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NOVEL DATA TYPES

Chapter One: Handling Mobile Data in Ediscovery

Key Case Law Rulings for Mobile Data in Ediscovery

Each year, important case law rulings come down involving mobile device discovery. Nine notable decisions are instructive for legal professionals tasked with discovery of mobile data.

Criminal Cases

- Riley v. California (U.S. June 25, 2014)
- Carpenter v. U.S. (U.S. June 22, 2018)
- U.S. v. Sam (W.D. Wash. May 18, 2020)

Civil Cases

- Calderon v. Corporacion Puertorriqueña de Salud (D.P.R. January 16, 2014)
- Lawrence v. City of New York, et al. (S.D.N.Y. July 27, 2018)
- Measured Wealth Private Client Grp. v. Foster, et al. (S.D. Fla. March 31, 2021)
- Sandoz, Inc. v. United Therapeutics Corp. (D.N.J. June 16, 2021)
- Rossbach v. Montefiore Med. Ctr. (S.D.N.Y. August 5, 2021)
- In re Pork Antitrust Litig. (D. Minn. March 31, 2022)

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RILEY *v.* CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

No. 13–132. Argued April 29, 2014—Decided June 25, 2014*

In No. 13–132, petitioner Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos that the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership. Riley moved to suppress all evidence that the police had obtained from his cell phone. The trial court denied the motion, and Riley was convicted. The California Court of Appeal affirmed.

In No. 13–212, respondent Wurie was arrested after police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone from Wurie's person and noticed that the phone was receiving multiple calls from a source identified as "my house" on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the "my house" label, and traced that number to what they suspected was Wurie's apartment. They secured a search warrant and found drugs, a firearm and ammunition, and cash in the ensuing search. Wurie was then charged with drug and firearm offenses. He moved to suppress the evidence obtained from the search of the apartment. The District Court denied the motion, and Wurie was convicted. The

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*Together with No. 13–212, *United States* v. *Wurie,* on certiorari to the United States Court of Appeals for the First Circuit.

First Circuit reversed the denial of the motion to suppress and vacated the relevant convictions.

Held: The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. Pp. 5–28.

(a) A warrantless search is reasonable only if it falls within a specific exception to the Fourth Amendment's warrant requirement. See *Kentucky* v. *King*, 563 U. S. ___, ___. The well-established exception at issue here applies when a warrantless search is conducted incident to a lawful arrest.

Three related precedents govern the extent to which officers may search property found on or near an arrestee. *Chimel* v. *California*, 395 U. S. 752, requires that a search incident to arrest be limited to the area within the arrestee's immediate control, where it is justified by the interests in officer safety and in preventing evidence destruction. In *United States* v. *Robinson*, 414 U. S. 218, the Court applied the *Chimel* analysis to a search of a cigarette pack found on the arrestee's person. It held that the risks identified in *Chimel* are present in all custodial arrests, 414 U. S., at 235, even when there is no specific concern about the loss of evidence or the threat to officers in a particular case, *id.,* at 236. The trilogy concludes with *Arizona* v. *Gant*, 556 U. S. 332, which permits searches of a car where the arrestee is unsecured and within reaching distance of the passenger compartment, or where it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle, *id.,* at 343. Pp. 5–8.

(b) The Court declines to extend *Robinson*'s categorical rule to searches of data stored on cell phones. Absent more precise guidance from the founding era, the Court generally determines whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming* v. *Houghton*, 526 U. S. 295, 300. That balance of interests supported the search incident to arrest exception in *Robinson*. But a search of digital information on a cell phone does not further the government interests identified in *Chimel*, and implicates substantially greater individual privacy interests than a brief physical search. Pp. 8–22.

(1) The digital data stored on cell phones does not present either *Chimel* risk. Pp. 10–15.

(i) Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Officers may examine the phone's physical aspects to ensure that it will not be used as a weapon, but the data on the phone can endanger no one. To the extent that a search of cell phone data

might warn officers of an impending danger, *e.g.,* that the arrestee's confederates are headed to the scene, such a concern is better addressed through consideration of case-specific exceptions to the warrant requirement, such as exigent circumstances. See, *e.g., Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 298–299. Pp. 10–12.

(ii) The United States and California raise concerns about the destruction of evidence, arguing that, even if the cell phone is physically secure, information on the cell phone remains vulnerable to remote wiping and data encryption. As an initial matter, those broad concerns are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. The briefing also gives little indication that either problem is prevalent or that the opportunity to perform a search incident to arrest would be an effective solution. And, at least as to remote wiping, law enforcement currently has some technologies of its own for combatting the loss of evidence. Finally, law enforcement's remaining concerns in a particular case might be addressed by responding in a targeted manner to urgent threats of remote wiping, see *Missouri* v. *McNeely*, 569 U. S. ___, ___, or by taking action to disable a phone's locking mechanism in order to secure the scene, see *Illinois* v. *McArthur*, 531 U. S. 326, 331–333. Pp. 12–15.

(2) A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but more substantial privacy interests are at stake when digital data is involved. Pp. 15–22.

(i) Cell phones differ in both a quantitative and a qualitative sense from other objects that might be carried on an arrestee's person. Notably, modern cell phones have an immense storage capacity. Before cell phones, a search of a person was limited by physical realities and generally constituted only a narrow intrusion on privacy. But cell phones can store millions of pages of text, thousands of pictures, or hundreds of videos. This has several interrelated privacy consequences. First, a cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record. Second, the phone's capacity allows even just one type of information to convey far more than previously possible. Third, data on the phone can date back for years. In addition, an element of pervasiveness characterizes cell phones but not physical records. A decade ago officers might have occasionally stumbled across a highly personal item such as a diary, but today many of the more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives. Pp. 17–21.

(ii) The scope of the privacy interests at stake is further complicated by the fact that the data viewed on many modern cell phones may in fact be stored on a remote server. Thus, a search may extend well beyond papers and effects in the physical proximity of an arrestee, a concern that the United States recognizes but cannot definitively foreclose. Pp. 21–22.

(c) Fallback options offered by the United States and California are flawed and contravene this Court's general preference to provide clear guidance to law enforcement through categorical rules. See *Michigan* v. *Summers*, 452 U. S. 692, 705, n. 19. One possible rule is to import the *Gant* standard from the vehicle context and allow a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest. That proposal is not appropriate in this context, and would prove no practical limit at all when it comes to cell phone searches. Another possible rule is to restrict the scope of a cell phone search to information relevant to the crime, the arrestee's identity, or officer safety. That proposal would again impose few meaningful constraints on officers. Finally, California suggests an analogue rule, under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart. That proposal would allow law enforcement to search a broad range of items contained on a phone even though people would be unlikely to carry such a variety of information in physical form, and would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records. Pp. 22–25.

(d) It is true that this decision will have some impact on the ability of law enforcement to combat crime. But the Court's holding is not that the information on a cell phone is immune from search; it is that a warrant is generally required before a search. The warrant requirement is an important component of the Court's Fourth Amendment jurisprudence, and warrants may be obtained with increasing efficiency. In addition, although the search incident to arrest exception does not apply to cell phones, the continued availability of the exigent circumstances exception may give law enforcement a justification for a warrantless search in particular cases. Pp. 25–27.

No. 13–132, reversed and remanded; No. 13–212, 728 F. 3d 1, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 13–132 and 13–212

DAVID LEON RILEY, PETITIONER
13–132 *v.*
CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

UNITED STATES, PETITIONER
13–212 *v.*
BRIMA WURIE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 25, 2014]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

These two cases raise a common question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

I

A

In the first case, petitioner David Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley's license had been suspended. The officer impounded Riley's car, pursuant to department policy, and another

officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car's hood. See Cal. Penal Code Ann. §§12025(a)(1), 12031(a)(1) (West 2009).

An officer searched Riley incident to the arrest and found items associated with the "Bloods" street gang. He also seized a cell phone from Riley's pants pocket. According to Riley's uncontradicted assertion, the phone was a "smart phone," a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity. The officer accessed information on the phone and noticed that some words (presumably in text messages or a contacts list) were preceded by the letters "CK"—a label that, he believed, stood for "Crip Killers," a slang term for members of the Bloods gang.

At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective testified that he "went through" Riley's phone "looking for evidence, because . . . gang members will often video themselves with guns or take pictures of themselves with the guns." App. in No. 13–132, p. 20. Although there was "a lot of stuff" on the phone, particular files that "caught [the detective's] eye" included videos of young men sparring while someone yelled encouragement using the moniker "Blood." *Id.,* at 11–13. The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier.

Riley was ultimately charged, in connection with that earlier shooting, with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder. The State alleged that Riley had committed those crimes for the benefit of a criminal street gang, an aggravating factor that carries an enhanced sentence. Compare Cal.

Penal Code Ann. §246 (2008) with §186.22(b)(4)(B) (2014). Prior to trial, Riley moved to suppress all evidence that the police had obtained from his cell phone. He contended that the searches of his phone violated the Fourth Amendment, because they had been performed without a warrant and were not otherwise justified by exigent circumstances. The trial court rejected that argument. App. in No. 13–132, at 24, 26. At Riley's trial, police officers testified about the photographs and videos found on the phone, and some of the photographs were admitted into evidence. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison.

The California Court of Appeal affirmed. No. D059840 (Cal. App., Feb. 8, 2013), App. to Pet. for Cert. in No. 13–132, pp. 1a–23a. The court relied on the California Supreme Court's decision in *People* v. *Diaz*, 51 Cal. 4th 84, 244 P. 3d 501 (2011), which held that the Fourth Amendment permits a warrantless search of cell phone data incident to an arrest, so long as the cell phone was immediately associated with the arrestee's person. See *id.,* at 93, 244 P. 3d, at 505–506.

The California Supreme Court denied Riley's petition for review, App. to Pet. for Cert. in No. 13–132, at 24a, and we granted certiorari, 571 U. S. ___ (2014).

B

In the second case, a police officer performing routine surveillance observed respondent Brima Wurie make an apparent drug sale from a car. Officers subsequently arrested Wurie and took him to the police station. At the station, the officers seized two cell phones from Wurie's person. The one at issue here was a "flip phone," a kind of phone that is flipped open for use and that generally has a smaller range of features than a smart phone. Five to ten minutes after arriving at the station, the officers noticed that the phone was repeatedly receiving calls from a

source identified as "my house" on the phone's external screen. A few minutes later, they opened the phone and saw a photograph of a woman and a baby set as the phone's wallpaper. They pressed one button on the phone to access its call log, then another button to determine the phone number associated with the "my house" label. They next used an online phone directory to trace that phone number to an apartment building.

When the officers went to the building, they saw Wurie's name on a mailbox and observed through a window a woman who resembled the woman in the photograph on Wurie's phone. They secured the apartment while obtaining a search warrant and, upon later executing the warrant, found and seized 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash.

Wurie was charged with distributing crack cocaine, possessing crack cocaine with intent to distribute, and being a felon in possession of a firearm and ammunition. See 18 U. S. C. §922(g); 21 U. S. C. §841(a). He moved to suppress the evidence obtained from the search of the apartment, arguing that it was the fruit of an unconstitutional search of his cell phone. The District Court denied the motion. 612 F. Supp. 2d 104 (Mass. 2009). Wurie was convicted on all three counts and sentenced to 262 months in prison.

A divided panel of the First Circuit reversed the denial of Wurie's motion to suppress and vacated Wurie's convictions for possession with intent to distribute and possession of a firearm as a felon. 728 F. 3d 1 (2013). The court held that cell phones are distinct from other physical possessions that may be searched incident to arrest without a warrant, because of the amount of personal data cell phones contain and the negligible threat they pose to law enforcement interests. See *id.,* at 8–11.

We granted certiorari. 571 U. S. ___ (2014).

II

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As the text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006). Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 653 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See *Kentucky* v. *King*, 563 U. S. ___, ___ (2011) (slip op., at 5–6).

The two cases before us concern the reasonableness of a warrantless search incident to a lawful arrest. In 1914, this Court first acknowledged in dictum "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Weeks* v. *United States*, 232 U. S. 383, 392. Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement. Indeed, the label "exception" is something of a

misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant. See 3 W. LaFave, Search and Seizure §5.2(b), p. 132, and n. 15 (5th ed. 2012).

Although the existence of the exception for such searches has been recognized for a century, its scope has been debated for nearly as long. See *Arizona* v. *Gant*, 556 U. S. 332, 350 (2009) (noting the exception's "checkered history"). That debate has focused on the extent to which officers may search property found on or near the arrestee. Three related precedents set forth the rules governing such searches:

The first, *Chimel* v. *California*, 395 U. S. 752 (1969), laid the groundwork for most of the existing search incident to arrest doctrine. Police officers in that case arrested Chimel inside his home and proceeded to search his entire three-bedroom house, including the attic and garage. In particular rooms, they also looked through the contents of drawers. *Id.,* at 753–754.

The Court crafted the following rule for assessing the reasonableness of a search incident to arrest:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. . . . There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a

weapon or destructible evidence." *Id.,* at 762–763.

The extensive warrantless search of Chimel's home did not fit within this exception, because it was not needed to protect officer safety or to preserve evidence. *Id.,* at 763, 768.

Four years later, in *United States* v. *Robinson*, 414 U. S. 218 (1973), the Court applied the *Chimel* analysis in the context of a search of the arrestee's person. A police officer had arrested Robinson for driving with a revoked license. The officer conducted a patdown search and felt an object that he could not identify in Robinson's coat pocket. He removed the object, which turned out to be a crumpled cigarette package, and opened it. Inside were 14 capsules of heroin. *Id.,* at 220, 223.

The Court of Appeals concluded that the search was unreasonable because Robinson was unlikely to have evidence of the crime of arrest on his person, and because it believed that extracting the cigarette package and opening it could not be justified as part of a protective search for weapons. This Court reversed, rejecting the notion that "case-by-case adjudication" was required to determine "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Id.,* at 235. As the Court explained, "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Ibid.* Instead, a "custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Ibid.*

The Court thus concluded that the search of Robinson

was reasonable even though there was no concern about the loss of evidence, and the arresting officer had no specific concern that Robinson might be armed. *Id.,* at 236. In doing so, the Court did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search. It merely noted that, "[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it." *Ibid.* A few years later, the Court clarified that this exception was limited to "personal property . . . immediately associated with the person of the arrestee." *United States* v. *Chadwick*, 433 U. S. 1, 15 (1977) (200-pound, locked footlocker could not be searched incident to arrest), abrogated on other grounds by *California* v. *Acevedo*, 500 U. S. 565 (1991).

The search incident to arrest trilogy concludes with *Gant*, which analyzed searches of an arrestee's vehicle. *Gant*, like *Robinson*, recognized that the *Chimel* concerns for officer safety and evidence preservation underlie the search incident to arrest exception. See 556 U. S., at 338. As a result, the Court concluded that *Chimel* could authorize police to search a vehicle "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." 556 U. S., at 343. *Gant* added, however, an independent exception for a warrantless search of a vehicle's passenger compartment "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Ibid.* (quoting *Thornton* v. *United States*, 541 U. S. 615, 632 (2004) (SCALIA, J., concurring in judgment)). That exception stems not from *Chimel*, the Court explained, but from "circumstances unique to the vehicle context." 556 U. S., at 343.

III

These cases require us to decide how the search incident

to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones. See A. Smith, Pew Research Center, Smartphone Ownership—2013 Update (June 5, 2013). Even less sophisticated phones like Wurie's, which have already faded in popularity since Wurie was arrested in 2007, have been around for less than 15 years. Both phones are based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided.

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming* v. *Houghton*, 526 U. S. 295, 300 (1999). Such a balancing of interests supported the search incident to arrest exception in *Robinson*, and a mechanical application of *Robinson* might well support the warrantless searches at issue here.

But while *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of

individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.

A

We first consider each *Chimel* concern in turn. In doing so, we do not overlook *Robinson*'s admonition that searches of a person incident to arrest, "while based upon the need to disarm and to discover evidence," are reasonable regardless of "the probability in a particular arrest situation that weapons or evidence would in fact be found." 414 U. S., at 235. Rather than requiring the "case-by-case adjudication" that *Robinson* rejected, *ibid.*, we ask instead whether application of the search incident to arrest doctrine to this particular category of effects would "untether the rule from the justifications underlying the *Chimel* exception," *Gant*, *supra*, at 343. See also *Knowles* v. *Iowa*, 525 U. S. 113, 119 (1998) (declining to extend *Robinson* to the issuance of citations, "a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all").

1

Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data

on the phone can endanger no one.

Perhaps the same might have been said of the cigarette pack seized from Robinson's pocket. Once an officer gained control of the pack, it was unlikely that Robinson could have accessed the pack's contents. But unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest. The officer in *Robinson* testified that he could not identify the objects in the cigarette pack but knew they were not cigarettes. See 414 U. S., at 223, 236, n. 7. Given that, a further search was a reasonable protective measure. No such unknowns exist with respect to digital data. As the First Circuit explained, the officers who searched Wurie's cell phone "knew exactly what they would find therein: data. They also knew that the data could not harm them." 728 F. 3d, at 10.

The United States and California both suggest that a search of cell phone data might help ensure officer safety in more indirect ways, for example by alerting officers that confederates of the arrestee are headed to the scene. There is undoubtedly a strong government interest in warning officers about such possibilities, but neither the United States nor California offers evidence to suggest that their concerns are based on actual experience. The proposed consideration would also represent a broadening of *Chimel*'s concern that an *arrestee himself* might grab a weapon and use it against an officer "to resist arrest or effect his escape." 395 U. S., at 763. And any such threats from outside the arrest scene do not "lurk[] in all custodial arrests." *Chadwick*, 433 U. S., at 14–15. Accordingly, the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board. To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for

exigent circumstances. See, *e.g., Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 298–299 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

2

The United States and California focus primarily on the second *Chimel* rationale: preventing the destruction of evidence.

Both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. See Brief for Petitioner in No. 13–132, p. 20; Brief for Respondent in No. 13–212, p. 41. That is a sensible concession. See *Illinois* v. *McArthur*, 531 U. S. 326, 331–333 (2001); *Chadwick*, *supra*, at 13, and n. 8. And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

The United States and California argue that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called "geofencing"). See Dept. of Commerce, National Institute of Standards and Technology, R. Ayers, S. Brothers, & W. Jansen, Guidelines on Mobile Device Forensics (Draft) 29, 31 (SP 800–101 Rev. 1, Sept. 2013) (hereinafter Ayers). Encryption is a security feature that some modern cell phones use in addition to password protection. When such phones lock, data becomes protected by sophisticated encryption that

renders a phone all but "unbreakable" unless police know the password. Brief for United States as *Amicus Curiae* in No. 13–132, p. 11.

As an initial matter, these broader concerns about the loss of evidence are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. See 395 U. S., at 763–764. With respect to remote wiping, the Government's primary concern turns on the actions of third parties who are not present at the scene of arrest. And data encryption is even further afield. There, the Government focuses on the ordinary operation of a phone's security features, apart from *any* active attempt by a defendant or his associates to conceal or destroy evidence upon arrest.

We have also been given little reason to believe that either problem is prevalent. The briefing reveals only a couple of anecdotal examples of remote wiping triggered by an arrest. See Brief for Association of State Criminal Investigative Agencies et al. as *Amici Curiae* in No. 13–132, pp. 9–10; see also Tr. of Oral Arg. in No. 13–132, p. 48. Similarly, the opportunities for officers to search a password-protected phone before data becomes encrypted are quite limited. Law enforcement officers are very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity. See, *e.g.,* iPhone User Guide for iOS 7.1 Software 10 (2014) (default lock after about one minute). This may explain why the encryption argument was not made until the merits stage in this Court, and has never been considered by the Courts of Appeals.

Moreover, in situations in which an arrest might trigger a remote-wipe attempt or an officer discovers an unlocked phone, it is not clear that the ability to conduct a warrantless search would make much of a difference. The need to effect the arrest, secure the scene, and tend to other press-

ing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away. See Tr. of Oral Arg. in No. 13–132, at 50; see also Brief for United States as *Amicus Curiae* in No. 13–132, at 19. Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed, which might be at the station house hours later. Likewise, an officer who seizes a phone in an unlocked state might not be able to begin his search in the short time remaining before the phone locks and data becomes encrypted.

In any event, as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. See Ayers 30–31. Such devices are commonly called "Faraday bags," after the English scientist Michael Faraday. They are essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use. See Brief for Criminal Law Professors as *Amici Curiae* 9. They may not be a complete answer to the problem, see Ayers 32, but at least for now they provide a reasonable response. In fact, a number of law enforcement agencies around the country already encourage the use of Faraday bags. See, *e.g.,* Dept. of Justice, National Institute of Justice, Electronic Crime Scene Investigation: A Guide for First Responders 14, 32 (2d ed. Apr. 2008); Brief for Criminal Law Professors as *Amici Curiae* 4–6.

To the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address

those concerns. If "the police are truly confronted with a 'now or never' situation,"—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately. *Missouri* v. *McNeely*, 569 U. S. ___, ___ (2013) (slip op., at 10) (quoting *Roaden* v. *Kentucky*, 413 U. S. 496, 505 (1973); some internal quotation marks omitted). Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data. See App. to Reply Brief in No. 13–132, p. 3a (diagramming the few necessary steps). Such a preventive measure could be analyzed under the principles set forth in our decision in *McArthur*, 531 U. S. 326, which approved officers' reasonable steps to secure a scene to preserve evidence while they awaited a warrant. See *id.,* at 331–333.

B

The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody. *Robinson* focused primarily on the first of those rationales. But it also quoted with approval then-Judge Cardozo's account of the historical basis for the search incident to arrest exception: "Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion." 414 U. S., at 232 (quoting *People* v. *Chiagles*, 237 N. Y. 193, 197, 142 N. E. 583, 584 (1923)); see also 414 U. S., at 237 (Powell, J., concurring) ("an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person"). Put simply, a patdown of Robinson's cloth-

ing and an inspection of the cigarette pack found in his pocket constituted only minor additional intrusions compared to the substantial government authority exercised in taking Robinson into custody. See *Chadwick*, 433 U. S., at 16, n. 10 (searches of a person are justified in part by "reduced expectations of privacy caused by the arrest").

The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search "is acceptable solely because a person is in custody." *Maryland* v. *King*, 569 U. S. ___, ___ (2013) (slip op., at 26). To the contrary, when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Ibid.* One such example, of course, is *Chimel*. *Chimel* refused to "characteriz[e] the invasion of privacy that results from a top-to-bottom search of a man's house as 'minor.'" 395 U. S., at 766–767, n. 12. Because a search of the arrestee's entire house was a substantial invasion beyond the arrest itself, the Court concluded that a warrant was required.

Robinson is the only decision from this Court applying *Chimel* to a search of the contents of an item found on an arrestee's person. In an earlier case, this Court had approved a search of a zipper bag carried by an arrestee, but the Court analyzed only the validity of the arrest itself. See *Draper* v. *United States*, 358 U. S. 307, 310–311 (1959). Lower courts applying *Robinson* and *Chimel*, however, have approved searches of a variety of personal items carried by an arrestee. See, *e.g., United States* v. *Carrion*, 809 F. 2d 1120, 1123, 1128 (CA5 1987) (billfold and address book); *United States* v. *Watson*, 669 F. 2d 1374, 1383–1384 (CA11 1982) (wallet); *United States* v. *Lee*, 501 F. 2d 890, 892 (CADC 1974) (purse).

The United States asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches of these sorts of physical items. Brief for

United States in No. 13–212, p. 26. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

1

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. See Kerr, Foreword: Accounting for Technological Change, 36 Harv. J. L. & Pub. Pol'y 403, 404–405 (2013). Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick*, *supra*, rather than a container the size of the cigarette package in *Robinson*.

But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. See Kerr, *supra*, at 404; Brief for Center for Democracy & Technology et al. as *Amici Curiae* 7–8. Cell phones couple that capacity with the ability to store many different types of information: Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on. See *id.,* at 30; *United States* v. *Flores-Lopez*, 670 F. 3d 803, 806 (CA7 2012). We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.[1]

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[1] Because the United States and California agree that these cases involve *searches* incident to arrest, these cases do not implicate the

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. See Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013). A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. See, *e.g., United States* v. *Frankenberry*, 387 F. 2d 337 (CA2 1967) (*per curiam*). But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. See *Ontario* v. *Quon*, 560 U. S. 746, 760 (2010). Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a stand-

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question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.

ard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. See *United States* v. *Jones*, 565 U. S. ___, ___ (2012) (SOTOMAYOR, J., concurring) (slip op., at 3) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life. See Brief for Electronic Privacy Information Center as *Amicus Curiae* in No. 13–132, p. 9.

In 1926, Learned Hand observed (in an opinion later quoted in *Chimel*) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." *United States* v. *Kirschenblatt*, 16 F. 2d 202, 203 (CA2). If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previ-

ously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

2

To further complicate the scope of the privacy interests at stake, the data a user views on many modern cell phones may not in fact be stored on the device itself. Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter. See *New York* v. *Belton*, 453 U. S. 454, 460, n. 4 (1981) (describing a "container" as "any object capable of holding another object"). But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen. That is what cell phones, with increasing frequency, are designed to do by taking advantage of "cloud computing." Cloud computing is the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself. Cell phone users often may not know whether particular information is stored on the device or in the cloud, and it generally makes little difference. See Brief for Electronic Privacy Information Center in No. 13–132, at 12–14, 20. Moreover, the same type of data may be stored locally on the device for one user and in the cloud for another.

The United States concedes that the search incident to arrest exception may not be stretched to cover a search of files accessed remotely—that is, a search of files stored in the cloud. See Brief for United States in No. 13–212, at 43–44. Such a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house. But officers searching a phone's data would not typically know whether the information they are viewing was stored locally at the time of the arrest or has been pulled from the cloud.

Although the Government recognizes the problem, its proposed solutions are unclear. It suggests that officers could disconnect a phone from the network before searching the device—the very solution whose feasibility it contested with respect to the threat of remote wiping. Compare Tr. of Oral Arg. in No. 13–132, at 50–51, with Tr. of Oral Arg. in No. 13–212, pp. 13–14. Alternatively, the Government proposes that law enforcement agencies "develop protocols to address" concerns raised by cloud computing. Reply Brief in No. 13–212, pp. 14–15. Probably a good idea, but the Founders did not fight a revolution to gain the right to government agency protocols. The possibility that a search might extend well beyond papers and effects in the physical proximity of an arrestee is yet another reason that the privacy interests here dwarf those in *Robinson*.

C

Apart from their arguments for a direct extension of *Robinson*, the United States and California offer various fallback options for permitting warrantless cell phone searches under certain circumstances. Each of the proposals is flawed and contravenes our general preference to provide clear guidance to law enforcement through categorical rules. "[I]f police are to have workable rules, the balancing of the competing interests . . . 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'" *Michigan* v. *Summers*, 452 U. S. 692, 705, n. 19 (1981) (quoting *Dunaway* v. *New York*, 442 U. S. 200, 219–220 (1979) (White, J., concurring)).

The United States first proposes that the *Gant* standard be imported from the vehicle context, allowing a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest. But *Gant* relied on "circumstances unique

to the vehicle context" to endorse a search solely for the purpose of gathering evidence. 556 U. S., at 343. JUSTICE SCALIA's *Thornton* opinion, on which *Gant* was based, explained that those unique circumstances are "a reduced expectation of privacy" and "heightened law enforcement needs" when it comes to motor vehicles. 541 U. S., at 631; see also *Wyoming* v. *Houghton*, 526 U. S., at 303–304. For reasons that we have explained, cell phone searches bear neither of those characteristics.

