no governing authority affecting the constitutionality of this application of the Act."). Because the good-faith question does not implicate any division of authority, and because petitioner could not obtain relief without reversing the court of appeals' good-faith holding, this case is not a suitable vehicle to take up the Fourth Amendment issue.

Moreover, the conclusion of the en banc court of appeals, the original panel, and the Fourth Circuit panel in *Graham* was clearly correct. 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 errors of judges and

magistrates." *United States* v. *Leon*, 468 U.S. 897 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.*

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 342, 349. 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. Moreover, at the time the records were acquired in this case, 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.").

Petitioner distinguishes *Krull* (Pet. 37-38) on the ground that in this case, a prosecutor, not a police officer, sought the SCA order. But petitioner cites no holding of this Court drawing that distinction. And the reasoning of *Krull*—that "[u]nless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law," 480 U.S. at 349-350—applies equally to prosecutors, at least where no binding judicial precedent establishes that the statute is unconstitutional. This is especially true here, where petitioner's Fourth Amendment theory relies on a novel repudiation of the settled principles that this Court applied in *Miller* and *Smith*. As in *Davis*, penalizing prosecutors for relying on those settled principles would not serve the deterrent purposes of the exclusionary rule. As the Court explained in *Krull*, "[t]here is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to [a] statute prior to the declaration of its invalidity will act as a significant, additional deterrent." *Id.* at 352.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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