At any rate, a *Gant* standard would prove no practical limit at all when it comes to cell phone searches. In the vehicle context, *Gant* generally protects against searches for evidence of past crimes. See 3 W. LaFave, Search and Seizure §7.1(d), at 709, and n. 191. In the cell phone context, however, it is reasonable to expect that incriminating information will be found on a phone regardless of when the crime occurred. Similarly, in the vehicle context *Gant* restricts broad searches resulting from minor crimes such as traffic violations. See *id.,* §7.1(d), at 713, and n. 204. That would not necessarily be true for cell phones. It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone. Even an individual pulled over for something as basic as speeding might well have locational data dispositive of guilt on his phone. An individual pulled over for reckless driving might have evidence on the phone that shows whether he was texting while driving. The sources of potential pertinent information are virtually unlimited, so applying the *Gant* standard to cell phones would in effect give "police officers unbridled discretion to rummage at will among a person's private effects." 556 U. S., at 345.

The United States also proposes a rule that would restrict the scope of a cell phone search to those areas of the phone where an officer reasonably believes that infor-

mation relevant to the crime, the arrestee's identity, or officer safety will be discovered. See Brief for United States in No. 13–212, at 51–53. This approach would again impose few meaningful constraints on officers. The proposed categories would sweep in a great deal of information, and officers would not always be able to discern in advance what information would be found where.

We also reject the United States' final suggestion that officers should always be able to search a phone's call log, as they did in Wurie's case. The Government relies on *Smith* v. *Maryland*, 442 U. S. 735 (1979), which held that no warrant was required to use a pen register at telephone company premises to identify numbers dialed by a particular caller. The Court in that case, however, concluded that the use of a pen register was not a "search" at all under the Fourth Amendment. See *id.,* at 745–746. There is no dispute here that the officers engaged in a search of Wurie's cell phone. Moreover, call logs typically contain more than just phone numbers; they include any identifying information that an individual might add, such as the label "my house" in Wurie's case.

Finally, at oral argument California suggested a different limiting principle, under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart. See Tr. of Oral Arg. in No. 13–132, at 38–43; see also *Flores-Lopez*, 670 F. 3d, at 807 ("If police are entitled to open a pocket diary to copy the owner's address, they should be entitled to turn on a cell phone to learn its number."). But the fact that a search in the pre-digital era could have turned up a photograph or two in a wallet does not justify a search of thousands of photos in a digital gallery. The fact that someone could have tucked a paper bank statement in a pocket does not justify a search of every bank statement from the last five years. And to make matters worse, such an analogue test would allow law enforcement to search a

range of items contained on a phone, even though people would be unlikely to carry such a variety of information in physical form. In Riley's case, for example, it is implausible that he would have strolled around with video tapes, photo albums, and an address book all crammed into his pockets. But because each of those items has a pre-digital analogue, police under California's proposal would be able to search a phone for all of those items—a significant diminution of privacy.

In addition, an analogue test would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records. Is an e-mail equivalent to a letter? Is a voicemail equivalent to a phone message slip? It is not clear how officers could make these kinds of decisions before conducting a search, or how courts would apply the proposed rule after the fact. An analogue test would "keep defendants and judges guessing for years to come." *Sykes* v. *United States*, 564 U. S. 1, ___ (2011) (SCALIA, J., dissenting) (slip op., at 7) (discussing the Court's analogue test under the Armed Career Criminal Act).

IV

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our machinery of gov-

ernment," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 481 (1971). Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient. See *McNeely*, 569 U. S., at ___ (slip op., at 11–12); *id.,* at ___ (ROBERTS, C. J., concurring in part and dissenting in part) (slip op., at 8) (describing jurisdiction where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes").

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky* v. *King*, 563 U. S., at ___ (slip op., at 6) (quoting *Mincey* v. *Arizona,* 437 U. S. 385, 394 (1978)). Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury. 563 U. S., at ___. In *Chadwick*, for example, the Court held that the exception for searches incident to arrest did not justify a search of the trunk at issue, but noted that "if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage." 433 U. S., at 15, n. 9.

In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect

texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone. The defendants here recognize—indeed, they stress—that such fact-specific threats may justify a warrantless search of cell phone data. See Reply Brief in No. 13–132, at 8–9; Brief for Respondent in No. 13–212, at 30, 41. The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case. See *McNeely*, *supra*, at ___ (slip op., at 6).[2]

* * *

Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself. In 1761, the patriot James Otis delivered a speech in Boston denouncing the use of writs of assistance. A young John Adams was there, and he would later write that "[e]very man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance." 10 Works of John Adams 247–248 (C. Adams ed. 1856). According to Adams, Otis's speech was "the first scene of the first act of

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[2] In Wurie's case, for example, the dissenting First Circuit judge argued that exigent circumstances could have justified a search of Wurie's phone. See 728 F. 3d 1, 17 (2013) (opinion of Howard, J.) (discussing the repeated unanswered calls from "my house," the suspected location of a drug stash). But the majority concluded that the Government had not made an exigent circumstances argument. See *id.,* at 1. The Government acknowledges the same in this Court. See Brief for United States in No. 13–212, p. 28, n. 8.

opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Id.,* at 248 (quoted in *Boyd* v. *United States*, 116 U. S. 616, 625 (1886)).

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," *Boyd*, *supra*, at 630. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

We reverse the judgment of the California Court of Appeal in No. 13–132 and remand the case for further proceedings not inconsistent with this opinion. We affirm the judgment of the First Circuit in No. 13–212.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 13–132 and 13–212

DAVID LEON RILEY, PETITIONER
13–132 *v.*
CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

UNITED STATES, PETITIONER
13–212 *v.*
BRIMA WURIE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 25, 2014]

JUSTICE ALITO, concurring in part and concurring in the judgment.

I agree with the Court that law enforcement officers, in conducting a lawful search incident to arrest, must generally obtain a warrant before searching information stored or accessible on a cell phone. I write separately to address two points.

I

A

First, I am not convinced at this time that the ancient rule on searches incident to arrest is based exclusively (or even primarily) on the need to protect the safety of arresting officers and the need to prevent the destruction of evidence. Cf. *ante*, at 9. This rule antedates the adoption of the Fourth Amendment by at least a century. See T. Clancy, The Fourth Amendment: Its History and Interpretation 340 (2008); T. Taylor, Two Studies in Constitutional

Interpretation 28 (1969); Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 764 (1994). In *Weeks* v. *United States*, 232 U. S. 383, 392 (1914), we held that the Fourth Amendment did not disturb this rule. See also Taylor, *supra*, at 45; Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L. J. 393, 401 (1995) ("The power to search incident to arrest—a search of the arrested suspect's person . . .—was well established in the mid-eighteenth century, and nothing in . . . the Fourth Amendment changed that"). And neither in *Weeks* nor in any of the authorities discussing the old common-law rule have I found any suggestion that it was based exclusively or primarily on the need to protect arresting officers or to prevent the destruction of evidence.

On the contrary, when pre-*Weeks* authorities discussed the basis for the rule, what was mentioned was the need to obtain probative evidence. For example, an 1839 case stated that "it is clear, and beyond doubt, that . . . constables . . . are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime." See *Dillon* v. *O'Brien*, 16 Cox Crim. Cas. 245, 249–251 (1887) (citing *Regina*, v. *Frost*, 9 Car. & P. 129, 173 Eng. Rep. 771)). The court noted that the origins of that rule "deriv[e] from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law." 16 Cox Crim. Cas., at 249–250. See also *Holker* v. *Hennessey*, 141 Mo. 527, 537–540, 42 S. W. 1090, 1093 (1897).

Two 19th-century treatises that this Court has previously cited in connection with the origin of the search-incident-to-arrest rule, see *Weeks*, *supra*, at 392, suggest the same rationale. See F. Wharton, Criminal Pleading and Practice §60, p. 45 (8th ed. 1880) ("Those arresting a

defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged"); J. Bishop, Criminal Procedure §§210–212, p. 127 (2d ed. 1872) (if an arresting officer finds "about the prisoner's person, or otherwise in his possession, either goods or moneys which there is reason to believe are connected with the supposed crime as its fruits, or as the instruments with which it was committed, or as directly furnishing evidence relating to the transaction, he may take the same, and hold them to be disposed of as the court may direct").

What ultimately convinces me that the rule is not closely linked to the need for officer safety and evidence preservation is that these rationales fail to explain the rule's well-recognized scope. It has long been accepted that written items found on the person of an arrestee may be examined and used at trial.* But once these items are

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*Cf. *Hill* v. *California*, 401 U. S. 797, 799–802, and n. 1 (1971) (diary); *Marron* v. *United States*, 275 U. S. 192, 193, 198–199 (1927) (ledger and bills); *Gouled* v. *United States*, 255 U. S. 298, 309 (1921), overruled on other grounds, *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 300–301 (1967) (papers); see *United States* v. *Rodriguez*, 995 F. 2d 776, 778 (CA7 1993) (address book); *United States* v. *Armendariz–Mata*, 949 F. 2d 151, 153 (CA5 1991) (notebook); *United States* v. *Molinaro*, 877 F. 2d 1341 (CA7 1989) (wallet); *United States* v. *Richardson*, 764 F. 2d 1514, 1527 (CA11 1985) (wallet and papers); *United States* v. *Watson*, 669 F. 2d 1374, 1383–1384 (CA11 1982) (documents found in a wallet); *United States* v. *Castro*, 596 F. 2d 674, 677 (CA5 1979), cert. denied, 444 U. S. 963 (1979) (paper found in a pocket); *United States* v. *Jeffers*, 520 F. 2d 1256, 1267–1268 (CA7 1975) (three notebooks and meeting minutes); *Bozel* v. *Hudspeth*, 126 F. 2d 585, 587 (CA10 1942) (papers, circulars, advertising matter, "memoranda containing various names and addresses"); *United States* v. *Park Avenue Pharmacy*, 56 F. 2d 753, 755 (CA2 1932) ("numerous prescriptions blanks" and a check book). See also 3 W. LaFave, Search and Seizure §5.2(c), p. 144 (5th ed. 2012) ("Lower courts, in applying Robinson, have deemed evidentiary searches of an arrested person to be virtually unlimited"); W. Cuddihy, Fourth Amendment: Origins and Original Meaning 847–848 (1990) (in the pre-Constitution colonial era, "[a]nyone arrested could expect that not only

taken away from an arrestee (something that obviously must be done before the items are read), there is no risk that the arrestee will destroy them. Nor is there any risk that leaving these items unread will endanger the arresting officers.

The idea that officer safety and the preservation of evidence are the sole reasons for allowing a warrantless search incident to arrest appears to derive from the Court's reasoning in *Chimel* v. *California*, 395 U. S. 752 (1969), a case that involved the lawfulness of a search of the scene of an arrest, not the person of an arrestee. As I have explained, *Chimel*'s reasoning is questionable, see *Arizona* v. *Gant*, 556 U. S. 332, 361–363 (2009) (ALITO, J., dissenting), and I think it is a mistake to allow that reasoning to affect cases like these that concern the search of the person of arrestees.

B

Despite my view on the point discussed above, I agree that we should not mechanically apply the rule used in the predigital era to the search of a cell phone. Many cell phones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form. This calls for a new balancing of law enforcement and privacy interests.

The Court strikes this balance in favor of privacy interests with respect to all cell phones and all information found in them, and this approach leads to anomalies. For example, the Court's broad holding favors information in digital form over information in hard-copy form. Suppose that two suspects are arrested. Suspect number one has in his pocket a monthly bill for his land-line phone, and

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his surface clothing but his body, luggage, and saddlebags would be searched").

the bill lists an incriminating call to a long-distance number. He also has in his a wallet a few snapshots, and one of these is incriminating. Suspect number two has in his pocket a cell phone, the call log of which shows a call to the same incriminating number. In addition, a number of photos are stored in the memory of the cell phone, and one of these is incriminating. Under established law, the police may seize and examine the phone bill and the snapshots in the wallet without obtaining a warrant, but under the Court's holding today, the information stored in the cell phone is out.

While the Court's approach leads to anomalies, I do not see a workable alternative. Law enforcement officers need clear rules regarding searches incident to arrest, and it would take many cases and many years for the courts to develop more nuanced rules. And during that time, the nature of the electronic devices that ordinary Americans carry on their persons would continue to change.

II

This brings me to my second point. While I agree with the holding of the Court, I would reconsider the question presented here if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.

The regulation of electronic surveillance provides an instructive example. After this Court held that electronic surveillance constitutes a search even when no property interest is invaded, see *Katz* v. *United States*, 389 U. S. 347, 353–359 (1967), Congress responded by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211. See also 18 U. S. C. §2510 *et seq*. Since that time, electronic surveillance has been governed primarily, not by decisions of this Court, but by the stat-

ute, which authorizes but imposes detailed restrictions on electronic surveillance. See *ibid.*

Modern cell phones are of great value for both lawful and unlawful purposes. They can be used in committing many serious crimes, and they present new and difficult law enforcement problems. See Brief for United States in No. 13–212, pp. 2–3. At the same time, because of the role that these devices have come to play in contemporary life, searching their contents implicates very sensitive privacy interests that this Court is poorly positioned to understand and evaluate. Many forms of modern technology are making it easier and easier for both government and private entities to amass a wealth of information about the lives of ordinary Americans, and at the same time, many ordinary Americans are choosing to make public much information that was seldom revealed to outsiders just a few decades ago.

In light of these developments, it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CARPENTER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 16–402. Argued November 29, 2017—Decided June 22, 2018

Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called "cell sites." Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store this information for their own business purposes. Here, after the FBI identified the cell phone numbers of several robbery suspects, prosecutors were granted court orders to obtain the suspects' cell phone records under the Stored Communications Act. Wireless carriers produced CSLI for petitioner Timothy Carpenter's phone, and the Government was able to obtain 12,898 location points cataloging Carpenter's movements over 127 days—an average of 101 data points per day. Carpenter moved to suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter's phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

Held:

1. The Government's acquisition of Carpenter's cell-site records was a Fourth Amendment search. Pp. 4–18.

(a) The Fourth Amendment protects not only property interests but certain expectations of privacy as well. *Katz* v. *United States,* 389 U. S. 347, 351. Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is

prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith* v. *Maryland*, 442 U. S. 735, 740 (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll* v. *United States,* 267 U. S. 132, 149. These Founding-era understandings continue to inform this Court when applying the Fourth Amendment to innovations in surveillance tools. See, *e.g., Kyllo* v. *United States,* 533 U. S. 27. Pp. 4–7.

(b) The digital data at issue—personal location information maintained by a third party—does not fit neatly under existing precedents but lies at the intersection of two lines of cases. One set addresses a person's expectation of privacy in his physical location and movements. See, *e.g., United States* v. *Jones,* 565 U. S. 400 (five Justices concluding that privacy concerns would be raised by GPS tracking). The other addresses a person's expectation of privacy in information voluntarily turned over to third parties. See *United States* v. *Miller,* 425 U. S. 435 (no expectation of privacy in financial records held by a bank), and *Smith,* 442 U. S. 735 (no expectation of privacy in records of dialed telephone numbers conveyed to telephone company). Pp. 7–10.

(c) Tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring considered in *Jones*—it is detailed, encyclopedic, and effortlessly compiled. At the same time, however, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller.* Given the unique nature of cell-site records, this Court declines to extend *Smith* and *Miller* to cover them. Pp. 10–18.

(1) A majority of the Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records—which "hold for many Americans the 'privacies of life,'" *Riley* v. *California*, 573 U. S. ___, ___—contravenes that expectation. In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring considered in *Jones*: They give the Government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers. The Government contends that CSLI data is less precise than GPS information, but it thought the data accurate enough here to highlight it during closing argument in Carpenter's trial. At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in

development," *Kyllo*, 533 U. S., at 36, and the accuracy of CSLI is rapidly approaching GPS-level precision. Pp. 12–15.

(2) The Government contends that the third-party doctrine governs this case, because cell-site records, like the records in *Smith* and *Miller*, are "business records," created and maintained by wireless carriers. But there is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. *Smith* and *Miller*, however, did not rely solely on the act of sharing. They also considered "the nature of the particular documents sought" and limitations on any "legitimate 'expectation of privacy' concerning their contents." *Miller*, 425 U. S., at 442. In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI.

Nor does the second rationale for the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as the term is normally understood. First, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley*, 573 U. S., at ___. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up. Pp. 15–17.

(d) This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security. Pp. 17–18.

2. The Government did not obtain a warrant supported by probable cause before acquiring Carpenter's cell-site records. It acquired those records pursuant to a court order under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U. S. C. §2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under §2703(d) is not a permissible mechanism for accessing historical cell-site records. Not all orders compelling the production of documents will require a showing of probable cause. A

warrant is required only in the rare case where the suspect has a legitimate privacy interest in records held by a third party. And even though the Government will generally need a warrant to access CSLI, case-specific exceptions—*e.g.*, exigent circumstances—may support a warrantless search. Pp. 18–22.

819 F. 3d 880, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined. GORSUCH, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 16–402

TIMOTHY IVORY CARPENTER, PETITIONER *v.* UNITED STATES

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

[June 22, 2018]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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

I

A

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

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times

a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

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

B

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

robberies.

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U. S. C. §2703(d). Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. App. to Pet. for Cert. 60a, 72a. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. See 18 U. S. C. §§924(c), 1951(a). Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. App. to Pet. for Cert. 38a–39a.

At trial, seven of Carpenter's confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-

site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's phone near four of the charged robberies. In the Government's view, the location records clinched the case: They confirmed that Carpenter was "right where the . . . robbery was at the exact time of the robbery." App. 131 (closing argument). Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. 819 F. 3d 880 (2016). The court held that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. Given that cell phone users voluntarily convey cell-site data to their carriers as "a means of establishing communication," the court concluded that the resulting business records are not entitled to Fourth Amendment protection. *Id.,* at 888 (quoting *Smith* v. *Maryland*, 442 U. S. 735, 741 (1979)).

We granted certiorari. 582 U. S. ___ (2017).

II

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "basic purpose of this Amendment," our cases have recognized, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 528 (1967). The Founding generation crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rum-

mage through homes in an unrestrained search for evidence of criminal activity." *Riley* v. *California*, 573 U. S. ___, ___ (2014) (slip op., at 27). In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was "the first act of opposition to the arbitrary claims of Great Britain" and helped spark the Revolution itself. *Id.,* at ___–___ (slip op., at 27–28) (quoting 10 Works of John Adams 248 (C. Adams ed. 1856)).

For much of our history, Fourth Amendment search doctrine was "tied to common-law trespass" and focused on whether the Government "obtains information by physically intruding on a constitutionally protected area." *United States* v. *Jones*, 565 U. S. 400, 405, 406, n. 3 (2012). More recently, the Court has recognized that "property rights are not the sole measure of Fourth Amendment violations." *Soldal* v. *Cook County*, 506 U. S. 56, 64 (1992). In *Katz* v. *United States*, 389 U. S. 347, 351 (1967), we established that "the Fourth Amendment protects people, not places," and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith*, 442 U. S., at 740 (internal quotation marks and alterations omitted).

Although no single rubric definitively resolves which expectations of privacy are entitled to protection,[1] the

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[1] JUSTICE KENNEDY believes that there is such a rubric—the "property-based concepts" that *Katz* purported to move beyond. *Post,* at 3 (dissenting opinion). But while property rights are often informative, our cases by no means suggest that such an interest is "fundamental" or "dispositive" in determining which expectations of privacy are legitimate. *Post,* at 8–9. JUSTICE THOMAS (and to a large extent JUSTICE GORSUCH) would have us abandon *Katz* and return to an

analysis is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll* v. *United States*, 267 U. S. 132, 149 (1925). On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd* v. *United States*, 116 U. S. 616, 630 (1886). Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *United States* v. *Di Re*, 332 U. S. 581, 595 (1948).

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

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exclusively property-based approach. *Post,* at 1–2, 17–21 (THOMAS J., dissenting); *post,* at 6–9 (GORSUCH, J., dissenting). *Katz* of course "discredited" the "premise that property interests control," 389 U. S., at 353, and we have repeatedly emphasized that privacy interests do not rise or fall with property rights, see, *e.g., United States* v. *Jones*, 565 U. S. 400, 411 (2012) (refusing to "make trespass the exclusive test"); *Kyllo* v. *United States*, 533 U. S. 27, 32 (2001) ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property."). Neither party has asked the Court to reconsider *Katz* in this case.

what was happening within the home. *Ibid.*

Likewise in *Riley*, the Court recognized the "immense storage capacity" of modern cell phones in holding that police officers must generally obtain a warrant before searching the contents of a phone. 573 U. S., at ___ (slip op., at 17). We explained that while the general rule allowing warrantless searches incident to arrest "strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to" the vast store of sensitive information on a cell phone. *Id.*, at ___ (slip op., at 9).

B

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

The first set of cases addresses a person's expectation of privacy in his physical location and movements. In *United States* v. *Knotts*, 460 U. S. 276 (1983), we considered the Government's use of a "beeper" to aid in tracking a vehicle through traffic. Police officers in that case planted a beeper in a container of chloroform before it was purchased by one of Knotts's co-conspirators. The officers (with intermittent aerial assistance) then followed the automobile carrying the container from Minneapolis to Knotts's cabin in Wisconsin, relying on the beeper's signal to help keep the vehicle in view. The Court concluded that the "augment[ed]" visual surveillance did not constitute a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of

privacy in his movements from one place to another." *Id.,* at 281, 282. Since the movements of the vehicle and its final destination had been "voluntarily conveyed to anyone who wanted to look," Knotts could not assert a privacy interest in the information obtained. *Id.,* at 281.

This Court in *Knotts*, however, was careful to distinguish between the rudimentary tracking facilitated by the beeper and more sweeping modes of surveillance. The Court emphasized the "limited use which the government made of the signals from this particular beeper" during a discrete "automotive journey." *Id.,* at 284, 285. Significantly, the Court reserved the question whether "different constitutional principles may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible." *Id.,* at 283–284.

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

SOTOMAYOR, J.).[2]

In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he shares with others. We have previously held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith,* 442 U. S., at 743–744. That remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose." *United States* v. *Miller*, 425 U. S. 435, 443 (1976). As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.

This third-party doctrine largely traces its roots to *Miller*. While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a Fourth Amendment challenge to the records collection. For one, Miller could "assert neither ownership nor possession" of the documents; they were "business records of the banks." *Id.,* at 440. For another, the nature of those records confirmed Miller's limited expectation of privacy, because the checks were "not confidential communications but negotiable instruments to be used in commercial transactions," and the bank statements contained information "exposed to

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[2] JUSTICE KENNEDY argues that this case is in a different category from *Jones* and the dragnet-type practices posited in *Knotts* because the disclosure of the cell-site records was subject to "judicial authorization." *Post*, at 14–16. That line of argument conflates the threshold question whether a "search" has occurred with the separate matter of whether the search was reasonable. The subpoena process set forth in the Stored Communications Act does not determine a target's expectation of privacy. And in any event, neither *Jones* nor *Knotts* purported to resolve the question of what authorization may be required to conduct such electronic surveillance techniques. But see *Jones*, 565 U. S., at 430 (ALITO, J., concurring in judgment) (indicating that longer term GPS tracking may require a warrant).

[bank] employees in the ordinary course of business." *Id.,* at 442. The Court thus concluded that Miller had "take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government." *Id.,* at 443.

Three years later, *Smith* applied the same principles in the context of information conveyed to a telephone company. The Court ruled that the Government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search. Noting the pen register's "limited capabilities," the Court "doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial." 442 U. S., at 742. Telephone subscribers know, after all, that the numbers are used by the telephone company "for a variety of legitimate business purposes," including routing calls. *Id.,* at 743. And at any rate, the Court explained, such an expectation "is not one that society is prepared to recognize as reasonable." *Ibid.* (internal quotation marks omitted). When Smith placed a call, he "voluntarily conveyed" the dialed numbers to the phone company by "expos[ing] that information to its equipment in the ordinary course of business." *Id.,* at 744 (internal quotation marks omitted). Once again, we held that the defendant "assumed the risk" that the company's records "would be divulged to police." *Id.,* at 745.

III

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

At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.

We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.[3]

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[3] The parties suggest as an alternative to their primary submissions that the acquisition of CSLI becomes a search only if it extends beyond a limited period. See Reply Brief 12 (proposing a 24-hour cutoff); Brief for United States 55–56 (suggesting a seven-day cutoff). As part of its argument, the Government treats the seven days of CSLI requested from Sprint as the pertinent period, even though Sprint produced only two days of records. Brief for United States 56. Contrary to JUSTICE KENNEDY's assertion, *post,* at 19, we need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.

A

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

Allowing government access to cell-site records contravenes that expectation. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." *Id.,* at 415 (opinion of SOTOMAYOR, J.). These location records "hold for many Americans the 'privacies of life.'" *Riley*, 573 U. S., at ___ (slip op., at 28) (quoting *Boyd*, 116 U. S., at 630). And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can

access each carrier's deep repository of historical location information at practically no expense.

In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts* or the car in *Jones*, a cell phone—almost a "feature of human anatomy," *Riley*, 573 U. S., at ___ (slip op., at 9)—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. See *id.*, at ___ (slip op., at 19) (noting that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower"); contrast *Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974) (plurality opinion) ("A car has little capacity for escaping public scrutiny."). Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

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

Unlike with the GPS device in *Jones*, police need not even know in advance whether they want to follow a particular individual, or when.

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

The Government and JUSTICE KENNEDY contend, however, that the collection of CSLI should be permitted because the data is less precise than GPS information. Not to worry, they maintain, because the location records did "not on their own suffice to place [Carpenter] at the crime scene"; they placed him within a wedge-shaped sector ranging from one-eighth to four square miles. Brief for United States 24; see *post,* at 18–19. Yet the Court has already rejected the proposition that "inference insulates a search." *Kyllo*, 533 U. S., at 36. From the 127 days of location data it received, the Government could, in combination with other information, deduce a detailed log of Carpenter's movements, including when he was at the site of the robberies. And the Government thought the CSLI accurate enough to highlight it during the closing argument of his trial. App. 131.

At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U. S., at 36. While the records in this case reflect the state of technology at the start of the decade, the accuracy of CSLI is rapidly approaching GPS-level precision. As the number of cell sites has proliferated, the geographic area covered by each cell sector has shrunk, particularly in urban areas. In addition, with new technology measuring the time and angle of signals hitting their towers, wireless carriers already have

the capability to pinpoint a phone's location within 50 meters. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 12 (describing triangulation methods that estimate a device's location inside a given cell sector).

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

B

The Government's primary contention to the contrary is that the third-party doctrine governs this case. In its view, cell-site records are fair game because they are "business records" created and maintained by the wireless carriers. The Government (along with JUSTICE KENNEDY) recognizes that this case features new technology, but asserts that the legal question nonetheless turns on a garden-variety request for information from a third-party witness. Brief for United States 32–34; *post,* at 12–14.

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

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in

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

The Court has in fact already shown special solicitude for location information in the third-party context. In *Knotts*, the Court relied on *Smith* to hold that an individual has no reasonable expectation of privacy in public movements that he "voluntarily conveyed to anyone who wanted to look." *Knotts*, 460 U. S., at 281; see *id.*, at 283 (discussing *Smith*). But when confronted with more pervasive tracking, five Justices agreed that longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search. *Jones*, 565 U. S., at 430 (ALITO, J., concurring in judgment); *id.*, at 415 (SOTOMAYOR, J., concurring). JUSTICE GORSUCH wonders why "someone's location when using a phone" is sensitive, *post,* at 3, and JUSTICE KENNEDY assumes that a person's discrete movements "are not particularly private," *post,* at 17. Yet this case is not about "using a phone" or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every

moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*.

Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley*, 573 U. S., at ___ (slip op., at 9). Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[] the risk" of turning over a comprehensive dossier of his physical movements. *Smith*, 442 U. S., at 745.

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

* * *

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular

interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not "embarrass the future." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 300 (1944).[4]

IV

Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. Although the "ultimate measure of the constitutionality of a governmental search is 'reasonableness,'" our cases establish that warrantless searches are typically unreasonable where "a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing." *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652–653 (1995). Thus, "[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley*, 573 U. S., at ___ (slip op., at 5).

The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and

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[4]JUSTICE GORSUCH faults us for not promulgating a complete code addressing the manifold situations that may be presented by this new technology—under a constitutional provision turning on what is "reasonable," no less. *Post,* at 10–12. Like JUSTICE GORSUCH, we "do not begin to claim all the answers today," *post,* at 13, and therefore decide no more than the case before us.

material to an ongoing investigation." 18 U. S. C. §2703(d). That showing falls well short of the probable cause required for a warrant. The Court usually requires "some quantum of individualized suspicion" before a search or seizure may take place. *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 560–561 (1976). Under the standard in the Stored Communications Act, however, law enforcement need only show that the cell-site evidence might be pertinent to an ongoing investigation—a "gigantic" departure from the probable cause rule, as the Government explained below. App. 34. Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant.

JUSTICE ALITO contends that the warrant requirement simply does not apply when the Government acquires records using compulsory process. Unlike an actual search, he says, subpoenas for documents do not involve the direct taking of evidence; they are at most a "constructive search" conducted by the target of the subpoena. *Post,* at 12. Given this lesser intrusion on personal privacy, JUSTICE ALITO argues that the compulsory production of records is not held to the same probable cause standard. In his view, this Court's precedents set forth a categorical rule—separate and distinct from the third-party doctrine—subjecting subpoenas to lenient scrutiny without regard to the suspect's expectation of privacy in the records. *Post,* at 8–19.

But this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. Almost all of the examples JUSTICE ALITO cites, see *post,* at 14–15, contemplated requests for evidence implicating diminished pri-

vacy interests or for a corporation's own books.[5] The lone exception, of course, is *Miller*, where the Court's analysis of the third-party subpoena merged with the application of the third-party doctrine. 425 U. S., at 444 (concluding that Miller lacked the necessary privacy interest to contest the issuance of a subpoena to his bank).

JUSTICE ALITO overlooks the critical issue. At some point, the dissent should recognize that CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers. When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents. See *Riley*, 573 U. S., at ___ (slip op., at 10) ("A search of the information on a cell phone bears little resemblance to the type of brief physical search considered [in prior precedents].").

If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement. Under JUSTICE ALITO's view, private letters, digital contents of a cell phone—any personal information reduced to document form, in fact—may be collected by

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[5] See *United States* v. *Dionisio*, 410 U. S. 1, 14 (1973) ("No person can have a reasonable expectation that others will not know the sound of his voice"); *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408, 411, 415 (1984) (payroll and sales records); *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 67 (1974) (Bank Secrecy Act reporting requirements); *See* v. *Seattle*, 387 U. S. 541, 544 (1967) (financial books and records); *United States* v. *Powell*, 379 U. S. 48, 49, 57 (1964) (corporate tax records); *McPhaul* v. *United States*, 364 U. S. 372, 374, 382 (1960) (books and records of an organization); *United States* v. *Morton Salt Co.*, 338 U. S. 632, 634, 651–653 (1950) (Federal Trade Commission reporting requirement); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 189, 204–208 (1946) (payroll records); *Hale* v. *Henkel*, 201 U. S. 43, 45, 75 (1906) (corporate books and papers).

subpoena for no reason other than "official curiosity." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652 (1950). JUSTICE KENNEDY declines to adopt the radical implications of this theory, leaving open the question whether the warrant requirement applies "when the Government obtains the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party." *Post,* at 13 (citing *United States* v. *Warshak*, 631 F. 3d 266, 283–288 (CA6 2010)). That would be a sensible exception, because it would prevent the subpoena doctrine from overcoming any reasonable expectation of privacy. If the third-party doctrine does not apply to the "modern-day equivalents of an individual's own 'papers' or 'effects,'" then the clear implication is that the documents should receive full Fourth Amendment protection. We simply think that such protection should extend as well to a detailed log of a person's movements over several years.

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

Further, even though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. "One well-recognized exception applies when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky* v. *King*, 563 U. S. 452, 460 (2011) (quoting *Mincey* v. *Arizona*, 437 U. S. 385, 394 (1978)). Such exigencies include the need to pursue a fleeing suspect, protect individuals who are

threatened with imminent harm, or prevent the imminent destruction of evidence. 563 U. S., at 460, and n. 3.

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

* * *

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

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

The judgment of the Court of Appeals is reversed, and

the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 16–402

TIMOTHY IVORY CARPENTER, PETITIONER *v.* UNITED STATES

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

[June 22, 2018]

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

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

The new rule the Court seems to formulate puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes. And it places undue restrictions on the lawful and necessary enforcement powers exercised not only by the Federal Government, but also by law enforcement in every State and locality throughout the Nation. Adherence to this Court's longstanding precedents and analytic framework would have been the proper and prudent way to resolve this case.

The Court has twice held that individuals have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. *United States* v. *Miller*, 425 U. S. 435 (1976); *Smith* v. *Maryland*, 442 U. S. 735 (1979). This is true even when the records contain personal and sensitive information. So when the Government uses a subpoena to obtain, for example, bank records, telephone records, and credit card

statements from the businesses that create and keep these records, the Government does not engage in a search of the business's customers within the meaning of the Fourth Amendment.

In this case petitioner challenges the Government's right to use compulsory process to obtain a now-common kind of business record: cell-site records held by cell phone service providers. The Government acquired the records through an investigative process enacted by Congress. Upon approval by a neutral magistrate, and based on the Government's duty to show reasonable necessity, it authorizes the disclosure of records and information that are under the control and ownership of the cell phone service provider, not its customer. Petitioner acknowledges that the Government may obtain a wide variety of business records using compulsory process, and he does not ask the Court to revisit its precedents. Yet he argues that, under those same precedents, the Government searched his records when it used court-approved compulsory process to obtain the cell-site information at issue here.

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

The Court today disagrees. It holds for the first time that by using compulsory process to obtain records of a business entity, the Government has not just engaged in an impermissible action, but has conducted a search of the business's customer. The Court further concludes that the search in this case was unreasonable and the Government needed to get a warrant to obtain more than six days of cell-site records.

In concluding that the Government engaged in a search,

the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other. According to today's majority opinion, the Government can acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy. But, in the Court's view, the Government crosses a constitutional line when it obtains a court's approval to issue a subpoena for more than six days of cell-site records in order to determine whether a person was within several hundred city blocks of a crime scene. That distinction is illogical and will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations.

It is true that the Cyber Age has vast potential both to expand and restrict individual freedoms in dimensions not contemplated in earlier times. See *Packingham* v. *North Carolina*, 582 U. S. ___, ___–___ (2017) (slip op., at 4–6). For the reasons that follow, however, there is simply no basis here for concluding that the Government interfered with information that the cell phone customer, either from a legal or commonsense standpoint, should have thought the law would deem owned or controlled by him.

I

Before evaluating the question presented it is helpful to understand the nature of cell-site records, how they are commonly used by cell phone service providers, and their proper use by law enforcement.

When a cell phone user makes a call, sends a text message or e-mail, or gains access to the Internet, the cell phone establishes a radio connection to an antenna at a nearby cell site. The typical cell site covers a more-or-less

circular geographic area around the site. It has three (or sometimes six) separate antennas pointing in different directions. Each provides cell service for a different 120-degree (or 60-degree) sector of the cell site's circular coverage area. So a cell phone activated on the north side of a cell site will connect to a different antenna than a cell phone on the south side.

Cell phone service providers create records each time a cell phone connects to an antenna at a cell site. For a phone call, for example, the provider records the date, time, and duration of the call; the phone numbers making and receiving the call; and, most relevant here, the cell site used to make the call, as well as the specific antenna that made the connection. The cell-site and antenna data points, together with the date and time of connection, are known as cell-site location information, or cell-site records. By linking an individual's cell phone to a particular 120- or 60-degree sector of a cell site's coverage area at a particular time, cell-site records reveal the general location of the cell phone user.

The location information revealed by cell-site records is imprecise, because an individual cell-site sector usually covers a large geographic area. The FBI agent who offered expert testimony about the cell-site records at issue here testified that a cell site in a city reaches between a half mile and two miles in all directions. That means a 60-degree sector covers between approximately one-eighth and two square miles (and a 120-degree sector twice that area). To put that in perspective, in urban areas cell-site records often would reveal the location of a cell phone user within an area covering between around a dozen and several hundred city blocks. In rural areas cell-site records can be up to 40 times more imprecise. By contrast, a Global Positioning System (GPS) can reveal an individual's location within around 15 feet.

Major cell phone service providers keep cell-site records

for long periods of time. There is no law requiring them to do so. Instead, providers contract with their customers to collect and keep these records because they are valuable to the providers. Among other things, providers aggregate the records and sell them to third parties along with other information gleaned from cell phone usage. This data can be used, for example, to help a department store determine which of various prospective store locations is likely to get more foot traffic from middle-aged women who live in affluent zip codes. The market for cell phone data is now estimated to be in the billions of dollars. See Brief for Technology Experts as *Amici Curiae* 23.

Cell-site records also can serve an important investigative function, as the facts of this case demonstrate. Petitioner, Timothy Carpenter, along with a rotating group of accomplices, robbed at least six RadioShack and T-Mobile stores at gunpoint over a 2-year period. Five of those robberies occurred in the Detroit area, each crime at least four miles from the last. The sixth took place in Warren, Ohio, over 200 miles from Detroit.

The Government, of course, did not know all of these details in 2011 when it began investigating Carpenter. In April of that year police arrested four of Carpenter's co-conspirators. One of them confessed to committing nine robberies in Michigan and Ohio between December 2010 and March 2011. He identified 15 accomplices who had participated in at least one of those robberies; named Carpenter as one of the accomplices; and provided Carpenter's cell phone number to the authorities. The suspect also warned that the other members of the conspiracy planned to commit more armed robberies in the immediate future.

The Government at this point faced a daunting task. Even if it could identify and apprehend the suspects, still it had to link each suspect in this changing criminal gang to specific robberies in order to bring charges and convict.

And, of course, it was urgent that the Government take all necessary steps to stop the ongoing and dangerous crime spree.

Cell-site records were uniquely suited to this task. The geographic dispersion of the robberies meant that, if Carpenter's cell phone were within even a dozen to several hundred city blocks of one or more of the stores when the different robberies occurred, there would be powerful circumstantial evidence of his participation; and this would be especially so if his cell phone usually was not located in the sectors near the stores except during the robbery times.

To obtain these records, the Government applied to federal magistrate judges for disclosure orders pursuant to §2703(d) of the Stored Communications Act. That Act authorizes a magistrate judge to issue an order requiring disclosure of cell-site records if the Government demonstrates "specific and articulable facts showing that there are reasonable grounds to believe" the records "are relevant and material to an ongoing criminal investigation." 18 U. S. C. §§2703(d), 2711(3). The full statutory provision is set out in the Appendix, *infra*.

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

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

II

The first Clause of the Fourth Amendment provides that "the right of the people to be secure in their persons, houses,

papers, and effects, against unreasonable searches and seizures, shall not be violated." The customary beginning point in any Fourth Amendment search case is whether the Government's actions constitute a "search" of the defendant's person, house, papers, or effects, within the meaning of the constitutional provision. If so, the next question is whether that search was reasonable.

Here the only question necessary to decide is whether the Government searched anything of Carpenter's when it used compulsory process to obtain cell-site records from Carpenter's cell phone service providers. This Court's decisions in *Miller* and *Smith* dictate that the answer is no, as every Court of Appeals to have considered the question has recognized. See *United States* v. *Thompson*, 866 F. 3d 1149 (CA10 2017); *United States* v. *Graham*, 824 F. 3d 421 (CA4 2016) (en banc); *Carpenter* v. *United States*, 819 F. 3d 880 (CA6 2016); *United States* v. *Davis*, 785 F. 3d 498 (CA11 2015) (en banc); *In re Application of U. S. for Historical Cell Site Data*, 724 F. 3d 600 (CA5 2013).

A

Miller and *Smith* hold that individuals lack any protected Fourth Amendment interests in records that are possessed, owned, and controlled only by a third party. In *Miller* federal law enforcement officers obtained four months of the defendant's banking records. 425 U. S., at 437–438. And in *Smith* state police obtained records of the phone numbers dialed from the defendant's home phone. 442 U. S., at 737. The Court held in both cases that the officers did not search anything belonging to the defendants within the meaning of the Fourth Amendment. The defendants could "assert neither ownership nor possession" of the records because the records were created, owned, and controlled by the companies. *Miller*, *supra*, at 440; see *Smith*, *supra*, at 741. And the defendants had no

reasonable expectation of privacy in information they "voluntarily conveyed to the [companies] and exposed to their employees in the ordinary course of business." *Miller*, *supra*, at 442; see *Smith*, 442 U. S., at 744. Rather, the defendants "assumed the risk that the information would be divulged to police." *Id.*, at 745.

Miller and *Smith* have been criticized as being based on too narrow a view of reasonable expectations of privacy. See, *e.g.,* Ashdown, The Fourth Amendment and the "Legitimate Expectation of Privacy," 34 Vand. L. Rev. 1289, 1313–1316 (1981). Those criticisms, however, are unwarranted. The principle established in *Miller* and *Smith* is correct for two reasons, the first relating to a defendant's attenuated interest in property owned by another, and the second relating to the safeguards inherent in the use of compulsory process.

First, *Miller* and *Smith* placed necessary limits on the ability of individuals to assert Fourth Amendment interests in property to which they lack a "requisite connection." *Minnesota* v. *Carter*, 525 U. S. 83, 99 (1998) (KENNEDY, J., concurring). Fourth Amendment rights, after all, are personal. The Amendment protects "[t]he right of the people to be secure in *their* . . . persons, houses, papers, and effects"—not the persons, houses, papers, and effects of others. (Emphasis added.)

The concept of reasonable expectations of privacy, first announced in *Katz* v. *United States*, 389 U. S. 347 (1967), sought to look beyond the "arcane distinctions developed in property and tort law" in evaluating whether a person has a sufficient connection to the thing or place searched to assert Fourth Amendment interests in it. *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978). Yet "property concepts" are, nonetheless, fundamental "in determining the presence or absence of the privacy interests protected by that Amendment." *Id.,* at 143–144, n. 12. This is so for at least two reasons. First, as a matter of settled expectations

from the law of property, individuals often have greater expectations of privacy in things and places that belong to them, not to others. And second, the Fourth Amendment's protections must remain tethered to the text of that Amendment, which, again, protects only a person's own "persons, houses, papers, and effects."

Katz did not abandon reliance on property-based concepts. The Court in *Katz* analogized the phone booth used in that case to a friend's apartment, a taxicab, and a hotel room. 389 U. S., at 352, 359. So when the defendant "shu[t] the door behind him" and "pa[id] the toll," *id.,* at 352, he had a temporary interest in the space and a legitimate expectation that others would not intrude, much like the interest a hotel guest has in a hotel room, *Stoner* v. *California*, 376 U. S. 483 (1964), or an overnight guest has in a host's home, *Minnesota* v. *Olson*, 495 U. S. 91 (1990). The Government intruded on that space when it attached a listening device to the phone booth. *Katz*, 389 U. S., at 348. (And even so, the Court made it clear that the Government's search could have been reasonable had there been judicial approval on a case-specific basis, which, of course, did occur here. *Id*., at 357–359.)

Miller and *Smith* set forth an important and necessary limitation on the *Katz* framework. They rest upon the commonsense principle that the absence of property law analogues can be dispositive of privacy expectations. The defendants in those cases could expect that the third-party businesses could use the records the companies collected, stored, and classified as their own for any number of business and commercial purposes. The businesses were not bailees or custodians of the records, with a duty to hold the records for the defendants' use. The defendants could make no argument that the records were their own papers or effects. See *Miller*, *supra*, at 440 ("the documents subpoenaed here are not respondent's 'private papers'"); *Smith*, *supra*, at 741 ("petitioner obviously

cannot claim that his 'property' was invaded"). The records were the business entities' records, plain and simple. The defendants had no reason to believe the records were owned or controlled by them and so could not assert a reasonable expectation of privacy in the records.

The second principle supporting *Miller* and *Smith* is the longstanding rule that the Government may use compulsory process to compel persons to disclose documents and other evidence within their possession and control. See *United States* v. *Nixon*, 418 U. S. 683, 709 (1974) (it is an "ancient proposition of law" that "the public has a right to every man's evidence" (internal quotation marks and alterations omitted)). A subpoena is different from a warrant in its force and intrusive power. While a warrant allows the Government to enter and seize and make the examination itself, a subpoena simply requires the person to whom it is directed to make the disclosure. A subpoena, moreover, provides the recipient the "opportunity to present objections" before complying, which further mitigates the intrusion. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 195 (1946).

For those reasons this Court has held that a subpoena for records, although a "constructive" search subject to Fourth Amendment constraints, need not comply with the procedures applicable to warrants—even when challenged by the person to whom the records belong. *Id.,* at 202, 208. Rather, a subpoena complies with the Fourth Amendment's reasonableness requirement so long as it is "'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'" *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408, 415 (1984). Persons with no meaningful interests in the records sought by a subpoena, like the defendants in *Miller* and *Smith*, have no rights to object to the records' disclosure—much less to assert that the Government must obtain a warrant to compel disclosure of the

records. See *Miller*, 425 U. S., at 444–446; *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U. S. 735, 742–743 (1984).

Based on *Miller* and *Smith* and the principles underlying those cases, it is well established that subpoenas may be used to obtain a wide variety of records held by businesses, even when the records contain private information. See 2 W. LaFave, Search and Seizure §4.13 (5th ed. 2012). Credit cards are a prime example. State and federal law enforcement, for instance, often subpoena credit card statements to develop probable cause to prosecute crimes ranging from drug trafficking and distribution to healthcare fraud to tax evasion. See *United States* v. *Phibbs*, 999 F. 2d 1053 (CA6 1993) (drug distribution); *McCune* v. *DOJ*, 592 Fed. Appx. 287 (CA5 2014) (healthcare fraud); *United States* v. *Green*, 305 F. 3d 422 (CA6 2002) (drug trafficking and tax evasion); see also 12 U. S. C. §§3402(4), 3407 (allowing the Government to subpoena financial records if "there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry"). Subpoenas also may be used to obtain vehicle registration records, hotel records, employment records, and records of utility usage, to name just a few other examples. See 1 LaFave, *supra*, §2.7(c).

And law enforcement officers are not alone in their reliance on subpoenas to obtain business records for legitimate investigations. Subpoenas also are used for investigatory purposes by state and federal grand juries, see *United States* v. *Dionisio*, 410 U. S. 1 (1973), state and federal administrative agencies, see *Oklahoma Press*, *supra*, and state and federal legislative bodies, see *McPhaul* v. *United States*, 364 U. S. 372 (1960).

B

Carpenter does not question these traditional investigative practices. And he does not ask the Court to reconsider *Miller* and *Smith*. Carpenter argues only that, under

Miller and *Smith*, the Government may not use compulsory process to acquire cell-site records from cell phone service providers.

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

Carpenter argues that he has Fourth Amendment interests in the cell-site records because they are in essence his personal papers by operation of 47 U. S. C. §222. That statute imposes certain restrictions on how providers may use "customer proprietary network information"—a term that encompasses cell-site records. §§222(c), (h)(1)(A). The statute in general prohibits providers from disclosing personally identifiable cell-site records to private third parties. §222(c)(1). And it allows customers to request cell-site records from the provider. §222(c)(2).

Carpenter's argument is unpersuasive, however, for §222 does not grant cell phone customers any meaningful interest in cell-site records. The statute's confidentiality protections may be overridden by the interests of the providers or the Government. The providers may disclose the records "to protect the[ir] rights or property" or to "initiate, render, bill, and collect for telecommunications services." §§222(d)(1), (2). They also may disclose the records "as required by law"—which, of course, is how they were disclosed in this case. §222(c)(1). Nor does the statute provide customers any practical control over the records. Customers do not create the records; they have no say in whether or for how long the records are stored; and they cannot require the records to be modified or destroyed. Even their right to request access to the records is limited, for the statute "does not preclude a carrier from

being reimbursed by the customers . . . for the costs associated with making such disclosures." H. R. Rep. No. 104–204, pt. 1, p. 90 (1995). So in every legal and practical sense the "network information" regulated by §222 is, under that statute, "proprietary" to the service providers, not Carpenter. The Court does not argue otherwise.

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

All this is not to say that *Miller* and *Smith* are without limits. *Miller* and *Smith* may not apply when the Government obtains the modern-day equivalents of an individual's own "papers" or "effects," even when those papers or effects are held by a third party. See *Ex parte Jackson*, 96 U. S. 727, 733 (1878) (letters held by mail carrier); *United States* v. *Warshak*, 631 F. 3d 266, 283–288 (CA6 2010) (e-mails held by Internet service provider). As already discussed, however, this case does not involve property or a bailment of that sort. Here the Government's acquisition of cell-site records falls within the heartland of *Miller* and *Smith*.

In fact, Carpenter's Fourth Amendment objection is even weaker than those of the defendants in *Miller* and *Smith*. Here the Government did not use a mere subpoena to obtain the cell-site records. It acquired the records only after it proved to a Magistrate Judge reasonable grounds to believe that the records were relevant and material to an ongoing criminal investigation. See 18 U. S. C. §2703(d). So even if §222 gave Carpenter some attenuated interest in the records, the Government's conduct here would be reasonable under the standards governing subpoenas. See *Donovan*, 464 U. S., at 415.

Under *Miller* and *Smith*, then, a search of the sort that

requires a warrant simply did not occur when the Government used court-approved compulsory process, based on a finding of reasonable necessity, to compel a cell phone service provider, as owner, to disclose cell-site records.

III

The Court rejects a straightforward application of *Miller* and *Smith*. It concludes instead that applying those cases to cell-site records would work a "significant extension" of the principles underlying them, *ante,* at 15, and holds that the acquisition of more than six days of cell-site records constitutes a search, *ante,* at 11, n. 3.

In my respectful view the majority opinion misreads this Court's precedents, old and recent, and transforms *Miller* and *Smith* into an unprincipled and unworkable doctrine. The Court's newly conceived constitutional standard will cause confusion; will undermine traditional and important law enforcement practices; and will allow the cell phone to become a protected medium that dangerous persons will use to commit serious crimes.

A

The Court errs at the outset by attempting to sidestep *Miller* and *Smith*. The Court frames this case as following instead from *United States* v. *Knotts*, 460 U. S. 276 (1983), and *United States* v. *Jones*, 565 U. S. 400 (2012). Those cases, the Court suggests, establish that "individuals have a reasonable expectation of privacy in the whole of their physical movements." *Ante*, at 7–9, 12.

Knotts held just the opposite: "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U. S., at 281. True, the Court in *Knotts* also suggested that "different constitutional principles may be applicable" to "dragnet-type law enforcement practices." *Id.,* at 284. But by dragnet practices the Court was refer-

ring to "'twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision.'" *Id.,* at 283.

Those "different constitutional principles" mentioned in *Knotts*, whatever they may be, do not apply in this case. Here the Stored Communications Act requires a neutral judicial officer to confirm in each case that the Government has "reasonable grounds to believe" the cell-site records "are relevant and material to an ongoing criminal investigation." 18 U. S. C. §2703(d). This judicial check mitigates the Court's concerns about "'a too permeating police surveillance.'" *Ante*, at 6 (quoting *United States* v. *Di Re*, 332 U. S. 581, 595 (1948)). Here, even more so than in *Knotts*, "reality hardly suggests abuse." 460 U. S., at 284.

The Court's reliance on *Jones* fares no better. In *Jones* the Government installed a GPS tracking device on the defendant's automobile. The Court held the Government searched the automobile because it "physically occupied private property [of the defendant] for the purpose of obtaining information." 565 U. S., at 404. So in *Jones* it was "not necessary to inquire about the target's expectation of privacy in his vehicle's movements." *Grady* v. *North Carolina*, 575 U. S. ___, ___ (2015) (*per curiam*) (slip op., at 3).

Despite that clear delineation of the Court's holding in *Jones*, the Court today declares that *Jones* applied the "'different constitutional principles'" alluded to in *Knotts* to establish that an individual has an expectation of privacy in the sum of his whereabouts. *Ante*, at 8, 12. For that proposition the majority relies on the two concurring opinions in *Jones*, one of which stated that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." 565 U. S., at 430 (ALITO, J., concurring). But *Jones* involved direct governmental surveillance of a defendant's automobile without judicial

authorization—specifically, GPS surveillance accurate within 50 to 100 feet. *Id.*, at 402–403. Even assuming that the different constitutional principles mentioned in *Knotts* would apply in a case like *Jones*—a proposition the Court was careful not to announce in *Jones*, *supra*, at 412–413—those principles are inapplicable here. Cases like this one, where the Government uses court-approved compulsory process to obtain records owned and controlled by a third party, are governed by the two majority opinions in *Miller* and *Smith*.

B

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

The Court appears, in my respectful view, to read *Miller* and *Smith* to establish a balancing test. For each "qualitatively different category" of information, the Court suggests, the privacy interests at stake must be weighed against the fact that the information has been disclosed to a third party. See *ante*, at 11, 15–17. When the privacy interests are weighty enough to "overcome" the third-party disclosure, the Fourth Amendment's protections apply. See *ante*, at 17.

That is an untenable reading of *Miller* and *Smith*. As already discussed, the fact that information was relinquished to a third party was the entire basis for concluding that the defendants in those cases lacked a reasonable expectation of privacy. *Miller* and *Smith* do not establish the kind of category-by-category balancing the Court today prescribes.

But suppose the Court were correct to say that *Miller* and *Smith* rest on so imprecise a foundation. Still the Court errs, in my submission, when it concludes that cell-site records implicate greater privacy interests—and thus deserve greater Fourth Amendment protection—than

financial records and telephone records.

Indeed, the opposite is true. A person's movements are not particularly private. As the Court recognized in *Knotts*, when the defendant there "traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination." 460 U. S., at 281–282. Today expectations of privacy in one's location are, if anything, even less reasonable than when the Court decided *Knotts* over 30 years ago. Millions of Americans choose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media.

And cell-site records, as already discussed, disclose a person's location only in a general area. The records at issue here, for example, revealed Carpenter's location within an area covering between around a dozen and several hundred city blocks. "Areas of this scale might encompass bridal stores and Bass Pro Shops, gay bars and straight ones, a Methodist church and the local mosque." 819 F. 3d 880, 889 (CA6 2016). These records could not reveal where Carpenter lives and works, much less his "'familial, political, professional, religious, and sexual associations.'" *Ante*, at 12 (quoting *Jones*, *supra*, at 415 (SOTOMAYOR, J., concurring)).

By contrast, financial records and telephone records do "'revea[l] . . . personal affairs, opinions, habits and associations.'" *Miller*, 425 U. S., at 451 (Brennan, J., dissenting); see *Smith*, 442 U. S., at 751 (Marshall, J., dissenting). What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or

straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records.

Still, the Court maintains, cell-site records are "unique" because they are "comprehensive" in their reach; allow for retrospective collection; are "easy, cheap, and efficient compared to traditional investigative tools"; and are not exposed to cell phone service providers in a meaningfully voluntary manner. *Ante*, at 11–13, 17, 22. But many other kinds of business records can be so described. Financial records are of vast scope. Banks and credit card companies keep a comprehensive account of almost every transaction an individual makes on a daily basis. "With just the click of a button, the Government can access each [company's] deep repository of historical [financial] information at practically no expense." *Ante*, at 12–13. And the decision whether to transact with banks and credit card companies is no more or less voluntary than the decision whether to use a cell phone. Today, just as when *Miller* was decided, "'it is impossible to participate in the economic life of contemporary society without maintaining a bank account.'" 425 U. S., at 451 (Brennan, J., dissenting). But this Court, nevertheless, has held that individuals do not have a reasonable expectation of privacy in financial records.

Perhaps recognizing the difficulty of drawing the constitutional line between cell-site records and financial and telephonic records, the Court posits that the accuracy of cell-site records "is rapidly approaching GPS-level precision." *Ante*, at 14. That is certainly plausible in the era of cyber technology, yet the privacy interests associated with location information, which is often disclosed to the public at large, still would not outweigh the privacy interests implicated by financial and telephonic records.

Perhaps more important, those future developments are no basis upon which to resolve this case. In general, the Court "risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *Ontario* v. *Quon*, 560 U. S. 746, 759 (2010). That judicial caution, prudent in most cases, is imperative in this one.

Technological changes involving cell phones have complex effects on crime and law enforcement. Cell phones make crimes easier to coordinate and conceal, while also providing the Government with new investigative tools that may have the potential to upset traditional privacy expectations. See Kerr, An Equilibrium-Adjustment Theory of the Fourth Amendment, 125 Harv. L. Rev 476, 512–517 (2011). How those competing effects balance against each other, and how property norms and expectations of privacy form around new technology, often will be difficult to determine during periods of rapid technological change. In those instances, and where the governing legal standard is one of reasonableness, it is wise to defer to legislative judgments like the one embodied in §2703(d) of the Stored Communications Act. See *Jones*, 565 U. S., at 430 (ALITO, J., concurring). In §2703(d) Congress weighed the privacy interests at stake and imposed a judicial check to prevent executive overreach. The Court should be wary of upsetting that legislative balance and erecting constitutional barriers that foreclose further legislative instructions. See *Quon*, *supra*, at 759. The last thing the Court should do is incorporate an arbitrary and outside limit—in this case six days' worth of cell-site records—and use it as the foundation for a new constitutional framework. The Court's decision runs roughshod over the mechanism Congress put in place to govern the acquisition of cell-site records and closes off further legislative debate on these issues.

C

The Court says its decision is a "narrow one." *Ante,* at 17. But its reinterpretation of *Miller* and *Smith* will have dramatic consequences for law enforcement, courts, and society as a whole.

Most immediately, the Court's holding that the Government must get a warrant to obtain more than six days of cell-site records limits the effectiveness of an important investigative tool for solving serious crimes. As this case demonstrates, cell-site records are uniquely suited to help the Government develop probable cause to apprehend some of the Nation's most dangerous criminals: serial killers, rapists, arsonists, robbers, and so forth. See also, *e.g.*, *Davis*, 785 F. 3d, at 500–501 (armed robbers); Brief for Alabama et al. as *Amici Curiae* 21–22 (serial killer). These records often are indispensable at the initial stages of investigations when the Government lacks the evidence necessary to obtain a warrant. See *United States* v. *Pembrook*, 876 F. 3d 812, 816–819 (CA6 2017). And the long-term nature of many serious crimes, including serial crimes and terrorism offenses, can necessitate the use of significantly more than six days of cell-site records. The Court's arbitrary 6-day cutoff has the perverse effect of nullifying Congress' reasonable framework for obtaining cell-site records in some of the most serious criminal investigations.

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

First, the Court's holding is premised on cell-site records being a "distinct category of information" from other busi-

ness records. *Ante*, at 15. But the Court does not explain what makes something a distinct category of information. Whether credit card records are distinct from bank records; whether payment records from digital wallet applications are distinct from either; whether the electronic bank records available today are distinct from the paper and microfilm records at issue in *Miller*; or whether cell-phone call records are distinct from the home-phone call records at issue in *Smith*, are just a few of the difficult questions that require answers under the Court's novel conception of *Miller* and *Smith*.

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

Third, even if a distinct category of information is deemed to be more like cell-site records than financial records, courts and law enforcement officers will have to guess how much of that information can be requested before a warrant is required. The Court suggests that less than seven days of location information may not require a warrant. See *ante,* at 11, n. 3; see also *ante,* at 17–18 (expressing no opinion on "real-time CSLI," tower dumps, and security-camera footage). But the Court does not explain why that is so, and nothing in its opinion even alludes to the considerations that should determine whether greater or lesser thresholds should apply to information like IP addresses or website browsing history.

Fourth, by invalidating the Government's use of court-approved compulsory process in this case, the Court calls into question the subpoena practices of federal and state grand juries, legislatures, and other investigative bodies,

as JUSTICE ALITO's opinion explains. See *post,* at 2–19 (dissenting opinion). Yet the Court fails even to mention the serious consequences this will have for the proper administration of justice.

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

* * *

This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy. Here the Government did not search anything over which Carpenter could assert ownership or control. Instead, it issued a court-authorized subpoena to a third party to disclose information it alone owned and controlled. That should suffice to resolve this case.

Having concluded, however, that the Government searched Carpenter when it obtained cell-site records from his cell phone service providers, the proper resolution of this case should have been to remand for the Court of Appeals to determine in the first instance whether the search was reasonable. Most courts of appeals, believing themselves bound by *Miller* and *Smith*, have not grappled with this question. And the Court's reflexive imposition of the warrant requirement obscures important and difficult issues, such as the scope of Congress' power to authorize the Government to collect new forms of information using processes that deviate from traditional warrant procedures, and how the Fourth Amendment's reasonableness requirement should apply when the Government uses compulsory process instead of engaging in an actual, physical search.

These reasons all lead to this respectful dissent.

APPENDIX

"§2703. Required disclosure of customer communications or records

"(d) REQUIREMENTS FOR COURT ORDER.—A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider."

SUPREME COURT OF THE UNITED STATES

No. 16–402

TIMOTHY IVORY CARPENTER, PETITIONER *v.* UNITED STATES

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

[June 22, 2018]

JUSTICE THOMAS, dissenting.

This case should not turn on "whether" a search occurred. *Ante,* at 1. It should turn, instead, on *whose* property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of "*their* persons, houses, papers, and effects." (Emphasis added.) In other words, "*each* person has the right to be secure against unreasonable searches . . . in *his own* person, house, papers, and effects." *Minnesota* v. *Carter*, 525 U. S. 83, 92 (1998) (Scalia, J., concurring). By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint.

The Court concludes that, although the records are not Carpenter's, the Government must get a warrant because Carpenter had a reasonable "expectation of privacy" in the location information that they reveal. *Ante,* at 11. I agree with JUSTICE KENNEDY, JUSTICE ALITO, JUSTICE GORSUCH, and every Court of Appeals to consider the question that this is not the best reading of our precedents.

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

I

Katz was the culmination of a series of decisions applying the Fourth Amendment to electronic eavesdropping. The first such decision was *Olmstead* v. *United States*, 277 U. S. 438 (1928), where federal officers had intercepted the defendants' conversations by tapping telephone lines near their homes. *Id.,* at 456–457. In an opinion by Chief Justice Taft, the Court concluded that this wiretap did not violate the Fourth Amendment. No "search" occurred, according to the Court, because the officers did not physically enter the defendants' homes. *Id.,* at 464–466. And neither the telephone lines nor the defendants' intangible conversations qualified as "persons, houses, papers, [or] effects" within the meaning of the Fourth Amendment. *Ibid.*[1] In the ensuing decades, this Court adhered to

[1] Justice Brandeis authored the principal dissent in *Olmstead*. He consulted the "underlying purpose," rather than "the words of the [Fourth] Amendment," to conclude that the wiretap was a search. 277 U. S., at 476. In Justice Brandeis' view, the Framers "recognized the significance of man's spiritual nature, of his feelings and of his intellect" and "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." *Id.,* at 478. Thus, "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed," should constitute an unreasonable search under the Fourth Amendment. *Ibid.*

Olmstead and rejected Fourth Amendment challenges to various methods of electronic surveillance. See *On Lee* v. *United States*, 343 U. S. 747, 749–753 (1952) (use of microphone to overhear conversations with confidential informant); *Goldman* v. *United States*, 316 U. S. 129, 131–132, 135–136 (1942) (use of detectaphone to hear conversations in office next door).

In the 1960s, however, the Court began to retreat from *Olmstead*. In *Silverman* v. *United States*, 365 U. S. 505 (1961), for example, federal officers had eavesdropped on the defendants by driving a "spike mike" several inches into the house they were occupying. *Id.,* at 506–507. This was a "search," the Court held, because the "unauthorized physical penetration into the premises" was an "actual intrusion into a constitutionally protected area." *Id.,* at 509, 512. The Court did not mention *Olmstead*'s other holding that intangible conversations are not "persons, houses, papers, [or] effects." That omission was significant. The Court confirmed two years later that "[i]t follows from [*Silverman*] that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'" *Wong Sun* v. *United States*, 371 U. S. 471, 485 (1963); accord, *Berger* v. *New York*, 388 U. S. 41, 51 (1967).

In *Katz*, the Court rejected *Olmstead*'s remaining holding—that eavesdropping is not a search absent a physical intrusion into a constitutionally protected area. The federal officers in *Katz* had intercepted the defendant's conversations by attaching an electronic device to the outside of a public telephone booth. 389 U. S., at 348. The Court concluded that this was a "search" because the officers "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Id.,* at 353. Although the device did not physically penetrate the booth, the Court overruled *Olmstead* and held that "the reach of [the Fourth] Amendment cannot turn upon the

presence or absence of a physical intrusion." 389 U. S., at 353. The Court did not explain what should replace *Olmstead*'s physical-intrusion requirement. It simply asserted that "the Fourth Amendment protects people, not places" and "what [a person] seeks to preserve as private . . . may be constitutionally protected." 389 U. S., at 351.

Justice Harlan's concurrence in *Katz* attempted to articulate the standard that was missing from the majority opinion. While Justice Harlan agreed that "'the Fourth Amendment protects people, not places,'" he stressed that "[t]he question . . . is what protection it affords to those people," and "the answer . . . requires reference to a 'place.'" *Id.,* at 361. Justice Harlan identified a "twofold requirement" to determine when the protections of the Fourth Amendment apply: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Ibid.*

Justice Harlan did not cite anything for this "expectation of privacy" test, and the parties did not discuss it in their briefs. The test appears to have been presented for the first time at oral argument by one of the defendant's lawyers. See Winn, *Katz* and the Origins of the "Reasonable Expectation of Privacy" Test, 40 McGeorge L. Rev. 1, 9–10 (2009). The lawyer, a recent law-school graduate, apparently had an "[e]piphany" while preparing for oral argument. Schneider, *Katz v. United States*: The Untold Story, 40 McGeorge L. Rev. 13, 18 (2009). He conjectured that, like the "reasonable person" test from his Torts class, the Fourth Amendment should turn on "whether a reasonable person . . . could have expected his communication to be private." *Id.,* at 19. The lawyer presented his new theory to the Court at oral argument. See, *e.g.,* Tr. of Oral Arg. in *Katz* v. *United States*, O. T. 1967, No. 35, p. 5 (proposing a test of "whether or not, objectively speaking, the communication was intended to be private"); *id.,* at 11

("We propose a test using a way that's not too dissimilar from the tort 'reasonable man' test"). After some questioning from the Justices, the lawyer conceded that his test should also require individuals to subjectively expect privacy. See *id.,* at 12. With that modification, Justice Harlan seemed to accept the lawyer's test almost verbatim in his concurrence.

Although the majority opinion in *Katz* had little practical significance after Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Justice Harlan's concurrence profoundly changed our Fourth Amendment jurisprudence. It took only one year for the full Court to adopt his two-pronged test. See *Terry* v. *Ohio*, 392 U. S. 1, 10 (1968). And by 1979, the Court was describing Justice Harlan's test as the "lodestar" for determining whether a "search" had occurred. *Smith* v. *Maryland*, 442 U. S. 735, 739 (1979). Over time, the Court minimized the subjective prong of Justice Harlan's test. See Kerr, *Katz* Has Only One Step: The Irrelevance of Subjective Expectations, 82 U. Chi. L. Rev. 113 (2015). That left the objective prong—the "reasonable expectation of privacy" test that the Court still applies today. See *ante,* at 5; *United States* v. *Jones*, 565 U. S. 400, 406 (2012).

II

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

vacy," the *Katz* test misconstrues virtually every one of these words.

A

The *Katz* test distorts the original meaning of "searc[h]"—the word in the Fourth Amendment that it purports to define, see *ante*, at 5; *Smith*, *supra*. Under the *Katz* test, the government conducts a search anytime it violates someone's "reasonable expectation of privacy." That is not a normal definition of the word "search."

At the founding, "search" did not mean a violation of someone's reasonable expectation of privacy. The word was probably not a term of art, as it does not appear in legal dictionaries from the era. And its ordinary meaning was the same as it is today: "'[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.'" *Kyllo* v. *United States*, 533 U. S. 27, 32, n. 1 (2001) (quoting N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989)); accord, 2 S. Johnson, A Dictionary of the English Language (5th ed. 1773) ("Inquiry by looking into every suspected place"); N. Bailey, An Universal Etymological English Dictionary (22d ed. 1770) ("a seeking after, a looking for, &c."); 2 J. Ash, The New and Complete Dictionary of the English Language (2d ed. 1795) ("An enquiry, an examination, the act of seeking, an enquiry by looking into every suspected place; a quest; a pursuit"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (similar). The word "search" was not associated with "reasonable expectation of privacy" until Justice Harlan coined that phrase in 1967. The phrase "expectation(s) of privacy" does not appear in the pre-*Katz* federal or state case reporters, the papers of prominent

Founders,[2] early congressional documents and debates,[3] collections of early American English texts,[4] or early American newspapers.[5]

B

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

Those who ratified the Fourth Amendment were quite familiar with the notion of security in property. Security in property was a prominent concept in English law. See, *e.g.,* 3 W. Blackstone, Commentaries on the Laws of Eng-

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[2] National Archives, Library of Congress, Founders Online, https://founders.archives.gov (all Internet materials as last visited June 18, 2018).

[3] A Century of Lawmaking For A New Nation, U. S. Congressional Documents and Debates, 1774–1875 (May 1, 2003), https://memory.loc.gov/ammem/amlaw/lawhome.html.

[4] Corpus of Historical American English, https://corpus.byu.edu/coha; Google Books (American), https://googlebooks.byu.edu/x.asp; Corpus of Founding Era American English, https://lawncl.byu.edu/cofea.

[5] Readex, America's Historical Newspapers (2018), https://www.readex.com/content/americas-historical-newspapers.

land 288 (1768) ("[E]very man's house is looked upon by the law to be his castle"); 3 E. Coke, Institutes of Laws of England 162 (6th ed. 1680) ("[F]or a man[']s house is his Castle, & domus sua cuique est tutissimum refugium [each man's home is his safest refuge]"). The political philosophy of John Locke, moreover, "permeated the 18th-century political scene in America." *Obergefell* v. *Hodges*, 576 U. S. ___, ___ (2015) (THOMAS, J., dissenting) (slip op., at 8). For Locke, every individual had a property right "in his own person" and in anything he "removed from the common state [of] Nature" and "mixed his labour with." Second Treatise of Civil Government §27 (1690). Because property is "very unsecure" in the state of nature, §123, individuals form governments to obtain "a secure enjoyment of their properties." §95. Once a government is formed, however, it cannot be given "a power to destroy that which every one designs to secure"; it cannot legitimately "endeavour to take away, and destroy the property of the people," or exercise "an absolute power over [their] lives, liberties, and estates." §222.

The concept of security in property recognized by Locke and the English legal tradition appeared throughout the materials that inspired the Fourth Amendment. In *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C. P. 1765)—a heralded decision that the founding generation considered "the true and ultimate expression of constitutional law," *Boyd* v. *United States*, 116 U. S. 616, 626 (1886)—Lord Camden explained that "[t]he great end, for which men entered into society, was to secure their property." 19 How. St. Tr., at 1066. The American colonists echoed this reasoning in their "widespread hostility" to the Crown's writs of assistance[6]—a practice that inspired the Revolu-

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[6] Writs of assistance were "general warrants" that gave "customs officials blanket authority to search where they pleased for goods

tion and became "[t]he driving force behind the adoption of the [Fourth] Amendment." *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 266 (1990). Prominent colonists decried the writs as destroying "'domestic security'" by permitting broad searches of homes. M. Smith, The Writs of Assistance Case 475 (1978) (quoting a 1772 Boston town meeting); see also *id.,* at 562 (complaining that "'every householder in this province, will necessarily become *less secure* than he was before this writ'" (quoting a 1762 article in the Boston Gazette)); *id.,* at 493 (complaining that the writs were "'expressly contrary to the common law, which ever regarded a man's *house* as his castle, or a place of perfect security'" (quoting a 1768 letter from John Dickinson)). James Otis, who argued the famous Writs of Assistance case, contended that the writs violated "'the fundamental Principl[e] of Law'" that "'[a] Man who is quiet, is as secure in his House, as a Prince in his Castle.'" *Id.,* at 339 (quoting John Adam's notes). John Adams attended Otis' argument and later drafted Article XIV of the Massachusetts Constitution,[7] which served as a model for the Fourth Amendment. See Clancy, The Framers' Intent: John Adams, His Era, and the Fourth Amendment, 86 Ind. L. J. 979, 982 (2011); Donohue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1269 (2016)

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imported in violation of the British tax laws." *Stanford* v. *Texas*, 379 U. S. 476, 481 (1965).

[7] "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws." Mass. Const., pt. I, Art. XIV (1780).

(Donohue). Adams agreed that "[p]roperty must be secured, or liberty cannot exist." Discourse on Davila, in 6 The Works of John Adams 280 (C. Adams ed. 1851).

Of course, the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well. See, *e.g., Boyd*, *supra*, at 630 (explaining that searches of houses invade "the privacies of life"); *Wilkes* v. *Wood*, 19 How. St. Tr. 1153, 1154 (C. P. 1763) (argument of counsel contending that seizures of papers implicate "our most private concerns"). But the Fourth Amendment's attendant protection of privacy does not justify *Katz*'s elevation of privacy as the *sine qua non* of the Amendment. See T. Clancy, The Fourth Amendment: Its History and Interpretation §3.4.4, p. 78 (2008) ("[The *Katz* test] confuse[s] the reasons for exercising the protected right with the right itself. A purpose of exercising one's Fourth Amendment rights might be the desire for privacy, but the individual's motivation is not the right protected"); cf. *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 145 (2006) (rejecting "a line of reasoning that 'abstracts from the right to its purposes, and then eliminates the right'"). As the majority opinion in *Katz* recognized, the Fourth Amendment "cannot be translated into a general constitutional 'right to privacy,'" as its protections "often have nothing to do with privacy at all." 389 U. S., at 350. Justice Harlan's focus on privacy in his concurrence—an opinion that was issued between *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and *Roe* v. *Wade*, 410 U. S. 113 (1973)—reflects privacy's status as the organizing constitutional idea of the 1960s and 1970s. The organizing constitutional idea of the founding era, by contrast, was property.

C

In shifting the focus of the Fourth Amendment from property to privacy, the *Katz* test also reads the words

"persons, houses, papers, and effects" out of the text. At its broadest formulation, the *Katz* test would find a search "*wherever* an individual may harbor a reasonable 'expectation of privacy.'" *Terry*, 392 U. S., at 9 (emphasis added). The Court today, for example, does not ask whether cell-site location records are "persons, houses, papers, [or] effects" within the meaning of the Fourth Amendment.[8] Yet "persons, houses, papers, and effects" cannot mean "anywhere" or "anything." *Katz*'s catchphrase that "the Fourth Amendment protects people, not places," is not a serious attempt to reconcile the constitutional text. See *Carter*, 525 U. S., at 98, n. 3 (opinion of Scalia, J.). The Fourth Amendment obviously protects people; "[t]he question . . . is what protection it affords to those people." *Katz*, 389 U. S., at 361 (Harlan, J., concurring). The Founders decided to protect the people from unreasonable searches and seizures of four specific things—persons, houses, papers, and effects. They identified those four categories as "the objects of privacy protection to which the *Constitution* would extend, leaving further expansion to the good judgment . . . of the people through their representatives in the legislature." *Carter*, *supra*, at 97–98 (opinion of Scalia, J.).

This limiting language was important to the founders. Madison's first draft of the Fourth Amendment used a different phrase: "their persons, their houses, their papers, and their *other property*." 1 Annals of Cong. 452 (1789)

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[8] The answer to that question is not obvious. Cell-site location records are business records that mechanically collect the interactions between a person's cell phone and the company's towers; they are not private papers and do not reveal the contents of any communications. Cf. Schnapper, Unreasonable Searches and Seizures of Papers, 71 Va. L. Rev. 869, 923–924 (1985) (explaining that business records that do not reveal "personal or speech-related confidences" might not satisfy the original meaning of "papers").

(emphasis added). In one of the few changes made to Madison's draft, the House Committee of Eleven changed "other property" to "effects." See House Committee of Eleven Report (July 28, 1789), in N. Cogan, The Complete Bill of Rights 334 (2d ed. 2015). This change might have narrowed the Fourth Amendment by clarifying that it does not protect real property (other than houses). See *Oliver* v. *United States*, 466 U. S. 170, 177, and n. 7 (1984); Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 709–714 (1999) (Davies). Or the change might have broadened the Fourth Amendment by clarifying that it protects commercial goods, not just personal possessions. See Donohue 1301. Or it might have done both. Whatever its ultimate effect, the change reveals that the Founders understood the phrase "persons, houses, papers, and effects" to be an important measure of the Fourth Amendment's overall scope. See Davies 710. The *Katz* test, however, displaces and renders that phrase entirely "superfluous." *Jones*, 565 U. S., at 405.

D

"[P]ersons, houses, papers, and effects" are not the only words that the *Katz* test reads out of the Fourth Amendment. The Fourth Amendment specifies that the people have a right to be secure from unreasonable searches of "their" persons, houses, papers, and effects. Although phrased in the plural, "[t]he obvious meaning of ['their'] is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects." *Carter*, *supra*, at 92 (opinion of Scalia, J.); see also *District of Columbia* v. *Heller*, 554 U. S. 570, 579 (2008) (explaining that the Constitution uses the plural phrase "the people" to "refer to individual rights, not 'collective' rights"). Stated differently, the word "their" means, at the very least, that individuals do not have Fourth Amendment rights in *someone else's* property. See

Carter, *supra*, at 92–94 (opinion of Scalia, J.). Yet, under the *Katz* test, individuals can have a reasonable expectation of privacy in another person's property. See, *e.g., Carter*, 525 U. S., at 89 (majority opinion) ("[A] person may have a legitimate expectation of privacy in the house of someone else"). Until today, our precedents have not acknowledged that individuals can claim a reasonable expectation of privacy in someone else's business records. See *ante,* at 2 (KENNEDY, J., dissenting). But the Court erases that line in this case, at least for cell-site location records. In doing so, it confirms that the *Katz* test does not necessarily require an individual to prove that the government searched *his* person, house, paper, or effect.

Carpenter attempts to argue that the cell-site records are, in fact, his "papers," see Brief for Petitioner 32–35; Reply Brief 14–15, but his arguments are unpersuasive, see *ante,* at 12–13 (opinion of KENNEDY, J.); *post,* at 20–23 (ALITO, J., dissenting). Carpenter stipulated below that the cell-site records are the business records of Sprint and MetroPCS. See App. 51. He cites no property law in his briefs to this Court, and he does not explain how he has a property right in the companies' records under the law of any jurisdiction at any point in American history. If someone stole these records from Sprint or MetroPCS, Carpenter does not argue that he could recover in a traditional tort action. Nor do his contracts with Sprint and MetroPCS make the records his, even though such provisions could exist in the marketplace. Cf., *e.g.,* Google Terms of Service, https://policies.google.com/terms ("Some of our Services allow you to upload, submit, store, send or receive content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours").

Instead of property, tort, or contract law, Carpenter relies on the federal Telecommunications Act of 1996 to demonstrate that the cell site records are his papers. The

Telecommunications Act generally bars cell-phone companies from disclosing customers' cell site location information to the public. See 47 U. S. C. §222(c). This is sufficient to make the records his, Carpenter argues, because the Fourth Amendment merely requires him to identify a source of "positive law" that "protects against access by the public without consent." Brief for Petitioner 32–33 (citing Baude & Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1825–1826 (2016); emphasis deleted).

Carpenter is mistaken. To come within the text of the Fourth Amendment, Carpenter must prove that the cell-site records are *his*; positive law is potentially relevant only insofar as it answers that question. The text of the Fourth Amendment cannot plausibly be read to mean "any violation of positive law" any more than it can plausibly be read to mean "any violation of a reasonable expectation of privacy."

Thus, the Telecommunications Act is insufficient because it does not give Carpenter a property right in the cell-site records. Section 222, titled "Privacy of customer information," protects customers' privacy by preventing cell-phone companies from disclosing sensitive information about them. The statute creates a "duty to protect the confidentiality" of information relating to customers, §222(a), and creates "[p]rivacy requirements" that limit the disclosure of that information, §222(c)(1). Nothing in the text pre-empts state property law or gives customers a property interest in the companies' business records (assuming Congress even has that authority).[9] Although

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[9] Carpenter relies on an order from the Federal Communications Commission (FCC), which weakly states that "'*[t]o the extent* [a customer's location information] is property, . . . it is better understood as belonging to the customer, not the carrier.'" Brief for Petitioner 34, and n. 23 (quoting 13 FCC Rcd. 8061, 8093 ¶43 (1998); emphasis added).

§222 "protects the interests of individuals against wrongful uses or disclosures of personal data, the rationale for these legal protections has not historically been grounded on a perception that people have property rights in personal data as such." Samuelson, Privacy as Intellectual Property? 52 Stan. L. Rev. 1125, 1130–1131 (2000) (footnote omitted). Any property rights remain with the companies.

E

The *Katz* test comes closer to the text of the Fourth Amendment when it asks whether an expectation of privacy is "reasonable," but it ultimately distorts that term as well. The Fourth Amendment forbids "unreasonable searches." In other words, reasonableness determines the legality of a search, not "whether a search . . . within the meaning of the Constitution has *occurred*." *Carter*, 525 U. S., at 97 (opinion of Scalia, J.) (internal quotation marks omitted).

Moreover, the *Katz* test invokes the concept of reasonableness in a way that would be foreign to the ratifiers of the Fourth Amendment. Originally, the word "unreasonable" in the Fourth Amendment likely meant "against reason"—as in "against the reason of the common law." See Donohue 1270–1275; Davies 686–693; *California* v. *Acevedo*, 500 U. S. 565, 583 (1991) (Scalia, J., concurring in judgment). At the founding, searches and seizures were

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But this order was vacated by the Court of Appeals for the Tenth Circuit. *U. S. West, Inc.* v. *FCC*, 182 F. 3d 1224, 1240 (1999). Notably, the carrier in that case argued that the FCC's regulation of customer information was a taking of *its* property. See *id.,* at 1230. Although the panel majority had no occasion to address this argument, see *id.,* at 1239, n. 14, the dissent concluded that the carrier had failed to prove the information was "property" at all, see *id.,* at 1247–1248 (opinion of Briscoe, J.).

regulated by a robust body of common-law rules. See generally W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791 (2009); *e.g., Wilson* v. *Arkansas*, 514 U. S. 927, 931–936 (1995) (discussing the common-law knock-and-announce rule). The search-and-seizure practices that the Founders feared most—such as general warrants—were already illegal under the common law, and jurists such as Lord Coke described violations of the common law as "against reason." See Donohue 1270–1271, and n. 513. Locke, Blackstone, Adams, and other influential figures shortened the phrase "against reason" to "unreasonable." See *id.,* at 1270–1275. Thus, by prohibiting "unreasonable" searches and seizures in the Fourth Amendment, the Founders ensured that the newly created Congress could not use legislation to abolish the established common-law rules of search and seizure. See T. Cooley, Constitutional Limitations *303 (2d ed. 1871); 3 J. Story, Commentaries on the Constitution of the United States §1895, p. 748 (1833).

Although the Court today maintains that its decision is based on "Founding-era understandings," *ante,* at 6, the Founders would be puzzled by the Court's conclusion as well as its reasoning. The Court holds that the Government unreasonably searched Carpenter by subpoenaing the cell-site records of Sprint and MetroPCS without a warrant. But the Founders would not recognize the Court's "warrant requirement." *Ante,* at 21. The common law required warrants for some types of searches and seizures, but not for many others. The relevant rule depended on context. See *Acevedo*, *supra*, at 583–584 (opinion of Scalia, J.); Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 763–770 (1994); Davies 738–739. In cases like this one, a subpoena for third-party documents was not a "search" to begin with, and the common law did not limit the government's authority to subpoena third parties. See *post,* at 2–12 (ALITO, J., dissent-

ing). Suffice it to say, the Founders would be confused by this Court's transformation of their common-law protection of property into a "warrant requirement" and a vague inquiry into "reasonable expectations of privacy."

III

That the *Katz* test departs so far from the text of the Fourth Amendment is reason enough to reject it. But the *Katz* test also has proved unworkable in practice. Jurists and commentators tasked with deciphering our jurisprudence have described the *Katz* regime as "an unpredictable jumble," "a mass of contradictions and obscurities," "all over the map," "riddled with inconsistency and incoherence," "a series of inconsistent and bizarre results that [the Court] has left entirely undefended," "unstable," "chameleon-like," "'notoriously unhelpful,'" "a conclusion rather than a starting point for analysis," "distressingly unmanageable," "a dismal failure," "flawed to the core," "unadorned fiat," and "inspired by the kind of logic that produced Rube Goldberg's bizarre contraptions."[10] Even

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[10] Kugler & Strahilevitz, Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory, 2015 S. Ct. Rev. 205, 261; Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468 (1985); Kerr, Four Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 505 (2007); Solove, Fourth Amendment Pragmatism, 51 Boston College L. Rev. 1511 (2010); Wasserstom & Seidman, The Fourth Amendment as Constitutional Theory, 77 Geo. L. J. 19, 29 (1988); Colb, What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 Stan. L. Rev. 119, 122 (2002); Clancy, The Fourth Amendment: Its History and Interpretation §3.3.4, p. 65 (2008); *Minnesota* v. *Carter*, 525 U. S. 83, 97 (1998) (Scalia, J., dissenting); *State* v. *Campbell*, 306 Ore. 157, 164, 759 P. 2d 1040, 1044 (1988); Wilkins, Defining the "Reasonable Expectation of Privacy": an Emerging Tripartite Analysis, 40 Vand. L. Rev. 1077, 1107 (1987); Yeager, Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment, 84 J. Crim. L. & C. 249, 251 (1993); Thomas, Time Travel, Hovercrafts, and the Framers:

Justice Harlan, four years after penning his concurrence in *Katz*, confessed that the test encouraged "the substitution of words for analysis." *United States* v. *White*, 401 U. S. 745, 786 (1971) (dissenting opinion).

After 50 years, it is still unclear what question the *Katz* test is even asking. This Court has steadfastly declined to elaborate the relevant considerations or identify any meaningful constraints. See, *e.g., ante,* at 5 ("[N]o single rubric definitively resolves which expectations of privacy are entitled to protection"); *O'Connor* v. *Ortega*, 480 U. S. 709, 715 (1987) (plurality opinion) ("We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable"); *Oliver*, 466 U. S., at 177 ("No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion").

Justice Harlan's original formulation of the *Katz* test appears to ask a descriptive question: Whether a given expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" 389 U. S., at 361. As written, the *Katz* test turns on society's actual, current views about the reasonableness of various expectations of privacy.

But this descriptive understanding presents several problems. For starters, it is easily circumvented. If, for example, "the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry," individuals could not realistically expect privacy in their homes. *Smith*, 442 U. S., at 740, n. 5; see also Chemerinsky, Rediscovering Brandeis's

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James Madison Sees the Future and Rewrites the Fourth Amendment, 80 Notre Dame L. Rev. 1451, 1500 (2005); *Rakas* v. *Illinois*, 439 U. S. 128, 165 (1978) (White, J., dissenting); Cloud, Rube Goldberg Meets the Constitution: The Supreme Court, Technology, and the Fourth Amendment, 72 Miss. L. J. 5, 7 (2002).

Right to Privacy, 45 Brandeis L. J. 643, 650 (2007) ("[Under *Katz,* t]he government seemingly can deny privacy just by letting people know in advance not to expect any"). A purely descriptive understanding of the *Katz* test also risks "circular[ity]." *Kyllo*, 533 U. S., at 34. While this Court is supposed to base its decisions on society's expectations of privacy, society's expectations of privacy are, in turn, shaped by this Court's decisions. See Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173, 188 ("[W]hether [a person] will or will not have [a reasonable] expectation [of privacy] will depend on what the legal rule is").

To address this circularity problem, the Court has insisted that expectations of privacy must come from outside its Fourth Amendment precedents, "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas* v. *Illinois*, 439 U. S. 128, 144, n. 12 (1978). But the Court's supposed reliance on "real or personal property law" rings hollow. The whole point of *Katz* was to "'discredi[t]'" the relationship between the Fourth Amendment and property law, 389 U. S., at 353, and this Court has repeatedly downplayed the importance of property law under the *Katz* test, see, *e.g., United States* v. *Salvucci*, 448 U. S. 83, 91 (1980) ("[P]roperty rights are neither the beginning nor the end of this Court's inquiry [under *Katz*]"); *Rawlings* v. *Kentucky*, 448 U. S. 98, 105 (1980) ("[This Court has] emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment"). Today, for example, the Court makes no mention of property law, except to reject its relevance. See *ante,* at 5, and n. 1.

As for "understandings that are recognized or permitted in society," this Court has never answered even the most basic questions about what this means. See Kerr, Four

Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 504–505 (2007). For example, our precedents do not explain who is included in "society," how we know what they "recogniz[e] or permi[t]," and how much of society must agree before something constitutes an "understanding."

Here, for example, society might prefer a balanced regime that prohibits the Government from obtaining cell-site location information unless it can persuade a neutral magistrate that the information bears on an ongoing criminal investigation. That is precisely the regime Congress created under the Stored Communications Act and Telecommunications Act. See 47 U. S. C. §222(c)(1); 18 U. S. C. §§2703(c)(1)(B), (d). With no sense of irony, the Court invalidates this regime today—the one that society actually created "in the form of its elected representatives in Congress." 819 F. 3d 880, 890 (2016).

Truth be told, this Court does not treat the *Katz* test as a descriptive inquiry. Although the *Katz* test is phrased in descriptive terms about society's views, this Court treats it like a normative question—whether a particular practice *should* be considered a search under the Fourth Amendment. Justice Harlan thought this was the best way to understand his test. See *White*, 401 U. S., at 786 (dissenting opinion) (explaining that courts must assess the "desirability" of privacy expectations and ask whether courts "should" recognize them by "balanc[ing]" the "impact on the individual's sense of security . . . against the utility of the conduct as a technique of law enforcement"). And a normative understanding is the only way to make sense of this Court's precedents, which bear the hallmarks of subjective policymaking instead of neutral legal decisionmaking. "[T]he only thing the past three decades have established about the *Katz* test" is that society's expectations of privacy "bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable."

Carter, 525 U. S., at 97 (opinion of Scalia, J.). Yet, "[t]hough we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election." *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in judgment).

* * *

In several recent decisions, this Court has declined to apply the *Katz* test because it threatened to narrow the original scope of the Fourth Amendment. See *Grady* v. *North Carolina*, 575 U. S. ___, ___ (2015) (*per curiam*) (slip op., at 3); *Florida* v. *Jardines*, 569 U. S. 1, 5 (2013); *Jones*, 565 U. S., at 406–407. But as today's decision demonstrates, *Katz* can also be invoked to expand the Fourth Amendment beyond its original scope. This Court should not tolerate errors in either direction. "The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail." *Luis* v. *United States*, 578 U. S. ___, ___ (2016) (THOMAS, J., concurring in judgment) (slip op., at 10). Whether the rights they ratified are too broad or too narrow by modern lights, this Court has no authority to unilaterally alter the document they approved.

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

SUPREME COURT OF THE UNITED STATES

No. 16–402

TIMOTHY IVORY CARPENTER, PETITIONER *v.* UNITED STATES

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

[June 22, 2018]

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

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

First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today's decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent. Unless it is somehow restricted to the particular situation in the present case, the Court's move will cause upheaval. Must every grand jury subpoena *duces tecum* be supported by probable cause? If so, investigations of terrorism, political

corruption, white-collar crime, and many other offenses will be stymied. And what about subpoenas and other document-production orders issued by administrative agencies? See, *e.g.*, 15 U. S. C. §57b–1(c) (Federal Trade Commission); §§77s(c), 78u(a)–(b) (Securities and Exchange Commission); 29 U. S. C. §657(b) (Occupational Safety and Health Administration); 29 CFR §1601.16(a)(2) (2017) (Equal Employment Opportunity Commission).

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

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

I

Today the majority holds that a court order requiring the production of cell-site records may be issued only after the Government demonstrates probable cause. See *ante*, at 18. That is a serious and consequential mistake. The Court's holding is based on the premise that the order issued in this case was an actual "search" within the meaning of the Fourth Amendment, but that premise is inconsistent with the original meaning of the Fourth Amendment and with more than a century of precedent.

A

The order in this case was the functional equivalent of a subpoena for documents, and there is no evidence that these writs were regarded as "searches" at the time of the founding. Subpoenas *duces tecum* and other forms of compulsory document production were well known to the founding generation. Blackstone dated the first writ of subpoena to the reign of King Richard II in the late 14th century, and by the end of the 15th century, the use of such writs had "become the daily practice of the [Chancery] court." 3 W. Blackstone, Commentaries on the Laws of England 53 (G. Tucker ed. 1803) (Blackstone). Over the next 200 years, subpoenas would grow in prominence and power in tandem with the Court of Chancery, and by the end of Charles II's reign in 1685, two important innovations had occurred.

First, the Court of Chancery developed a new species of subpoena. Until this point, subpoenas had been used largely to compel attendance and oral testimony from witnesses; these subpoenas correspond to today's subpoenas *ad testificandum*. But the Court of Chancery also improvised a new version of the writ that tacked onto a regular subpoena an order compelling the witness to bring certain items with him. By issuing these so-called subpoenas *duces tecum*, the Court of Chancery could compel the production of papers, books, and other forms of physical evidence, whether from the parties to the case or from third parties. Such subpoenas were sufficiently commonplace by 1623 that a leading treatise on the practice of law could refer in passing to the fee for a "*Sub pœna* of *Ducas tecum*" (seven shillings and two pence) without needing to elaborate further. T. Powell, The Attourneys Academy 79 (1623). Subpoenas *duces tecum* would swell in use over the next century as the rules for their application became ever more developed and definite. See, *e.g.*, 1 G. Jacob, The Compleat Chancery-Practiser 290 (1730) ("The *Sub-*

poena duces tecum is awarded when the Defendant has confessed by his Answer that he hath such Writings in his Hands as are prayed by the Bill to be discovered or brought into Court").

Second, although this new species of subpoena had its origins in the Court of Chancery, it soon made an appearance in the work of the common-law courts as well. One court later reported that "[t]he Courts of Common law . . . employed the same or similar means . . . from the time of Charles the Second at least." *Amey* v. *Long*, 9 East. 473, 484, 103 Eng. Rep. 653, 658 (K. B. 1808).

By the time Blackstone published his Commentaries on the Laws of England in the 1760's, the use of subpoenas *duces tecum* had bled over substantially from the courts of equity to the common-law courts. Admittedly, the transition was still incomplete: In the context of jury trials, for example, Blackstone complained about "the want of a compulsive power for the production of books and papers belonging to the parties." Blackstone 381; see also, *e.g.*, *Entick* v. *Carrington*, 19 State Trials 1029, 1073 (K. B. 1765) ("I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. [But] where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action"). But Blackstone found some comfort in the fact that at least those documents "[i]n the hands of third persons . . . can generally be obtained by rule of court, or by adding a clause of requisition to the writ of *subpoena*, which is then called a *subpoena duces tecum*." Blackstone 381; see also, *e.g.*, *Leeds* v. *Cook*, 4 Esp. 256, 257, 170 Eng. Rep. 711 (N. P. 1803) (third-party subpoena *duces tecum*); *Rex* v. *Babb*, 3 T. R. 579, 580, 100 Eng. Rep. 743, 744 (K. B. 1790) (third-party document production). One of the primary questions outstanding, then, was whether common-law courts would remedy the "defect[s]" identified by the Commentaries, and allow

parties to use subpoenas *duces tecum* not only with respect to third parties but also with respect to each other. Blackstone 381.

That question soon found an affirmative answer on both sides of the Atlantic. In the United States, the First Congress established the federal court system in the Judiciary Act of 1789. As part of that Act, Congress authorized "all the said courts of the United States . . . in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." §15, 1 Stat. 82. From that point forward, federal courts in the United States could compel the production of documents regardless of whether those documents were held by parties to the case or by third parties.

In Great Britain, too, it was soon definitively established that common-law courts, like their counterparts in equity, could subpoena documents held either by parties to the case or by third parties. After proceeding in fits and starts, the King's Bench eventually held in *Amey* v. *Long* that the "writ of subpœna duces tecum [is] a writ of compulsory obligation and effect in the law." 9 East., at 486, 103 Eng. Rep., at 658. Writing for a unanimous court, Lord Chief Justice Ellenborough explained that "[t]he right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a Court of Common Law." *Id.,* at 484, 103 Eng. Rep., at 658. Without the power to issue subpoenas *duces tecum*, the Lord Chief Justice observed, common-law courts "could not possibly proceed with due effect." *Ibid.*

The prevalence of subpoenas *duces tecum* at the time of the founding was not limited to the civil context. In crim-

inal cases, courts and prosecutors were also using the writ to compel the production of necessary documents. In *Rex* v. *Dixon*, 3 Burr. 1687, 97 Eng. Rep. 1047 (K. B. 1765), for example, the King's Bench considered the propriety of a subpoena *duces tecum* served on an attorney named Samuel Dixon. Dixon had been called "to give evidence before the grand jury of the county of Northampton" and specifically "to produce three vouchers . . . in order to found a prosecution by way of indictment against [his client] Peach . . . for forgery." *Id.,* at 1687, 97 Eng. Rep., at 1047–1048. Although the court ultimately held that Dixon had not needed to produce the vouchers on account of attorney-client privilege, none of the justices expressed the slightest doubt about the general propriety of subpoenas *duces tecum* in the criminal context. See *id.,* at 1688, 97 Eng. Rep., at 1048. As Lord Chief Justice Ellenborough later explained, "[i]n that case no objection was taken to the writ, but to the special circumstances under which the party possessed the papers; so that the Court may be considered as recognizing the general obligation to obey writs of that description in other cases." *Amey*, *supra*, at 485, 103 Eng. Rep., at 658; see also 4 J. Chitty, Practical Treatise on the Criminal Law 185 (1816) (template for criminal subpoena *duces tecum*).

As *Dixon* shows, subpoenas *duces tecum* were routine in part because of their close association with grand juries. Early American colonists imported the grand jury, like so many other common-law traditions, and they quickly flourished. See *United States* v. *Calandra*, 414 U. S. 338, 342–343 (1974). Grand juries were empaneled by the federal courts almost as soon as the latter were established, and both they and their state counterparts actively exercised their wide-ranging common-law authority. See R. Younger, The People's Panel 47–55 (1963). Indeed, "the Founders thought the grand jury so essential . . . that they provided in the Fifth Amendment that federal prosecution

for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.'" *Calandra*, *supra*, at 343.

Given the popularity and prevalence of grand juries at the time, the Founders must have been intimately familiar with the tools they used—including compulsory process—to accomplish their work. As a matter of tradition, grand juries were "accorded wide latitude to inquire into violations of criminal law," including the power to "compel the production of evidence or the testimony of witnesses as [they] conside[r] appropriate." *Ibid.* Long before national independence was achieved, grand juries were already using their broad inquisitorial powers not only to present and indict criminal suspects but also to inspect public buildings, to levy taxes, to supervise the administration of the laws, to advance municipal reforms such as street repair and bridge maintenance, and in some cases even to propose legislation. Younger, *supra*, at 5–26. Of course, such work depended entirely on grand juries' ability to access any relevant documents.

Grand juries continued to exercise these broad inquisitorial powers up through the time of the founding. See *Blair* v. *United States*, 250 U. S. 273, 280 (1919) ("At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power"). In a series of lectures delivered in the early 1790's, Justice James Wilson crowed that grand juries were "the peculiar boast of the common law" thanks in part to their wide-ranging authority: "All the operations of government, and of its ministers and officers, are within the compass of their view and research." 2 J. Wilson, The Works of James Wilson 534, 537 (R. McCloskey ed. 1967). That reflected the broader insight that "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *Calandra*, *supra*, at 344.

Compulsory process was also familiar to the founding

generation in part because it reflected "the ancient proposition of law" that "'"the public . . . has a right to every man's evidence."'" *United States* v. *Nixon*, 418 U. S. 683, 709 (1974); see also *ante*, at 10 (KENNEDY, J., dissenting). As early as 1612, "Lord Bacon is reported to have declared that 'all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.'" *Blair*, *supra*, at 279–280. That duty could be "onerous at times," yet the Founders considered it "necessary to the administration of justice according to the forms and modes established in our system of government." *Id.,* at 281; see also *Calandra*, *supra*, at 345.

B

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

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

stalwart proponent of construing the Fourth Amendment liberally—acknowledged that "under any ordinary construction of language," "there is no 'search' or 'seizure' when a defendant is required to produce a document in the orderly process of a court's procedure." *Olmstead* v. *United States*, 277 U. S. 438, 476 (1928) (dissenting opinion).[1]

Nor is there any reason to believe that the Founders intended the Fourth Amendment to regulate courts' use of compulsory process. American colonists rebelled against the Crown's physical invasions of their persons and their property, not against its acquisition of information by any and all means. As Justice Black once put it, "[t]he Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates." *Katz*, 389 U. S., at 367 (dissenting opinion). More recently, we have acknowledged that "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed

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[1] Any other interpretation of the Fourth Amendment's text would run into insuperable problems because it would apply not only to subpoenas *duces tecum* but to all other forms of compulsory process as well. If the Fourth Amendment applies to the compelled production of documents, then it must also apply to the compelled production of testimony—an outcome that we have repeatedly rejected and which, if accepted, would send much of the field of criminal procedure into a tailspin. See, *e.g.*, *United States* v. *Dionisio*, 410 U. S. 1, 9 (1973) ("It is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome"); *United States* v. *Calandra*, 414 U. S. 338, 354 (1974) ("Grand jury questions . . . involve no independent governmental invasion of one's person, house, papers, or effects"). As a matter of original understanding, a subpoena *duces tecum* no more effects a "search" or "seizure" of papers within the meaning of the Fourth Amendment than a subpoena *ad testificandum* effects a "search" or "seizure" of a person.

British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley* v. *California*, 573 U. S. ___, ___ (2014) (slip op., at 27).

General warrants and writs of assistance were noxious not because they allowed the Government to acquire evidence in criminal investigations, but because of the *means* by which they permitted the Government to acquire that evidence. Then, as today, searches could be quite invasive. Searches generally begin with officers "mak[ing] nonconsensual entries into areas not open to the public." *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408, 414 (1984). Once there, officers are necessarily in a position to observe private spaces generally shielded from the public and discernible only with the owner's consent. Private area after private area becomes exposed to the officers' eyes as they rummage through the owner's property in their hunt for the object or objects of the search. If they are searching for documents, officers may additionally have to rifle through many other papers—potentially filled with the most intimate details of a person's thoughts and life—before they find the specific information they are seeking. See *Andresen* v. *Maryland*, 427 U. S. 463, 482, n. 11 (1976). If anything sufficiently incriminating comes into view, officers seize it. *Horton* v. *California*, 496 U. S. 128, 136–137 (1990). Physical destruction always lurks as an underlying possibility; "officers executing search warrants on occasion must damage property in order to perform their duty." *Dalia* v. *United States*, 441 U. S. 238, 258 (1979); see, *e.g.*, *United States* v. *Ramirez*, 523 U. S. 65, 71–72 (1998) (breaking garage window); *United States* v. *Ross*, 456 U. S. 798, 817–818 (1982) (ripping open car upholstery); *Brown* v. *Battle Creek Police Dept.*, 844 F. 3d 556, 572 (CA6 2016) (shooting and killing two pet dogs); *Lawmaster* v. *Ward*, 125 F. 3d 1341, 1350, n. 3 (CA10 1997) (breaking locks).

Compliance with a subpoena *duces tecum* requires none

of that. A subpoena *duces tecum* permits a subpoenaed individual to conduct the search for the relevant documents himself, without law enforcement officers entering his home or rooting through his papers and effects. As a result, subpoenas avoid the many incidental invasions of privacy that necessarily accompany any actual search. And it was *those* invasions of privacy—which, although incidental, could often be extremely intrusive and damaging—that led to the adoption of the Fourth Amendment.

Neither this Court nor any of the parties have offered the slightest bit of historical evidence to support the idea that the Fourth Amendment originally applied to subpoenas *duces tecum* and other forms of compulsory process. That is telling, for as I have explained, these forms of compulsory process were a feature of criminal (and civil) procedure well known to the Founders. The Founders would thus have understood that holding the compulsory production of documents to the same standard as actual searches and seizures would cripple the work of courts in civil and criminal cases alike. It would be remarkable to think that, despite that knowledge, the Founders would have gone ahead and sought to impose such a requirement. It would be even more incredible to believe that the Founders would have imposed that requirement through the inapt vehicle of an amendment directed at different concerns. But it would blink reality entirely to argue that this entire process happened without anyone saying *the least thing about it*—not during the drafting of the Bill of Rights, not during any of the subsequent ratification debates, and not for most of the century that followed. If the Founders thought the Fourth Amendment applied to the compulsory production of documents, one would imagine that there would be *some* founding-era evidence of the Fourth Amendment being applied to the compulsory production of documents. Cf. *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505

(2010); *Printz* v. *United States*, 521 U. S. 898, 905 (1997). Yet none has been brought to our attention.

C

Of course, our jurisprudence has not stood still since 1791. We now evaluate subpoenas *duces tecum* and other forms of compulsory document production under the Fourth Amendment, although we employ a reasonableness standard that is less demanding than the requirements for a warrant. But the road to that doctrinal destination was anything but smooth, and our initial missteps—and the subsequent struggle to extricate ourselves from their consequences—should provide an object lesson for today's majority about the dangers of holding compulsory process to the same standard as actual searches and seizures.

For almost a century after the Fourth Amendment was enacted, this Court said and did nothing to indicate that it might regulate the compulsory production of documents. But that changed temporarily when the Court decided *Boyd* v. *United States*, 116 U. S. 616 (1886), the first—and, until today, the only—case in which this Court has ever held the compulsory production of documents to the same standard as actual searches and seizures.

The *Boyd* Court held that a court order compelling a company to produce potentially incriminating business records violated both the Fourth and the Fifth Amendments. The Court acknowledged that "certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting" when the Government relies on compulsory process. *Id.*, at 622. But it nevertheless asserted that the Fourth Amendment ought to "be liberally construed," *id.*, at 635, and further reasoned that compulsory process "effects the sole object and purpose of search and seizure" by "forcing from a party evidence against himself," *id.*, at 622. "In this regard," the Court concluded,

"the Fourth and Fifth Amendments run almost into each other." *Id.*, at 630. Having equated compulsory process with actual searches and seizures and having melded the Fourth Amendment with the Fifth, the Court then found the order at issue unconstitutional because it compelled the production of property to which the Government did not have superior title. See *id.*, at 622–630.

In a concurrence joined by Chief Justice Waite, Justice Miller agreed that the order violated the Fifth Amendment, *id.*, at 639, but he strongly protested the majority's invocation of the Fourth Amendment. He explained: "[T]here is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers . . . , authorizes an unreasonable search or seizure of the house, papers, or effects of that party. There is in fact no search and no seizure." *Ibid.* "If the mere service of a notice to produce a paper . . . is a search," Justice Miller concluded, "then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made." *Id.,* at 641.

Although *Boyd* was replete with stirring rhetoric, its reasoning was confused from start to finish in a way that ultimately made the decision unworkable. See 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure §8.7(a) (4th ed. 2015). Over the next 50 years, the Court would gradually roll back *Boyd*'s erroneous conflation of compulsory process with actual searches and seizures.

That effort took its first significant stride in *Hale* v. *Henkel*, 201 U. S. 43 (1906), where the Court found it "quite clear" and "conclusive" that "the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpœna duces tecum*, the production, upon a trial in court, of documentary evidence." *Id.,* at 73. Without that writ, the Court recognized, "it would be 'utterly impossible

to carry on the administration of justice.'" *Ibid.*

Hale, however, did not entirely liberate subpoenas *duces tecum* from Fourth Amendment constraints. While refusing to treat such subpoenas as the equivalent of actual searches, *Hale* concluded that they must not be unreasonable. And it held that the subpoena *duces tecum* at issue was "far too sweeping in its terms to be regarded as reasonable." *Id.,* at 76. The *Hale* Court thus left two critical questions unanswered: Under the Fourth Amendment, what makes the compulsory production of documents "reasonable," and how does that standard differ from the one that governs actual searches and seizures?

The Court answered both of those questions definitively in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946), where we held that the Fourth Amendment regulates the compelled production of documents, but less stringently than it does full-blown searches and seizures. *Oklahoma Press* began by admitting that the Court's opinions on the subject had "perhaps too often . . . been generative of heat rather than light," "mov[ing] with variant direction" and sometimes having "highly contrasting" "emphasis and tone." *Id.,* at 202. "The primary source of misconception concerning the Fourth Amendment's function" in this context, the Court explained, "lies perhaps in the identification of cases involving so-called 'figurative' or 'constructive' search with cases of actual search and seizure." *Ibid.* But the Court held that "the basic distinction" between the compulsory production of documents on the one hand, and actual searches and seizures on the other, meant that two different standards had to be applied. *Id.,* at 204.

Having reversed *Boyd*'s conflation of the compelled production of documents with actual searches and seizures, the Court then set forth the relevant Fourth Amendment standard for the former. When it comes to "the production of corporate or other business records," the

Court held that the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Oklahoma Press*, *supra*, at 208. Notably, the Court held that a showing of probable cause was not necessary so long as "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.,* at 209.

Since *Oklahoma Press*, we have consistently hewed to that standard. See, *e.g.*, *Lone Steer, Inc.*, 464 U. S., at 414–415; *United States* v. *Miller*, 425 U. S. 435, 445–446 (1976); *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 67 (1974); *United States* v. *Dionisio*, 410 U. S. 1, 11–12 (1973); *See* v. *Seattle*, 387 U. S. 541, 544 (1967); *United States* v. *Powell*, 379 U. S. 48, 57–58 (1964); *McPhaul* v. *United States*, 364 U. S. 372, 382–383 (1960); *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652–653 (1950); cf. *McLane Co.* v. *EEOC*, 581 U. S. ___, ___ (2017) (slip op., at 11). By applying *Oklahoma Press* and thereby respecting "the traditional distinction between a search warrant and a subpoena," *Miller*, *supra*, at 446, this Court has reinforced "the basic compromise" between "the public interest" in every man's evidence and the private interest "of men to be free from officious meddling." *Oklahoma Press*, *supra*, at 213.

D

Today, however, the majority inexplicably ignores the settled rule of *Oklahoma Press* in favor of a resurrected version of *Boyd*. That is mystifying. This should have been an easy case regardless of whether the Court looked to the original understanding of the Fourth Amendment or to our modern doctrine.

As a matter of original understanding, the Fourth

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

As a matter of modern doctrine, this case is equally straightforward. As JUSTICE KENNEDY explains, no search or seizure of Carpenter or his property occurred in this case. *Ante*, at 6–22; see also Part II, *infra*. But even if the majority were right that the Government "searched" Carpenter, it would at most be a "figurative or constructive search" governed by the *Oklahoma Press* standard, not an "actual search" controlled by the Fourth Amendment's warrant requirement.

And there is no doubt that the Government met the *Oklahoma Press* standard here. Under *Oklahoma Press*, a court order must "'be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'" *Lone Steer, Inc.*, *supra*, at 415. Here, the type of order obtained by the Government almost necessarily satisfies that standard. The Stored Communications Act allows a court to issue the relevant type of order "only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that . . . the records . . . sough[t] are relevant and material to an ongoing criminal investigation." 18 U. S. C. §2703(d). And the court "may quash or modify such order" if the provider objects that the "records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider." *Ibid.* No such objection was made in this case, and Carpenter does not suggest that the orders contravened the *Oklahoma Press* standard in any other way.

That is what makes the majority's opinion so puzzling.

It decides that a "search" of Carpenter occurred within the meaning of the Fourth Amendment, but then it leaps straight to imposing requirements that—until this point—have governed only *actual* searches and seizures. See *ante*, at 18–19. Lost in its race to the finish is any real recognition of the century's worth of precedent it jeopardizes. For the majority, this case is apparently no different from one in which Government agents raided Carpenter's home and removed records associated with his cell phone.

Against centuries of precedent and practice, all that the Court can muster is the observation that "this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." *Ante*, at 19. Frankly, I cannot imagine a concession more damning to the Court's argument than that. As the Court well knows, the reason that we have never seen such a case is because—until today—defendants categorically had no "reasonable expectation of privacy" and no property interest in records belonging to third parties. See Part II, *infra*. By implying otherwise, the Court tries the nice trick of seeking shelter under the cover of precedents that it simultaneously perforates.

Not only that, but even if the Fourth Amendment permitted someone to object to the subpoena of a third party's records, the Court cannot explain why that individual should be entitled to *greater* Fourth Amendment protection than the party actually being subpoenaed. When parties are subpoenaed to turn over their records, after all, they will at most receive the protection afforded by *Oklahoma Press* even though they will own and have a reasonable expectation of privacy in the records at issue. Under the Court's decision, however, the Fourth Amendment will extend greater protections to someone else who is not being subpoenaed and does not own the records. That outcome makes no sense, and the Court does not even attempt to defend it.

We have set forth the relevant Fourth Amendment standard for subpoenaing business records many times over. Out of those dozens of cases, the majority cannot find even one that so much as suggests an exception to the *Oklahoma Press* standard for sufficiently personal information. Instead, we have always "described the constitutional requirements" for compulsory process as being "'settled'" and as applying categorically to all "'subpoenas [of] corporate books or records.'" *Lone Steer, Inc.*, 464 U. S., at 415 (internal quotation marks omitted). That standard, we have held, is "*the most*" protection the Fourth Amendment gives "to the production of corporate records and papers." *Oklahoma Press*, 327 U. S., at 208 (emphasis added).[2]

Although the majority announces its holding in the context of the Stored Communications Act, nothing stops its logic from sweeping much further. The Court has offered no meaningful limiting principle, and none is apparent. Cf. Tr. of Oral Arg. 31 (Carpenter's counsel admitting that "a grand jury subpoena . . . would be held to the same standard as any other subpoena or subpoena-like request for [cell-site] records").

Holding that subpoenas must meet the same standard as conventional searches will seriously damage, if not destroy, their utility. Even more so than at the founding, today the Government regularly uses subpoenas *duces tecum* and other forms of compulsory process to carry out its essential functions. See, *e.g.*, *Dionisio*, 410 U. S., at 11–12 (grand jury subpoenas); *McPhaul*, 364 U. S., at 382–383 (legislative subpoenas); *Oklahoma Press*, *supra*, at 208–209 (administrative subpoenas). Grand juries, for

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[2] All that the Court can say in response is that we have "been careful not to uncritically extend existing precedents" when confronting new technologies. *Ante*, at 20. But applying a categorical rule categorically does not "extend" precedent, so the Court's statement ends up sounding a lot like a tacit admission that it is overruling our precedents.

example, have long "compel[led] the production of evidence" in order to determine "*whether* there is probable cause to believe a crime has been committed." *Calandra*, 414 U. S., at 343 (emphasis added). Almost by definition, then, grand juries will be unable at first to demonstrate "the probable cause required for a warrant." *Ante*, at 19 (majority opinion); see also *Oklahoma Press*, *supra*, at 213. If they are required to do so, the effects are as predictable as they are alarming: Many investigations will sputter out at the start, and a host of criminals will be able to evade law enforcement's reach.

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

II

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

A

It bears repeating that the Fourth Amendment guaran-

tees "[t]he right of the people to be secure in *their* persons, houses, papers, and effects." (Emphasis added.) The Fourth Amendment does not confer rights with respect to the persons, houses, papers, and effects of others. Its language makes clear that "Fourth Amendment rights are personal," *Rakas* v. *Illinois*, 439 U. S. 128, 140 (1978), and as a result, this Court has long insisted that they "may not be asserted vicariously," *id.*, at 133. It follows that a "person who is aggrieved . . . only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id.*, at 134.

In this case, as JUSTICE KENNEDY cogently explains, the cell-site records obtained by the Government belong to Carpenter's cell service providers, not to Carpenter. See *ante*, at 12–13. Carpenter did not create the cell-site records. Nor did he have possession of them; at all relevant times, they were kept by the providers. Once Carpenter subscribed to his provider's service, he had no right to prevent the company from creating or keeping the information in its records. Carpenter also had no right to demand that the providers destroy the records, no right to prevent the providers from destroying the records, and, indeed, no right to modify the records in any way whatsoever (or to prevent the providers from modifying the records). Carpenter, in short, has no meaningful control over the cell-site records, which are created, maintained, altered, used, and eventually destroyed by his cell service providers.

Carpenter responds by pointing to a provision of the Telecommunications Act that requires a provider to disclose cell-site records when a customer so requests. See 47 U. S. C. §222(c)(2). But a statutory disclosure requirement is hardly sufficient to give someone an ownership interest in the documents that must be copied and disclosed. Many statutes confer a right to obtain copies of documents

without creating any property right.[3]

Carpenter's argument is particularly hard to swallow because nothing in the Telecommunications Act precludes cell service providers from charging customers a fee for accessing cell-site records. See *ante*, at 12–13 (KENNEDY, J., dissenting). It would be very strange if the owner of records were required to pay in order to inspect his own

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[3] See, *e.g.*, Freedom of Information Act, 5 U. S. C. §552(a) ("Each agency shall make available to the public information as follows . . ."); Privacy Act, 5 U. S. C. §552a(d)(1) ("Each agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof . . ."); Fair Credit Reporting Act, 15 U. S. C. §1681j(a)(1)(A) ("All consumer reporting agencies . . . shall make all disclosures pursuant to section 1681g of this title once during any 12-month period upon request of the consumer and without charge to the consumer"); Right to Financial Privacy Act of 1978, 12 U. S. C. §3404(c) ("The customer has the right . . . to obtain a copy of the record which the financial institution shall keep of all instances in which the customer's record is disclosed to a Government authority pursuant to this section, including the identity of the Government authority to which such disclosure is made"); Government in the Sunshine Act, 5 U. S. C. §552b(f)(2) ("Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription"); Cable Act, 47 U. S. C. §551(d) ("A cable subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator"); Family Educational Rights and Privacy Act of 1974, 20 U. S. C. §1232g(a)(1)(A) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . . Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made").

property.

Nor does the Telecommunications Act give Carpenter a property right in the cell-site records simply because they are subject to confidentiality restrictions. See 47 U. S. C. §222(c)(1) (without a customer's permission, a cell service provider may generally "use, disclose, or permit access to individually identifiable [cell-site records]" only with respect to "its provision" of telecommunications services). Many federal statutes impose similar restrictions on private entities' use or dissemination of information in their own records without conferring a property right on third parties.[4]

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[4] See, *e.g.*, Family Educational Rights and Privacy Act, 20 U. S. C. §1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization . . ."); Video Privacy Protection Act, 18 U. S. C. §2710(b)(1) ("A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d)"); Driver Privacy Protection Act, 18 U. S. C. §2721(a)(1) ("A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity . . . personal information . . ."); Fair Credit Reporting Act, 15 U. S. C. §1681b(a) ("[A]ny consumer reporting agency may furnish a consumer report under the following circumstances and no other . . ."); Right to Financial Privacy Act, 12 U. S. C. §3403(a) ("No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter"); Patient Safety and Quality Improvement Act, 42 U. S. C. §299b–22(b) ("Notwithstanding any other provision of Federal, State, or local law, and subject to subsection (c) of this section, patient safety work product shall be confidential and shall not be disclosed"); Cable Act, 47 U. S. C. §551(c)(1) ("[A] cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the sub-

It would be especially strange to hold that the Telecommunication Act's confidentiality provision confers a property right when the Act creates an express exception for any disclosure of records that is "required by law." 47 U. S. C. §222(c)(1). So not only does Carpenter lack "'the most essential and beneficial'" of the "'constituent elements'" of property, *Dickman* v. *Commissioner*, 465 U. S. 330, 336 (1984)—*i.e.*, the right to use the property to the exclusion of others—but he cannot even exclude the party he would most like to keep out, namely, the Government.[5]

For all these reasons, there is no plausible ground for maintaining that the information at issue here represents Carpenter's "papers" or "effects."[6]

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scriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator").

[5] Carpenter also cannot argue that he owns the cell-site records merely because they fall into the category of records referred to as "customer proprietary network information." 47 U. S. C. §222(c). Even assuming labels alone can confer property rights, nothing in this particular label indicates whether the "information" is "proprietary" to the "customer" or to the provider of the "network." At best, the phrase "customer proprietary network information" is ambiguous, and context makes clear that it refers to the *provider*'s information. The Telecommunications Act defines the term to include all "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U. S. C. §222(h)(1)(A). For Carpenter to be right, he must own not only the cell-site records in this case, but also records relating to, for example, the "technical configuration" of his subscribed service—records that presumably include such intensely personal and private information as transmission wavelengths, transport protocols, and link layer system configurations.

[6] Thus, this is not a case in which someone has entrusted papers that he or she owns to the safekeeping of another, and it does not involve a bailment. Cf. *post*, at 14 (GORSUCH, J., dissenting).

B

In the days when this Court followed an exclusively property-based approach to the Fourth Amendment, the distinction between an individual's Fourth Amendment rights and those of a third party was clear cut. We first asked whether the object of the search—say, a house, papers, or effects—belonged to the defendant, and, if it did, whether the Government had committed a "trespass" in acquiring the evidence at issue. *Jones*, 565 U. S., at 411, n. 8.

When the Court held in *Katz* that "property rights are not the sole measure of Fourth Amendment violations," *Soldal* v. *Cook County*, 506 U. S. 56, 64 (1992), the sharp boundary between personal and third-party rights was tested. Under *Katz*, a party may invoke the Fourth Amendment whenever law enforcement officers violate the party's "justifiable" or "reasonable" expectation of privacy. See 389 U. S., at 353; see also *id.*, at 361 (Harlan, J., concurring) (applying the Fourth Amendment where "a person [has] exhibited an actual (subjective) expectation of privacy" and where that "expectation [is] one that society is prepared to recognize as 'reasonable'"). Thus freed from the limitations imposed by property law, parties began to argue that they had a reasonable expectation of privacy in items owned by others. After all, if a trusted third party took care not to disclose information about the person in question, that person might well have a reasonable expectation that the information would not be revealed.

Efforts to claim Fourth Amendment protection against searches of the papers and effects of others came to a head in *Miller*, 425 U. S. 435, where the defendant sought the suppression of two banks' microfilm copies of his checks, deposit slips, and other records. The defendant did not claim that he owned these documents, but he nonetheless argued that "analysis of ownership, property rights and possessory interests in the determination of Fourth

Amendment rights ha[d] been severely impeached" by *Katz* and other recent cases. See Brief for Respondent in *United States* v. *Miller*, O. T. 1975, No. 74–1179, p. 6. Turning to *Katz*, he then argued that he had a reasonable expectation of privacy in the banks' records regarding his accounts. Brief for Respondent in No. 74–1179, at 6; see also *Miller*, *supra*, at 442–443.

Acceptance of this argument would have flown in the face of the Fourth Amendment's text, and the Court rejected that development. Because Miller gave up "dominion and control" of the relevant information to his bank, *Rakas,* 439 U. S., at 149, the Court ruled that he lost any protected Fourth Amendment interest in that information. See *Miller*, *supra*, at 442–443. Later, in *Smith* v. *Maryland*, 442 U. S. 735, 745 (1979), the Court reached a similar conclusion regarding a telephone company's records of a customer's calls. As JUSTICE KENNEDY concludes, *Miller* and *Smith* are thus best understood as placing "necessary limits on the ability of individuals to assert Fourth Amendment interests in property to which they lack a 'requisite connection.'" *Ante*, at 8.

The same is true here, where Carpenter indisputably lacks any meaningful property-based connection to the cell-site records owned by his provider. Because the records are not Carpenter's in any sense, Carpenter may not seek to use the Fourth Amendment to exclude them.

By holding otherwise, the Court effectively allows Carpenter to object to the "search" of a third party's property, not recognizing the revolutionary nature of this change. The Court seems to think that *Miller* and *Smith* invented a new "doctrine"—"the third-party doctrine"—and the Court refuses to "extend" this product of the 1970's to a new age of digital communications. *Ante*, at 11, 17. But the Court fundamentally misunderstands the role of *Miller* and *Smith*. Those decisions did not forge a new doctrine; instead, they rejected an argument that would have

disregarded the clear text of the Fourth Amendment and a formidable body of precedent.

In the end, the Court never explains how its decision can be squared with the fact that the Fourth Amendment protects only "[t]he right of the people to be secure in *their* persons, houses, papers, and effects." (Emphasis added.)

* * *

Although the majority professes a desire not to "'embarrass the future,'" *ante*, at 18, we can guess where today's decision will lead.

One possibility is that the broad principles that the Court seems to embrace will be applied across the board. All subpoenas *duces tecum* and all other orders compelling the production of documents will require a demonstration of probable cause, and individuals will be able to claim a protected Fourth Amendment interest in any sensitive personal information about them that is collected and owned by third parties. Those would be revolutionary developments indeed.

The other possibility is that this Court will face the embarrassment of explaining in case after case that the principles on which today's decision rests are subject to all sorts of qualifications and limitations that have not yet been discovered. If we take this latter course, we will inevitably end up "mak[ing] a crazy quilt of the Fourth Amendment." *Smith*, *supra*, at 745.

All of this is unnecessary. In the Stored Communications Act, Congress addressed the specific problem at issue in this case. The Act restricts the misuse of cell-site records by cell service providers, something that the Fourth Amendment cannot do. The Act also goes beyond current Fourth Amendment case law in restricting access by law enforcement. It permits law enforcement officers to acquire cell-site records only if they meet a heightened standard and obtain a court order. If the American people

now think that the Act is inadequate or needs updating, they can turn to their elected representatives to adopt more protective provisions. Because the collection and storage of cell-site records affects nearly every American, it is unlikely that the question whether the current law requires strengthening will escape Congress's notice.

Legislation is much preferable to the development of an entirely new body of Fourth Amendment caselaw for many reasons, including the enormous complexity of the subject, the need to respond to rapidly changing technology, and the Fourth Amendment's limited scope. The Fourth Amendment restricts the conduct of the Federal Government and the States; it does not apply to private actors. But today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans. If today's decision encourages the public to think that this Court can protect them from this looming threat to their privacy, the decision will mislead as well as disrupt. And if holding a provision of the Stored Communications Act to be unconstitutional dissuades Congress from further legislation in this field, the goal of protecting privacy will be greatly disserved.

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

SUPREME COURT OF THE UNITED STATES

No. 16–402

TIMOTHY IVORY CARPENTER, PETITIONER *v.* UNITED STATES

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

[June 22, 2018]

JUSTICE GORSUCH, dissenting.

In the late 1960s this Court suggested for the first time that a search triggering the Fourth Amendment occurs when the government violates an "expectation of privacy" that "society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). Then, in a pair of decisions in the 1970s applying the *Katz* test, the Court held that a "reasonable expectation of privacy" *doesn't* attach to information shared with "third parties." See *Smith* v. *Maryland*, 442 U. S. 735, 743–744 (1979); *United States* v. *Miller*, 425 U. S. 435, 443 (1976). By these steps, the Court came to conclude, the Constitution does nothing to limit investigators from searching records you've entrusted to your bank, accountant, and maybe even your doctor.

What's left of the Fourth Amendment? Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game. Countless Internet companies maintain records about us and, increasingly, *for* us. Even our most private documents—those that, in other eras, we would have locked safely in a desk drawer or destroyed—now reside on third party servers. *Smith* and *Miller* teach that the police can review all of this material, on the theory that no one reasonably

expects any of it will be kept private. But no one believes that, if they ever did.

What to do? It seems to me we could respond in at least three ways. The first is to ignore the problem, maintain *Smith* and *Miller*, and live with the consequences. If the confluence of these decisions and modern technology means our Fourth Amendment rights are reduced to nearly nothing, so be it. The second choice is to set *Smith* and *Miller* aside and try again using the *Katz* "reasonable expectation of privacy" jurisprudence that produced them. The third is to look for answers elsewhere.

*

Start with the first option. *Smith* held that the government's use of a pen register to record the numbers people dial on their phones doesn't infringe a reasonable expectation of privacy because that information is freely disclosed to the third party phone company. 442 U. S., at 743–744. *Miller* held that a bank account holder enjoys no reasonable expectation of privacy in the bank's records of his account activity. That's true, the Court reasoned, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." 425 U. S., at 443. Today the Court suggests that *Smith* and *Miller* distinguish between *kinds* of information disclosed to third parties and require courts to decide whether to "extend" those decisions to particular classes of information, depending on their sensitivity. See *ante,* at 10–18. But as the Sixth Circuit recognized and JUSTICE KENNEDY explains, no balancing test of this kind can be found in *Smith* and *Miller*. See *ante*, at 16 (dissenting opinion). Those cases announced a categorical rule: Once you disclose information to third parties, you forfeit any reasonable expectation of privacy you might have had in it. And even if *Smith* and *Miller* did permit courts to conduct a

balancing contest of the kind the Court now suggests, it's still hard to see how that would help the petitioner in this case. Why is someone's location when using a phone so much more sensitive than who he was talking to (*Smith*) or what financial transactions he engaged in (*Miller*)? I do not know and the Court does not say.

The problem isn't with the Sixth Circuit's application of *Smith* and *Miller* but with the cases themselves. Can the government demand a copy of all your e-mails from Google or Microsoft without implicating your Fourth Amendment rights? Can it secure your DNA from 23andMe without a warrant or probable cause? *Smith* and *Miller* say yes it can—at least without running afoul of *Katz*. But that result strikes most lawyers and judges today—me included—as pretty unlikely. In the years since its adoption, countless scholars, too, have come to conclude that the "third-party doctrine is not only wrong, but horribly wrong." Kerr, The Case for the Third-Party Doctrine, 107 Mich. L. Rev. 561, 563, n. 5, 564 (2009) (collecting criticisms but defending the doctrine (footnotes omitted)). The reasons are obvious. "As an empirical statement about subjective expectations of privacy," the doctrine is "quite dubious." Baude & Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1872 (2016). People often *do* reasonably expect that information they entrust to third parties, especially information subject to confidentiality agreements, will be kept private. Meanwhile, if the third party doctrine is supposed to represent a normative assessment of when a person should expect privacy, the notion that the answer might be "never" seems a pretty unattractive societal prescription. *Ibid.*

What, then, is the explanation for our third party doctrine? The truth is, the Court has never offered a persuasive justification. The Court has said that by conveying information to a third party you "'assum[e] the risk'" it will be revealed to the police and therefore lack a reason-

able expectation of privacy in it. *Smith*, *supra,* at 744. But assumption of risk doctrine developed in tort law. It generally applies when "by contract or otherwise [one] expressly agrees to accept a risk of harm" or impliedly does so by "manifest[ing] his willingness to accept" that risk and thereby "take[s] his chances as to harm which may result from it." Restatement (Second) of Torts §§496B, 496C(1), and Comment *b* (1965); see also 1 D. Dobbs, P. Hayden, & E. Bublick, Law of Torts §§235–236, pp. 841–850 (2d ed. 2017). That rationale has little play in this context. Suppose I entrust a friend with a letter and he promises to keep it secret until he delivers it to an intended recipient. In what sense have I agreed to bear the risk that he will turn around, break his promise, and spill its contents to someone else? More confusing still, what have I done to "manifest my willingness to accept" the risk that the government will pry the document from my friend and read it *without* his consent?

One possible answer concerns knowledge. I know that my friend *might* break his promise, or that the government *might* have some reason to search the papers in his possession. But knowing about a risk doesn't mean you assume responsibility for it. Whenever you walk down the sidewalk you know a car may negligently or recklessly veer off and hit you, but that hardly means you accept the consequences and absolve the driver of any damage he may do to you. Epstein, Privacy and the Third Hand: Lessons From the Common Law of Reasonable Expectations, 24 Berkeley Tech. L. J. 1199, 1204 (2009); see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 490 (5th ed. 1984).

Some have suggested the third party doctrine is better understood to rest on consent than assumption of risk. "So long as a person knows that they are disclosing information to a third party," the argument goes, "their choice to do so is voluntary and the consent valid." Kerr, *supra,*

at 588. I confess I still don't see it. Consenting to give a third party access to private papers that remain my property is not the same thing as consenting to a *search of those papers by the government*. Perhaps there are exceptions, like when the third party is an undercover government agent. See Murphy, The Case Against the Case Against the Third-Party Doctrine: A Response to Epstein and Kerr, 24 Berkeley Tech. L. J. 1239, 1252 (2009); cf. *Hoffa* v. *United States*, 385 U. S. 293 (1966). But otherwise this conception of consent appears to be just assumption of risk relabeled—you've "consented" to whatever risks are foreseeable.

Another justification sometimes offered for third party doctrine is clarity. You (and the police) know exactly how much protection you have in information confided to others: none. As rules go, "the king always wins" is admirably clear. But the opposite rule would be clear too: Third party disclosures *never* diminish Fourth Amendment protection (call it "the king always loses"). So clarity alone cannot justify the third party doctrine.

In the end, what do *Smith* and *Miller* add up to? A doubtful application of *Katz* that lets the government search almost whatever it wants whenever it wants. The Sixth Circuit had to follow that rule and faithfully did just that, but it's not clear why we should.

*

There's a second option. What if we dropped *Smith* and *Miller*'s third party doctrine and retreated to the root *Katz* question whether there is a "reasonable expectation of privacy" in data held by third parties? Rather than solve the problem with the third party doctrine, I worry this option only risks returning us to its source: After all, it was *Katz* that produced *Smith* and *Miller* in the first place.

Katz's problems start with the text and original under-

standing of the Fourth Amendment, as JUSTICE THOMAS thoughtfully explains today. *Ante,* at 5–17 (dissenting opinion). The Amendment's protections do not depend on the breach of some abstract "expectation of privacy" whose contours are left to the judicial imagination. Much more concretely, it protects your "person," and your "houses, papers, and effects." Nor does your right to bring a Fourth Amendment claim depend on whether a judge happens to agree that your subjective expectation to privacy is a "reasonable" one. Under its plain terms, the Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.

History too holds problems for *Katz*. Little like it can be found in the law that led to the adoption of the Fourth Amendment or in this Court's jurisprudence until the late 1960s. The Fourth Amendment came about in response to a trio of 18th century cases "well known to the men who wrote and ratified the Bill of Rights, [and] famous throughout the colonial population." Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L. J. 393, 397 (1995). The first two were English cases invalidating the Crown's use of general warrants to enter homes and search papers. *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (K. B. 1765); *Wilkes* v. *Wood*, 19 How. St. Tr. 1153 (K. B. 1763); see W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 439–487 (2009); *Boyd* v. *United States*, 116 U. S. 616, 625–630 (1886). The third was American: the Boston Writs of Assistance Case, which sparked colonial outrage at the use of writs permitting government agents to enter houses and business, breaking open doors and chests along the way, to conduct searches and seizures—and to force third parties to help them. Stuntz, *supra,* at 404–409; M. Smith, The Writs of Assistance Case (1978). No doubt the colonial outrage engen-

dered by these cases rested in part on the government's intrusion upon privacy. But the framers chose not to protect privacy in some ethereal way dependent on judicial intuitions. They chose instead to protect privacy in particular places and things—"persons, houses, papers, and effects"—and against particular threats—"unreasonable" governmental "searches and seizures." See *Entick*, *supra,* at 1066 ("Papers are the owner's goods and chattels; they are his dearest property; and so far from enduring a seizure, that they will hardly bear an inspection"); see also *ante,* at 1–21 (THOMAS, J., dissenting).

Even taken on its own terms, *Katz* has never been sufficiently justified. In fact, we still don't even know what its "reasonable expectation of privacy" test *is*. Is it supposed to pose an empirical question (what privacy expectations do people *actually* have) or a normative one (what expectations *should* they have)? Either way brings problems. If the test is supposed to be an empirical one, it's unclear why judges rather than legislators should conduct it. Legislators are responsive to their constituents and have institutional resources designed to help them discern and enact majoritarian preferences. Politically insulated judges come armed with only the attorneys' briefs, a few law clerks, and their own idiosyncratic experiences. They are hardly the representative group you'd expect (or want) to be making empirical judgments for hundreds of millions of people. Unsurprisingly, too, judicial judgments often fail to reflect public views. See Slobogin & Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 Duke L. J. 727, 732, 740–742 (1993). Consider just one example. Our cases insist that the seriousness of the offense being investigated does *not* reduce Fourth Amendment protection. *Mincey* v. *Arizona*, 437 U. S. 385, 393–394 (1978). Yet scholars suggest that most people *are* more tolerant of

police intrusions when they investigate more serious crimes. See Blumenthal, Adya, & Mogle, The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy," 11 U. Pa. J. Const. L. 331, 352–353 (2009). And I very much doubt that this Court would be willing to adjust its *Katz* cases to reflect these findings even if it believed them.

Maybe, then, the *Katz* test should be conceived as a normative question. But if that's the case, why (again) do judges, rather than legislators, get to determine whether society *should be* prepared to recognize an expectation of privacy as legitimate? Deciding what privacy interests *should be* recognized often calls for a pure policy choice, many times between incommensurable goods—between the value of privacy in a particular setting and society's interest in combating crime. Answering questions like that calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts. See The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton). When judges abandon legal judgment for political will we not only risk decisions where "reasonable expectations of privacy" come to bear "an uncanny resemblance to those expectations of privacy" shared by Members of this Court. *Minnesota* v. *Carter*, 525 U. S. 83, 97 (1998) (Scalia, J., concurring). We also risk undermining public confidence in the courts themselves.

My concerns about *Katz* come with a caveat. *Sometimes*, I accept, judges may be able to discern and describe existing societal norms. See, *e.g., Florida* v. *Jardines*, 569 U. S. 1, 8 (2013) (inferring a license to enter on private property from the "'habits of the country'" (quoting *McKee* v. *Gratz*, 260 U. S. 127, 136 (1922))); Sachs, Finding Law, 107 Cal. L. Rev. (forthcoming 2019), online at https://ssrn.com/abstract=3064443 (as last visited June 19, 2018). That is particularly true when the judge looks to positive law rather than intuition for guidance on social norms. See

Byrd v. *United States,* 584 U. S. ___, ___–___ (2018) (slip op., at 7–9) ("general property-based concept[s] guid[e] the resolution of this case"). So there may be *some* occasions where *Katz* is capable of principled application—though it may simply wind up approximating the more traditional option I will discuss in a moment. Sometimes it may also be possible to apply *Katz* by analogizing from precedent when the line between an existing case and a new fact pattern is short and direct. But so far this Court has declined to tie itself to any significant restraints like these. See *ante,* at 5, n. 1 ("[W]hile property rights are often informative, our cases by no means suggest that such an interest is 'fundamental' or 'dispositive' in determining which expectations of privacy are legitimate").

As a result, *Katz* has yielded an often unpredictable—and sometimes unbelievable—jurisprudence. *Smith* and *Miller* are only two examples; there are many others. Take *Florida* v. *Riley*, 488 U. S. 445 (1989), which says that a police helicopter hovering 400 feet above a person's property invades no reasonable expectation of privacy. Try that one out on your neighbors. Or *California* v. *Greenwood*, 486 U. S. 35 (1988), which holds that a person has no reasonable expectation of privacy in the garbage he puts out for collection. In that case, the Court said that the homeowners forfeited their privacy interests because "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.*, at 40 (footnotes omitted). But the habits of raccoons don't prove much about the habits of the country. I doubt, too, that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager. Making the decision all the stranger, California state law expressly *protected* a homeowner's property rights in discarded trash. *Id.*, at 43. Yet rather than defer to that

as evidence of the people's habits and reasonable expectations of privacy, the Court substituted its own curious judgment.

Resorting to *Katz* in data privacy cases threatens more of the same. Just consider. The Court today says that judges should use *Katz*'s reasonable expectation of privacy test to decide what Fourth Amendment rights people have in cell-site location information, explaining that "no single rubric definitively resolves which expectations of privacy are entitled to protection." *Ante,* at 5. But then it offers a twist. Lower courts should be sure to add two special principles to their *Katz* calculus: the need to avoid "arbitrary power" and the importance of "plac[ing] obstacles in the way of a too permeating police surveillance." *Ante,* at 6 (internal quotation marks omitted). While surely laudable, these principles don't offer lower courts much guidance. The Court does not tell us, for example, how far to carry either principle or how to weigh them against the legitimate needs of law enforcement. At what point does access to electronic data amount to "arbitrary" authority? When does police surveillance become "too permeating"? And what sort of "obstacles" should judges "place" in law enforcement's path when it does? We simply do not know.

The Court's application of these principles supplies little more direction. The Court declines to say whether there is any sufficiently limited period of time "for which the Government may obtain an individual's historical [location information] free from Fourth Amendment scrutiny." *Ante,* at 11, n. 3; see *ante,* at 11–15. But then it tells us that access to seven days' worth of information *does* trigger Fourth Amendment scrutiny—even though here the carrier "produced only two days of records." *Ante,* at 11, n. 3. Why is the relevant fact the seven days of information the government *asked for* instead of the two days of information the government *actually saw*? Why seven days instead of ten or three or one? And in what possible sense

did the government "search" five days' worth of location information it was never even sent? We do not know.

Later still, the Court adds that it can't say whether the Fourth Amendment is triggered when the government collects "real-time CSLI or 'tower dumps' (a download of information on all the devices that connected to a particular cell site during a particular interval)." *Ante,* at 17–18. But what distinguishes historical data from real-time data, or seven days of a single person's data from a download of *everyone*'s data over some indefinite period of time? Why isn't a tower dump the *paradigmatic* example of "too permeating police surveillance" and a dangerous tool of "arbitrary" authority—the touchstones of the majority's modified *Katz* analysis? On what possible basis could such mass data collection survive the Court's test while collecting a single person's data does not? Here again we are left to guess. At the same time, though, the Court offers some firm assurances. It tells us its decision does *not* "call into question conventional surveillance techniques and tools, such as security cameras." *Ibid.* That, however, just raises more questions for lower courts to sort out about what techniques qualify as "conventional" and why those techniques would be okay *even if* they lead to "permeating police surveillance" or "arbitrary police power."

Nor is this the end of it. After finding a reasonable expectation of privacy, the Court says there's still more work to do. Courts must determine whether to "extend" *Smith* and *Miller* to the circumstances before them. *Ante,* at 11, 15–17. So apparently *Smith* and *Miller* aren't quite left for dead; they just no longer have the clear reach they once did. How do we measure their new reach? The Court says courts now must conduct a *second Katz*-like balancing inquiry, asking whether the fact of disclosure to a third party outweighs privacy interests in the "category of information" so disclosed. *Ante,* at 13, 15–16. But how are lower courts supposed to weigh these radically different

interests? Or assign values to different categories of information? All we know is that historical cell-site location information (for seven days, anyway) escapes *Smith* and *Miller*'s shorn grasp, while a lifetime of bank or phone records does not. As to any other kind of information, lower courts will have to stay tuned.

In the end, our lower court colleagues are left with two amorphous balancing tests, a series of weighty and incommensurable principles to consider in them, and a few illustrative examples that seem little more than the product of judicial intuition. In the Court's defense, though, we have arrived at this strange place not because the Court has misunderstood *Katz*. Far from it. We have arrived here because this is where *Katz* inevitably leads.

*

There is another way. From the founding until the 1960s, the right to assert a Fourth Amendment claim didn't depend on your ability to appeal to a judge's personal sensibilities about the "reasonableness" of your expectations or privacy. It was tied to the law. *Jardines*, 569 U. S., at 11; *United States* v. *Jones*, 565 U. S. 400, 405 (2012). The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." True to those words and their original understanding, the traditional approach asked if a house, paper or effect was *yours* under law. No more was needed to trigger the Fourth Amendment. Though now often lost in *Katz*'s shadow, this traditional understanding persists. *Katz* only "supplements, rather than displaces the traditional property-based understanding of the Fourth Amendment." *Byrd*, 584 U. S., at ___ (slip op., at 7) (internal quotation marks omitted); *Jardines*, *supra,* at 11 (same); *Soldal* v. *Cook County*, 506 U. S. 56, 64 (1992) (*Katz* did not "snuf[f] out the previously recognized protection for property under

the Fourth Amendment").

Beyond its provenance in the text and original understanding of the Amendment, this traditional approach comes with other advantages. Judges are supposed to decide cases based on "democratically legitimate sources of law"—like positive law or analogies to items protected by the enacted Constitution—rather than "their own biases or personal policy preferences." Pettys, Judicial Discretion in Constitutional Cases, 26 J. L. & Pol. 123, 127 (2011). A Fourth Amendment model based on positive legal rights "carves out significant room for legislative participation in the Fourth Amendment context," too, by asking judges to consult what the people's representatives have to say about their rights. Baude & Stern, 129 Harv. L. Rev., at 1852. Nor is this approach hobbled by *Smith* and *Miller*, for those cases are just *limitations* on *Katz*, addressing only the question whether individuals have a reasonable expectation of privacy in materials they share with third parties. Under this more traditional approach, Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties.

Given the prominence *Katz* has claimed in our doctrine, American courts are pretty rusty at applying the traditional approach to the Fourth Amendment. We know that if a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection. But what kind of legal interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times? Both? See *Byrd*, *supra*, at ___–___ (slip op., at 1–2) (THOMAS, J., concurring); cf. Re, The Positive Law Floor, 129 Harv. L. Rev. Forum 313 (2016). Much work is needed to revitalize this area and answer these questions. I do not begin to claim all the answers today, but (unlike with *Katz*) at least I have a pretty good idea

what the questions *are*. And it seems to me a few things can be said.

First, the fact that a third party has access to or possession of your papers and effects does not necessarily eliminate your interest in them. Ever hand a private document to a friend to be returned? Toss your keys to a valet at a restaurant? Ask your neighbor to look after your dog while you travel? You would not expect the friend to share the document with others; the valet to lend your car to his buddy; or the neighbor to put Fido up for adoption. Entrusting your stuff to others is a *bailment*. A bailment is the "delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose." Black's Law Dictionary 169 (10th ed. 2014); J. Story, Commentaries on the Law of Bailments §2, p. 2 (1832) ("a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust"). A bailee normally owes a legal duty to keep the item safe, according to the terms of the parties' contract if they have one, and according to the "implication[s] from their conduct" if they don't. 8 C. J. S., Bailments §36, pp. 468–469 (2017). A bailee who uses the item in a different way than he's supposed to, or against the bailor's instructions, is liable for conversion. *Id.*, §43, at 481; see *Goad* v. *Harris*, 207 Ala. 357, 92 So. 546, (1922); *Knight* v. *Seney*, 290 Ill. 11, 17, 124 N. E. 813, 815–816 (1919); *Baxter* v. *Woodward*, 191 Mich. 379, 385, 158 N. W. 137, 139 (1916). This approach is quite different from *Smith* and *Miller*'s (counter)-intuitive approach to reasonable expectations of privacy; where those cases extinguish Fourth Amendment interests once records are given to a third party, property law may preserve them.

Our Fourth Amendment jurisprudence already reflects this truth. In *Ex parte Jackson*, 96 U. S. 727 (1878), this Court held that sealed letters placed in the mail are "as

fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." *Id.,* at 733. The reason, drawn from the Fourth Amendment's text, was that "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to *their papers*, thus closed against inspection, *wherever they may be*." *Ibid.* (emphasis added). It did not matter that letters were bailed to a third party (the government, no less). The sender enjoyed the same Fourth Amendment protection as he does "when papers are subjected to search in one's own household." *Ibid.*

These ancient principles may help us address modern data cases too. Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. Whatever may be left of *Smith* and *Miller*, few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest. See *ante,* at 13 (KENNEDY, J., dissenting) (noting that enhanced Fourth Amendment protection may apply when the "modern-day equivalents of an individual's own 'papers' or 'effects' . . . are held by a third party" through "bailment"); *ante,* at 23, n. 6 (ALITO, J., dissenting) (reserving the question whether Fourth Amendment protection may apply in the case of "bailment" or when "someone has entrusted papers he or she owns . . . to the safekeeping of another"); *United States* v. *Warshak*, 631 F. 3d 266, 285–286 (CA6 2010) (relying on an analogy to *Jackson* to extend Fourth Amendment protection to e-mail held by a third party service provider).

Second, I doubt that complete ownership or exclusive control of property is always a necessary condition to the assertion of a Fourth Amendment right. Where houses

are concerned, for example, individuals can enjoy Fourth Amendment protection without fee simple title. Both the text of the Amendment and the common law rule support that conclusion. "People call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free." *Carter*, 525 U. S., at 95–96 (Scalia, J., concurring). That rule derives from the common law. *Oystead* v. *Shed*, 13 Mass. 520, 523 (1816) (explaining, citing "[t]he very learned judges, *Foster*, *Hale*, and *Coke*," that the law "would be as much disturbed by a forcible entry to arrest a boarder or a servant, who had acquired, by contract, express or implied, a right to enter the house at all times, and to remain in it as long as they please, as if the object were to arrest the master of the house or his children"). That is why tenants and resident family members—though they have no legal title—have standing to complain about searches of the houses in which they live. *Chapman* v. *United States*, 365 U. S. 610, 616–617 (1961), *Bumper* v. *North Carolina*, 391 U. S. 543, 548, n. 11 (1968).

Another point seems equally true: just because you *have* to entrust a third party with your data doesn't necessarily mean you should lose all Fourth Amendment protections in it. Not infrequently one person comes into possession of someone else's property without the owner's consent. Think of the finder of lost goods or the policeman who impounds a car. The law recognizes that the goods and the car still belong to their true owners, for "where a person comes into lawful possession of the personal property of another, even though there is no formal agreement between the property's owner and its possessor, the possessor will become a constructive bailee when justice so requires." *Christensen* v. *Hoover*, 643 P. 2d 525, 529 (Colo. 1982) (en banc); Laidlaw, Principles of Bailment, 16 Cornell L. Q. 286 (1931). At least some of this Court's decisions have already suggested that use of technology is

functionally compelled by the demands of modern life, and in that way the fact that we store data with third parties may amount to a sort of involuntary bailment too. See *ante,* at 12–13 (majority opinion); *Riley* v. *California*, 573 U. S. ___, ___ (2014) (slip op., at 9).

Third, positive law may help provide detailed guidance on evolving technologies without resort to judicial intuition. State (or sometimes federal) law often creates rights in both tangible and intangible things. See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1001 (1984). In the context of the Takings Clause we often ask whether those state-created rights are sufficient to make something someone's property for constitutional purposes. See *id.,* at 1001–1003; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 590–595 (1935). A similar inquiry may be appropriate for the Fourth Amendment. Both the States and federal government are actively legislating in the area of third party data storage and the rights users enjoy. See, *e.g.,* Stored Communications Act, 18 U. S. C. §2701 *et seq.*; Tex. Prop. Code Ann. §111.004(12) (West 2017) (defining "[p]roperty" to include "property held in any digital or electronic medium"). State courts are busy expounding common law property principles in this area as well. *E.g., Ajemian* v. *Yahoo!, Inc.*, 478 Mass. 169, 170, 84 N. E. 3d 766, 768 (2017) (e-mail account is a "form of property often referred to as a 'digital asset'"); *Eysoldt* v. *ProScan Imaging*, 194 Ohio App. 3d 630, 638, 2011–Ohio–2359, 957 N. E. 2d 780, 786 (2011) (permitting action for conversion of web account as intangible property). If state legislators or state courts say that a digital record has the attributes that normally make something property, that may supply a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations.

Fourth, while positive law may help establish a person's Fourth Amendment interest there may be some circumstances where positive law cannot be used to defeat it.

Ex parte Jackson reflects that understanding. There this Court said that "[n]o law of Congress" could authorize letter carriers "to invade the secrecy of letters." 96 U. S., at 733. So the post office couldn't impose a regulation dictating that those mailing letters surrender all legal interests in them once they're deposited in a mailbox. If that is right, *Jackson* suggests the existence of a constitutional floor below which Fourth Amendment rights may not descend. Legislatures cannot pass laws declaring your house or papers to be your property except to the extent the police wish to search them without cause. As the Court has previously explained, "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Jones*, 565 U. S., at 406 (quoting *Kyllo* v. *United States*, 533 U. S. 27, 34 (2001)). Nor does this mean protecting only the specific rights known at the founding; it means protecting their modern analogues too. So, for example, while thermal imaging was unknown in 1791, this Court has recognized that using that technology to look inside a home constitutes a Fourth Amendment "search" of that "home" no less than a physical inspection might. *Id.,* at 40.

Fifth, this constitutional floor may, in some instances, bar efforts to circumvent the Fourth Amendment's protection through the use of subpoenas. No one thinks the government can evade *Jackson*'s prohibition on opening sealed letters without a warrant simply by issuing a subpoena to a postmaster for "all letters sent by John Smith" or, worse, "all letters sent by John Smith concerning a particular transaction." So the question courts will confront will be this: What other kinds of records are sufficiently similar to letters in the mail that the same rule should apply?

It may be that, as an original matter, a subpoena requiring the recipient to produce records wasn't thought of as a

"search or seizure" by the government implicating the Fourth Amendment, see *ante,* at 2–12 (opinion of ALITO, J.), but instead as an act of compelled self-incrimination implicating the Fifth Amendment, see *United States* v. *Hubbell*, 530 U. S. 27, 49–55 (2000) (THOMAS, J., dissenting); Nagareda, Compulsion "To Be a Witness" and the Resurrection of Boyd, 74 N. Y. U. L. Rev. 1575, 1619, and n. 172 (1999). But the common law of searches and seizures does not appear to have confronted a case where private documents equivalent to a mailed letter were entrusted to a bailee and then subpoenaed. As a result, "[t]he common-law rule regarding subpoenas for documents held by third parties entrusted with information from the target is . . . unknown and perhaps unknowable." Dripps, Perspectives on The Fourth Amendment Forty Years Later: Toward the Realization of an Inclusive Regulatory Model, 100 Minn. L. Rev. 1885, 1922 (2016). Given that (perhaps insoluble) uncertainty, I am content to adhere to *Jackson* and its implications for now.

To be sure, we must be wary of returning to the doctrine of *Boyd* v. *United States*, 116 U. S. 616. *Boyd* invoked the Fourth Amendment to restrict the use of subpoenas even for ordinary business records and, as JUSTICE ALITO notes, eventually proved unworkable. See *ante,* at 13 (dissenting opinion); 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure §8.7(a), pp. 185–187 (4th ed. 2015). But if we were to overthrow *Jackson* too and deny Fourth Amendment protection to *any* subpoenaed materials, we would do well to reconsider the scope of the Fifth Amendment while we're at it. Our precedents treat the right against self-incrimination as applicable only to testimony, not the production of incriminating evidence. See *Fisher* v. *United States*, 425 U. S. 391, 401 (1976). But there is substantial evidence that the privilege against self-incrimination was also originally understood to protect a person from being forced to turn over potentially incrimi-

nating evidence. Nagareda, *supra,* at 1605–1623; *Rex* v. *Purnell*, 96 Eng. Rep. 20 (K. B. 1748); Slobogin, Privacy at Risk 145 (2007).

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What does all this mean for the case before us? To start, I cannot fault the Sixth Circuit for holding that *Smith* and *Miller* extinguish any *Katz*-based Fourth Amendment interest in third party cell-site data. That is the plain effect of their categorical holdings. Nor can I fault the Court today for its implicit but unmistakable conclusion that the rationale of *Smith* and *Miller* is wrong; indeed, I agree with that. The Sixth Circuit was powerless to say so, but this Court can and should. At the same time, I do not agree with the Court's decision today to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that seems to be only *Katz*-squared. Returning there, I worry, promises more trouble than help. Instead, I would look to a more traditional Fourth Amendment approach. Even if *Katz* may still supply one way to prove a Fourth Amendment interest, it has never been the only way. Neglecting more traditional approaches may mean failing to vindicate the full protections of the Fourth Amendment.

Our case offers a cautionary example. It seems to me entirely possible a person's cell-site data could qualify as *his* papers or effects under existing law. Yes, the telephone carrier holds the information. But 47 U. S. C. §222 designates a customer's cell-site location information as "customer proprietary network information" (CPNI), §222(h)(1)(A), and gives customers certain rights to control use of and access to CPNI about themselves. The statute generally forbids a carrier to "use, disclose, or permit access to individually identifiable" CPNI without the customer's consent, except as needed to provide the customer's telecommunications services. §222(c)(1). It also

requires the carrier to disclose CPNI "upon affirmative written request by the customer, to any person designated by the customer." §222(c)(2). Congress even afforded customers a private cause of action for damages against carriers who violate the Act's terms. §207. Plainly, customers have substantial legal interests in this information, including at least some right to include, exclude, and control its use. Those interests might even rise to the level of a property right.

The problem is that we do not know anything more. Before the district court and court of appeals, Mr. Carpenter pursued only a *Katz* "reasonable expectations" argument. He did not invoke the law of property or any analogies to the common law, either there or in his petition for certiorari. Even in his merits brief before this Court, Mr. Carpenter's discussion of his positive law rights in cell-site data was cursory. He offered no analysis, for example, of what rights state law might provide him in addition to those supplied by §222. In these circumstances, I cannot help but conclude—reluctantly—that Mr. Carpenter forfeited perhaps his most promising line of argument.

Unfortunately, too, this case marks the second time this Term that individuals have forfeited Fourth Amendment arguments based on positive law by failing to preserve them. See *Byrd*, 584 U. S., at ___ (slip op., at 7). Litigants have had fair notice since at least *United States* v. *Jones* (2012) and *Florida* v. *Jardines* (2013) that arguments like these may vindicate Fourth Amendment interests even where *Katz* arguments do not. Yet the arguments have gone unmade, leaving courts to the usual *Katz* handwaving. These omissions do not serve the development of a sound or fully protective Fourth Amendment jurisprudence.

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. JOSEPH SAM, Defendant.	CASE NO. CR19-0115-JCC ORDER

This matter comes before the Court on Defendant Joseph Sam's motion to suppress cell phone contents (Dkt. No. 55). Having considered the parties' briefing and the relevant record, the Court GRANTS the motion in part for the reasons explained herein.

I. BACKGROUND

Mr. Sam has been indicted and charged with conspiracy to commit robbery, robbery, and assault resulting in serious bodily injury. (*Id.* at 1.) On May 15, 2019, Mountlake Terrace Police Officer Shin arrested Mr. Sam. (Dkt. No. 55-1 at 3.) Incident to the arrest, Officer Shin searched Mr. Sam and seized Mr. Sam's Motorola smart phone. (*Id.*)

What happened next is unclear. Mr. Sam says that during his arrest, Officer Shin activated his phone's display screen, which revealed the name "STREEZY." (*See* Dkt. No. 55 at 2.) The Government seems to dispute Mr. Sam's account, claiming that after Officer Shin brought Mr. Sam to the Tulalip Police Department, "officers"—whose identities are

unspecified—examined the phone “pursuant to inventory procedures . . . to determine the type of phone and whether it was locked, and to place it into airplane mode so the phone could not be wiped remotely.” (*See* Dkt. No. 58 at 2.) But both the Government and Mr. Sam base their accounts on the report of Detective Sergeant Wayne Schakel, which says only that “[w]hen Sam was arrested, he had . . . a black Motorola Smart phone and the screen stated it was Metro PCS and the screen banner stated ‘>>>Streezy.’” (*See* Dkt. No. 55-1 at 3.) The report says nothing about the circumstances under which the phone was examined. (*See id.*) Those circumstances remain unknown.

What is known is that on February 13, 2020, the FBI removed Mr. Sam’s phone from inventory, powered the phone on, and took a photograph of the lock screen. (*See* Dkt. No. 55-2 at 2.) The photograph shows the name “STREEZY” right underneath the time and date. (*See id.* at 3.) It also shows that the phone is in airplane mode. (*See id.*)

Mr. Sam now moves to suppress any evidence obtained from the first and second examinations of the phone. (Dkt. No. 55.)

II. DISCUSSION

In their respective briefs, Mr. Sam and the Government treat the police’s and FBI’s examinations as legally indistinguishable. (*See generally id.*; Dkt. No. 58.) They are not. The police’s examination took place either incident to a lawful arrest or as part of the police’s efforts to inventory the personal effects found during Mr. Sam’s arrest. The FBI’s examination, by contrast, occurred long after the police had arrested Mr. Sam and inventoried his personal effects. Those examinations present significantly different legal issues, which the Court will address separately.

A. The FBI’s Examination

The Fourth Amendment protects people from “unreasonable searches and seizures” of “their persons, houses, papers, and effects.” U.S. Const. amend. IV. The default rule is that a search is unreasonable unless conducted pursuant to a warrant. *See Vernonia Sch. Dist. 47J v.*

1 *Acton*, 515 U.S. 646, 653 (1995). This default rule makes the term "search" critically important
2 because the term's definition often dictates when the Government needs to obtain a warrant.
3 Over time, the Supreme Court has defined "search" in two distinct ways. The first establishes a
4 "baseline" of Fourth Amendment protections: the Government engages in a search if it
5 physically intrudes on a constitutionally protected area to obtain information. *See Florida v.*
6 *Jardines*, 569 U.S. 1, 5 (2013). The second definition expands Fourth Amendment protections
7 beyond notions of property. *See Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). Under
8 that definition, the Government also engages in a search if it intrudes on a person's reasonable
9 expectation of privacy. *See id.*

10 Here, the FBI physically intruded on Mr. Sam's personal effect when the FBI powered on
11 his phone to take a picture of the phone's lock screen. *See United States v. Jones*, 565 U.S. 400,
12 410 (2012) (plurality opinion) (holding Government searched a car by attaching a GPS device to
13 the car); *Bond v. United States*, 529 U.S. 334, 337 (2000) (concluding Border Patrol agent
14 searched a bag by squeezing it); *Arizona v.* Hicks, 480 U.S. 321, 324–25 (1987) (holding officer
15 searched stereo equipment by moving it so that the officer could view concealed serial numbers).
16 The FBI therefore "searched" the phone within the meaning of the Fourth Amendment. *See*
17 *Jardines*, 569 U.S. at 5. And because the FBI conducted the search without a warrant, the search
18 was unconstitutional. *See Vernonia Sch. Dist.*, 515 U.S. at 653.

19 The Government argues that the FBI did not need a warrant because Mr. Sam had no
20 reasonable expectation of privacy in his phone's lock screen. But that expectation is irrelevant.
21 The reasonable-expectations test first emerged in *Katz v. United States*, 389 U.S. 437 (1967).
22 Although the test sometimes determines when the Government engages in a search, the Supreme
23 Court has repeatedly emphasized that "a person's 'Fourth Amendment rights do not rise or fall
24 with the *Katz* formulation'" because "the *Katz* reasonable-expectations test 'has been *added to*,
25 not *substituted for*,' the traditional property-based understanding of the Fourth Amendment."
26 *Jardines*, 569 U.S. at 10–11 (quoting *United States v. Jones*, 565 U.S. 400, 409 (2012)); *see also*

1 *Carpenter*, 138 S. Ct. at 2213. Thus, when the Government gains evidence by physically
2 intruding on a constitutionally protected area—as the FBI did here—it is "unnecessary to
3 consider" whether the government also violated the defendant's reasonable expectation of
4 privacy. *Jardines*, 569 U.S. at 10–11. Accordingly, the Court GRANTS Mr. Sam's motion to
5 suppress as to the evidence the FBI gathered during the second examination of Mr. Sam's phone.

6 **B. The Police's Examination**

7 The police's examination of Mr. Sam's phone raises different issues because the
8 examination may have been a search incident to arrest or an inventory search—two special
9 circumstances where the Government does not always need a warrant to conduct a search.
10 Unfortunately, the Court cannot decide whether the police needed a warrant because the
11 circumstances surrounding the police's examination are unclear. To explain why, the Court will
12 briefly discuss the law governing searches incident to arrest and inventory searches.

13 1. Searches Incident to Arrest

14 A police officer's power to search a person incident to a lawful arrest is heightened such
15 that it is often reasonable for a police officer to conduct a search incident to arrest without a
16 warrant. *See Riley v. California*, 573 U.S. 373, 381–85 (2014). Whether a warrantless search
17 incident to an arrest is reasonable depends on "the degree to which it intrudes upon an
18 individual's privacy and . . . the degree to which it is needed for the promotion of legitimate
19 governmental interests." *See id.* (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The
20 balance of these interests led the Supreme Court in *United States v. Robinson*, 414 U.S. 218
21 (1973), to create a "categorical rule" allowing officers to search physical objects found on an
22 arrestee's person. *See Riley*, 573 U.S. at 383–86 (describing *Robinson*'s holding). In *Riley v.*
23 *California*, 573 U.S. 373, 386 (2014), however, the Supreme Court declined to extend
24 *Robinson*'s rule to searches of data on cell phones, holding that officers must generally secure a
25 warrant before conducting such searches.

26 This case could fall at the intersection of *Robinson* and *Riley*. On the one hand, a phone is

a physical object, and it is debatable whether Mr. Sam has a greater privacy interest in his lock screen than he does in an address book, wallet, or purse—objects that appear searchable under *Robinson*. *See Riley*, 573 U.S. at 392–93 (citing *United States v. Carrion*, 809 F.2d 1120, 1123, 1128 (5th Cir. 1987); *United States v. Watson*, 669 F.2d 1374, 1383–84 (11th Cir. 1982); *United States v. Lee*, 501 F.2d 890, 892 (D.C. Cir. 1974)). On the other hand, *Riley* showed a unique sensitivity to the privacy concerns raised by searches of cell phones. *See id.* at 393–98. The tension between *Riley* and *Robinson* is, therefore, not easy to resolve in a case like this one. However, the Court need only resolve that tension if Officer Shin viewed the lock screen on Mr. Sam's phone incident to Officer Shin's arrest of Mr. Sam. The record does not show what Officer Shin did.

2. Inventory Searches

When the police arrest a person, they may seize and inventory property found in the person's possession—a process known as an "inventory search." *See United States v. Garay*, 938 F.3d 1108, 1111 (9th Cir. 2019). Inventory searches serve three limited purposes: (1) protecting the property itself; (2) protecting the police from claims by the property's owner; and (3) protecting the police from potential danger. *See United States v. Wanless*, 882 F.2d 1459, 1463 (9th Cir. 1989). If an inventory search strays beyond these limited purposes—for example, if it is conducted "in bad faith or for the sole purpose of investigation"—then the search is unconstitutional. *See Colorado v. Bertine*, 479 U.S. 367, 372 (1987). An inventory search is also unconstitutional if it is not carried out according to standard procedures. *See Florida v. Wells*, 495 U.S. 1, 4 (1990) (holding inventory search unconstitutional where Florida Highway Patrol had no policy regarding the opening of closed containers). Requiring such procedures "ensure[s] that the inventory search is 'limited in scope to the extent necessary to carry out the caretaking function.'" *Wanless*, 882 F.2d at 1463 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 375 (1975)).

In this case, the record is devoid of concrete evidence regarding the inventory search

1 purportedly conducted by the Tulalip Police Department. For example, the record does not show
2 why the Tulalip Police Department felt it necessary to power on or manipulate Mr. Sam's cell
3 phone to properly inventory the phone. The record also does not show whether the Tulalip Police
4 Department's established procedures require its officers to power on every cell phone that they
5 inventory. Indeed, the record does not even show whether the Tulalip Police Department
6 searched Mr. Sam's cell phone. Accordingly, the Court cannot resolve Mr. Sam's motion to
7 suppress as to the police's examination of the phone.

8 The Court hereby ORDERS the parties to file supplemental briefing addressing the
9 circumstances surrounding Office Shin's and the Tulalip Police Department's alleged
10 examinations of Mr. Sam's phone. That briefing should also address the relevant legal standard
11 for searches incident to arrest and/or inventory searches. The Court recognizes that it may take
12 time for the parties to gather the required information and conduct the necessary legal research.
13 The Court therefore ORDERS the parties to file a joint status report proposing a briefing
14 schedule within 14 days of the date this order is issued.

15 **II. CONCLUSION**

16 For the foregoing reasons, the Court GRANTS in part Mr. Sam's motion to suppress cell
17 phone contents (Dkt. No. 55). The Court further ORDERS the parties to file a joint status report
18 proposing a supplemental briefing schedule within 14 days of the date this order is issued. The
19 supplemental briefing should address (1) the circumstances surrounding the initial examination
20 of Mr. Sam's phone and (2) the legal standard relevant to those circumstances.

21 DATED this 18th day of May 2020.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CLAUDIO POLO CALDERON and JONATHAN POLO ECHEVARRIA,

Plaintiffs,

v.

CORPORACION PUERTORRIQUEÑA DE SALUD and JOAQUIN RODRIGUEZ-BENITEZ,

Defendants.

Civil No. 12-1006 (FAB)

MEMORANDUM AND ORDER

BESOSA, District Judge.

On September 30, 2013, defendants filed a motion *in limine* requesting that the Court exclude all text messages sent and received between plaintiff Jonathan Polo-Echevarria ("Polo") and prpng@hotmail.com or "Siempre Atento" at trial. (Docket No. 92.) They claim that Polo's own admission that certain text messages were deleted from his phone precludes the use of <u>any messages</u> whatsoever, (Docket No. 92), and they submit that the "complaint must be dismissed with prejudice since the case is based on those printed text messages . . . ." (Docket No. 128 at p. 10.)

While their motion *in limine* was pending, defendants received documents in response to an *ex-parte* subpoena to T-Mobile that they had issued — unbeknownst to plaintiffs or the Court — on August 23, 2013. The documents T-Mobile produced in response to the subpoena contain Polo's phone and text messaging records from December 1, 2010 to March 1, 2011. (Docket No. 158-1.) Defendants informed

the Court of the phone and text logs in a supplemental motion *in limine*, in which they again request that plaintiffs' case be dismissed due to spoliation of evidence and plaintiffs' bad faith.[1] (Docket Nos. 143 and 167.)

I. Plaintiffs' Motion to Quash

As a preliminary matter, plaintiffs argue that defendants' T-Mobile subpoena should be quashed as procedurally defective for failure to give pre-service notice. (Docket No. 144 at p. 2.) Pursuant to Federal Rule of Civil Procedure 45(b)(1), which was in effect at the time defendants issued the subpoena to T-Mobile, a subpoena commanding the production of documents and electronically

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[1] Although defendants received the requested records on October 9, 2013, defendants waited to produce the records to plaintiffs until December 23, 2013, just prior to filing the pretrial report. Defendants' proposed reason for not producing the responsive documents when they received them is that they intended to limit the use of the evidence "for impeachment purposes." (Docket No. 143 at p. 3.) Pursuant to Fed. R. Civ. P. 26 (a)(3)(A), a party need not provide the other parties with information about the evidence that it may present at trial if it intends to use the evidence "solely for impeachment." Evidence that is at least in part substantive, meaning that it pertains to the truth of a matter to be determined by the jury, does not fall within the "solely for impeachment" exception of Rule 26(a)(3), and must be produced pursuant to Rule 26. See Klonoski v. Mahlab, 156 F.3d 255, 270 (1st Cir. 1998) (finding written excerpts of a letter to be substantive evidence "because, separate and apart from whether they contradicted Dr. Klonoski's testimony, they tended to establish the truth of a matter to be determined by the trier of fact," and concluding that the letters should have been produced during discovery) (internal quotations and citation omitted). Because defendants did not timely produce the documents to plaintiffs, defendants would normally be limited to using the same at trial for impeachment purposes only. As discussed in detail below, however, an examination of the T-Mobile records leads the Court to conclude that the effect of plaintiff Polo's spoliation — defendants' inability to invoke Federal Rule of Evidence 106 — warrants an adverse inference regarding the missing messages.

stored information requires that notice be served on each party before service. The Advisory Committee Notes have defended similar provisions as attempting to "achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials . . . ." See Fed.R.Civ.P. 45(a)(4).

Defendants issued the subpoena to T-Mobile before the discovery deadline; had plaintiffs objected, the Court would probably not have quashed defendants' subpoena — just as it did not quash plaintiffs' subpoena to attain Rodriguez's AT&T records. (See Docket Nos. 59 & 70); (See also Docket No. 61) (plaintiffs' admission that "[t]he fact that there were telephone conversations between plaintiff and defendant Rodriguez is certainly relevant and fair game here. It is corroboration of plaintiff's testimony"). Thus, quashing the subpoena now for failing to give timely notice would only result in its re-issuance. Given that trial is less than two weeks away, a re-issuance would promote inefficiency, delay, and undue costs on the litigants. See, e.g. Richardson v. Axion Logistics, LLC, 2013 U.S. Dist. LEXIS 144440 (M.D. La. Oct. 7, 2013).

Furthermore, the Court finds defendants' late disclosure of the T-Mobile records to be harmless to plaintiffs. Plaintiffs do not advance any argument demonstrating prejudice resulting from the late production of the records, and the Court finds no basis for concluding either that the defendants are attempting to engage in trial by ambush or that the T-Mobile information otherwise affects plaintiffs' ability to litigate their case. Cf. Klonoski v.

Mahlab, 156 F.3d 255, 270–71 (1st Cir. 1998) (finding defendants' late disclosure of letters significantly prejudiced plaintiff because "it was devastating to his ability to succeed with the jury"). To the contrary, the records merely reveal information personally known to Polo, and the plaintiffs will have had more than one month to review the records before going to trial. (Docket No. 144 at p. 2.) Accordingly, the Court **DENIES** plaintiffs' motion to quash the T-Mobile subpoena.

II. Defendants' Motions *in Limine*

Arguing that Polo engaged in spoliation and that the case therefore must be dismissed, defendants direct the Court to the T-Mobile records. They point out that Polo received numerous messages — the Court counts 22 messages from prpng@hotmail.com between December 31, 2010 and January 7, 2011 and 16 messages from prpng@hotmail.com between February 4, 2011 and February 7, 2011 - that were not among the messages plaintiffs produced in discovery. (Docket No. 158-1 at pp. 90–94.) That estimate does not include the numerous text messages that Polo sent in response. (See Docket No. 167 at pp. 7-10.)

The Court finds that spoliation occurred in this case. A party has a general duty to preserve relevant evidence once it has notice of or reasonably foresees litigation; failure to preserve the evidence constitutes spoliation. Gomez v. Stop & Shop Supermarket Co., 670 F.3d 395, 399 (1st Cir. 2012); see also Perez-Garcia v. P.R. Ports Auth., 871 F. Supp. 2d 66, 69 (D.P.R. 2012) (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216

(S.D.N.Y. 2003)). "The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001). It cannot be disputed that all messages and phone calls between Polo and Rodriguez, and Polo and the prpng@hotmail.com and "Siempre Atento" users, are relevant to plaintiffs' lawsuit. (Docket Nos. 61 & 145.) Polo admits to forwarding some messages received from prpng@hotmail.com and "Siempre Atento" to himself so that he "would be able to print" them, (Docket No. 98-1 at p. 44), and the record reflects that he did so as early as 12:09:46 p.m. on February 8, 2011. (Docket No. 92.) The T-Mobile records also reveal that by that time, Polo had contacted his attorney. (Docket No. 158-1 at p. 65.) At a bare minimum, Polo's decision not to forward or save the unproduced texts and photos from prpng@hotmail.com constitutes "conscious abandonment of potentially useful evidence" that indicates that he believed those records would not help his side of the case. Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 219 (1st Cir. 1982). The record thus indicates that Polo reasonably foresaw litigation and had a duty to preserve relevant evidence, and spoliation occurred.

Once spoliation has been established, the Court enjoys considerable discretion over whether to sanction the offending party. See Booker v. Mass. Dep't. of Pub. Health, 612 F.3d 34, 46 (1st Cir. 2010). The only sanction defendants identify in their

motions *in limine* is dismissal of the entire lawsuit; that sanction is traditionally reserved, however, for the most extreme of cases. Benitez-Garcia v. Gonzalez-Vega, 468 F.3d 1, 5 (1st Cir. 2006) ("[I]t has long been our rule that a case should not be dismissed with prejudice except when a plaintiff's misconduct is particularly egregious or extreme."). The Court regards an adverse inference instruction[2] as the most appropriate sanction in this case. Pursuant to that doctrine, "a trier of fact may (but need not) infer from a party's obliteration of a document relevant to a litigated issue that the contents of the document were unfavorable to that party." Testa v. Wal-Mart Stores, Inc., 144 F.3d 173, 177 (1st Cir. 1998).

To qualify for an adverse inference instruction, defendants must "proffer[] evidence sufficient to show that the party who destroyed the document knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document's potential relevance to that claim." Booker v. Mass. Dep't of Pub. Health, 612 F.3d 34, 46 (1st Cir. 2010). The Court finds that

[2] "This permissive negative inference springs from the commonsense notion that a party who destroys a document (or permits it to be destroyed) when facing litigation, knowing the document's relevancy to issues in the case, may well do so out of a sense that the document's contents hurt his position." Testa, 144 F.3d at 177.

The First Circuit Court of Appeals has indicated that such an instruction usually is appropriate "only where the evidence permits a finding of bad faith destruction." United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010). It recognizes, however, that "unusual circumstances or even other policies might warrant exceptions." Id. at 902-03; See also Nation-Wide Check Corp. v. Forest Hills Distrib., Inc., 692 F.2d 214, 219 (1st Cir. 1982).

defendants easily meet their burden. It is reasonable to conclude that the mere act of Polo forwarding himself some messages from prpng@hotmail.com on February 8, 2011 — the same day that he submitted a sexual harassment complaint to CPS — reveals his understanding that those messages were relevant to a potential claim against Rodriguez. Even if Polo's behavior does not amount to bad faith, his selective retention of certain messages over the 38 messages that had been received from prpng@hotmail.com and his respective responses, indicates his belief that the records would not help his side of the case. See Nation-Wide Check Corp., 692 F.2d at 219. Thus, Polo knew of both the potential for litigation and the potential relevance of the unproduced messages to that claim. His failure to preserve those messages severely prejudices defendants by precluding a complete review of the conversations and pictures sent between Polo and prpng@hotmail.com. It also prevents defendants from introducing, pursuant to Fed. R. Evid. 106, other writings "that in fairness ought to be considered at the same time" as the messages that plaintiffs seek to introduce at trial. Finally, it impedes defendants from offering evidence pertinent to their defense that prpng@hotmail.com's identity cannot be determined — and is not defendant Rodriguez. Due to those circumstances, and in light of the First Circuit Court of Appeals' indication that "above all else[,] an instruction must make sense in the context of the evidence," Laurent, 607 F.3d at 903, the Court will give an adverse inference instruction at trial against

plaintiff Polo regarding the more than 38 missing communications between Polo and prpng@hotmail.com.

III. Conclusion

For the reasons discussed above, the Court **DENIES** plaintiffs' motion to quash, (Docket No. 144), and **GRANTS IN PART and DENIES IN PART** defendants' motions *in limine*, (Docket Nos. 92 and 167). An adverse inference instruction regarding the 24 missing communications between Polo and prpng@hotmail.com, and Polo and Rodriguez, will be given at trial.

IT IS SO ORDERED.

San Juan, Puerto Rico, January 16, 2014.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANGELA LAWRENCE, Plaintiff, -against- THE CITY OF NEW YORK, *et al.*, Defendants.	15cv8947 OPINION & ORDER

WILLIAM H. PAULEY III, Senior United States District Judge:

The City of New York, Daniel Nunez, Daniel Beddows, Juan Rodriguez, Jens Maldonado, John Anzelino, and Michael Raso (together, "Defendants") move for sanctions against Angela Lawrence and her former counsel Jason Leventhal stemming from their production of 67 photographs purporting to show the immediate aftermath of the events at issue in this action. Defendants contend that sanctions are warranted under Federal Rules of Civil Procedure 11, 26, and 37, and seek dismissal with prejudice and attorneys' fees. For the reasons that follow, Defendants' motion is granted in part and denied in part, and this case is dismissed.

BACKGROUND

This Opinion & Order showcases the importance of verifying a client's representations. In November 2015, Leventhal filed this civil rights action on behalf of Lawrence. (See Compl., ECF No. 1.) The complaint alleged that in August 2014, NYPD officers entered Lawrence's home without a warrant, pushed her to the floor, damaged her property, and stole more than $1,000 in cash. (Am. Compl., ECF No. 17, ¶¶ 17, 22.)

In September 2016, Lawrence provided photographs that she claimed depicted the

condition of her apartment several days after the incident. (Decl. of Jason L. Leventhal, Esq., in Opp. to Defs.' Mot. for Sanctions & Attorneys' Fees & Costs, ECF No. 123 ("Leventhal Decl.") ¶¶ 15–16.) Leventhal accepted his client's representations and after reviewing the photographs, saved them to a PDF, Bates-stamped them, and produced them to Defendants. (Leventhal Decl. ¶ 17; Decl. of Evan F. Jaffe in Supp. of Defs.' Mot. for Sanctions & Attorneys' Fees, ECF No. 113 ("Jaffe Decl."), Ex. F.). At that time, Leventhal was unfamiliar with electronically stored metadata and "did not doubt [that] the photographs were taken contemporaneously with the occurrence of the damage." (Leventhal Decl. ¶ 15.)

During a December 2016 deposition, Lawrence testified that her son or a friend took the photographs two days after the incident. (Jaffe Decl., Ex. H ("Dec. Dep."), at 197:19–198:18, 203:3:10, 204:14.) In a subsequent deposition in April 2017, Lawrence asserted that she had taken most of the pictures, that her son had taken a few, and that none of them were taken by the previously described friend. (Jaffe Decl., Ex. I ("Apr. Dep."), at 265:5–11, 266:19–24, 273:12–14, 301:25–302:4, 306:10–14.) At that juncture, Leventhal believed his client had memory problems but did not believe she was testifying falsely. (Leventhal Decl. ¶ 21.) In view of Lawrence's conflicting testimony, Defendants requested the smartphones which Lawrence claimed were used to take the photos. (Jaffe Decl. ¶ 21.) In August 2017, Leventhal objected, but agreed to produce the photographs' native files, which included metadata. (Jaffe Decl. ¶ 29.)

When Defendants checked the photographs' metadata, they learned that 67 of the 70 photographs had been taken in September 2016—two years after the incident and immediately before Lawrence provided them to Leventhal. (Jaffe Decl. ¶ 33.) In September 2017, Defendants sent a Rule 11 safe-harbor letter to Leventhal. (Jaffe Decl. ¶ 34; Ex. N.)

In October 2017, Leventhal moved to withdraw as counsel, asserting that "based upon facts of which [he] was not aware . . . [he] hereby disavow[ed] all prior statements made [regarding] the photographs." (See Aff. of Jason Leventhal, ECF No. 78-1, at 3.) At an October 2017 conference, Leventhal's ethics counsel represented that at the time of production, Leventhal "did not believe or have reason to believe that there was any question about the date or provenance of the photographs." (Jaffe Decl., Ex. Q ("Oct. Hr'g Tr."), at 3:23–25.) Ethics counsel also stated that other events now compelled Leventhal to withdraw. (Oct. Hr'g Tr., at 5:3–16.) While Leventhal's motion was pending, Lawrence terminated Leventhal's representation. (Letter, ECF No. 94.)

In December 2017, this Court granted Leventhal's motion to withdraw and afforded Lawrence two months to secure new counsel. (ECF Nos. 97 & 98.) Lawrence was unable to engage a new lawyer and appeared pro se. By letter dated February 20, 2018, Lawrence claimed she provided the photographs to her attorney by accident because she had an eye infection. (ECF No. 105.) At a status conference, this Court advised Lawrence that "[t]he issue here is whether the photographs that you submitted actually depicted the damages at the time or whether it was all staged by you and then given to your attorney." (Feb. Hr'g Tr., at 9:13–16.) Further, this Court informed Lawrence that "if evidence comes out on [Defendants'] motion that in fact this is all fabricated, at a minimum, [the Court] may be duty bound to refer it to the United States attorney," that her case could be dismissed, and that she "may be subject to substantial monetary penalties." (Feb. Hr'g Tr., at 9:18–25.) Lawrence elected to proceed.

In the wake of Defendants' motion for sanctions, Lawrence forwarded numerous documents to this Court and attributed her production of the photographs to mental illness. (See

Opposing Mot. for Sanctions & Attorneys Fees, ECF No. 115 ("Lawrence Opp. Brief"), at *1.[1]) She also claims that her medications prevented her from testifying truthfully during depositions. (Lawrence Opp. Brief at *1.) Lawrence's medical records evince a history of mental illness. (See, e.g., Lawrence Supp. Brief, at *185 & Ex. 1, at *2, *16–17, *23.) Most recently, Lawrence amended her deposition testimony and now contends that the photographs were taken by her grandchild for a book report. (Lawrence's Amended Answers to Deposition, ECF No. 132-1, at *76.)

LEGAL STANDARD

The Federal Rules of Civil Procedure provide for sanctions based on litigation misconduct. Courts also "possess certain inherent powers, not conferred by rule or statute . . . to fashion an appropriate sanction for conduct which abuses the judicial process." Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186 (2017) (citation and marks omitted). Courts have the inherent power to correct a fraud upon the court. Fraud upon the court exists where a litigant attempts to "improperly influence[] the trier" of fact, "lies to the court and h[er] adversary intentionally, repeatedly, and about issues that are central to the truth finding process," or "knowingly submit[s] fraudulent documents to the Court." Passlogix, Inc. v. 2FA Tech., Inc., 708 F. Supp. 2d 378, 395 (S.D.N.Y. 2010) (citation and marks omitted). A district court has broad discretion in fashioning sanctions under its "inherent power to manage its own affairs." Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 106–07 (2d Cir. 2002).

Discovery sanctions serve broad purposes, including: (1) to ensure "that a party will not benefit from its own failure to comply"; (2) "as specific deterrents [to] seek compliance

[1] Citations to materials submitted by Lawrence refer to their ECF pagination.

with the particular order issued"; and (3) "as a general deterrent effect on the case at hand and on other litigation." Update Art, Inc. v. Modiin Publ'g, Ltd., 843 F.2d 67, 71 (2d Cir. 1988). In determining sanctions based on discovery misconduct, courts consider willfulness, duration of non-compliance, whether the non-compliant party had been warned of the consequences of non-compliance, and the efficacy of lesser sanctions. Dragon Yu Bag Mfg. Co. v. Brand Sci., LLC, 282 F.R.D. 343, 345 (S.D.N.Y. 2012).

"[D]ismissal is a harsh remedy, not to be utilized without a careful weighing of its appropriateness," and should only be employed when a court is "sure of the impotence of lesser sanctions." Dodson v. Runyon, 86 F.3d 37, 39, 42 (2d Cir. 1996) (citation and marks omitted). Nonetheless, "when a party lies to the court and h[er] adversary intentionally, repeatedly, and about issues that are central to the truth-finding process, it can fairly be said that [s]he has forfeited h[er] right to have h[er] claim decided on the merits." McMunn v. Mem'l Sloan-Kettering Cancer Ctr., 191 F. Supp. 2d 440, 445 (S.D.N.Y. 2002).

DISCUSSION

I. Rule 11

Rule 11 states that by signing a pleading, motion, or other paper, an attorney certifies that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the document is submitted for a proper purpose, the legal claims are nonfrivolous, and "the factual contentions have evidentiary support." Fed. R. Civ. P. 11(b). "Rule 11 imposes a duty on every attorney to conduct a reasonable pre-filing inquiry into the evidentiary and factual support for [a] claim . . . ." Capital Bridge Co. v. IVL Tech., Ltd., 2007 WL 3168327, at *10 (S.D.N.Y. Oct. 26, 2007). It serves "to deter baseless

filings." Gal v. Viacom Int'l, Inc., 403 F. Supp. 2d 294, 307 (S.D.N.Y. 2005) (citation omitted).

A pleading violates Rule 11 where "a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law." W.K. Webster & Co. v. Am. President Lines, Ltd., 32 F.3d 665, 670 (2d Cir. 1994). An attorney also has an obligation not to "reaffirm[] to the court and advocat[e] positions contained in [prior] pleadings and motions after learning that they cease to have merit." Fed. R. Civ. P. 11 advisory committee's note. Rule 11 "does not apply to disclosures and discovery requests, responses, objections, and motions . . . ." Fed R. Civ. P. 11(d).

In enforcing Rule 11, a court may "impose an appropriate sanction on any attorney, law firm, or party that violated the rule." Fed. R. Civ. P. 11(c)(1). A represented party may be sanctioned if she "had actual knowledge that the filing of the papers constituted wrongful conduct, e.g. the papers made false statements or were filed for an improper purpose." Ilkowitz v. Durand, 2018 WL 1595987, at *19 (S.D.N.Y. Mar. 27, 2018) (citation omitted). A court "resolves all doubts in favor of the signer." Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986). "Courts impose Rule 11 sanctions with discretion and caution." Robeldo v. Bond No. 9, 965 F. Supp. 2d 470, 478 (S.D.N.Y. 2013).

Defendants attempt to cast what occurred here as conduct sanctionable under Rule 11. They contend that Leventhal failed to adequately investigate Lawrence's claims before filing this action and failed to drop those claims after learning that Lawrence had provided fraudulent photographs and given false testimony. But Rule 11 does not apply to this situation. Leventhal produced documents in discovery that turned out to be fraudulent. Defendants' sanctions motion rests entirely on that production. "These incidents are not sanctionable under Rule 11 because

they arose in the context of discovery and thus are not within the scope of Rule 11." Moeck v. Pleasant Valley Sch. Dist., 844 F.3d 387, 391 n.8 (3d Cir. 2016) (citing Fed. R. Civ. P. 11(d)).

Further, the record does not support Defendants' contention that it was unreasonable for Leventhal to bring this action. "[U]nder Rule 11, an attorney has an affirmative duty to make reasonable inquiry into the facts and the law." In re Austr. & N.Z. Banking Grp. Ltd. Sec. Litig., 712 F. Supp. 2d 255, 263 (S.D.N.Y. 2010) (citation and marks omitted). Here, Leventhal made such an inquiry. Although Defendants allege the photographs constitute the only evidence of Lawrence's claims, Leventhal also: (1) requested Lawrence's medical records, which showed that she sought treatment for difficulty sleeping, nightmares, anxiety, depression, and weight loss from the alleged incident, (2) reviewed Civilian Complaint Review Board records regarding the incident and certain police officers' prior conduct, and (3) interviewed both Lawrence and her son. (See Leventhal Decl. ¶¶ 6–7, 11–14.) This investigation was sufficient. "[A]n attorney is entitled to rely on the objectively reasonable representations of the client." Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1329–30 (2d Cir. 1995); Optical Commc'ns Grp., v. M/V AMBASSADOR, 938 F. Supp. 2d 449, 465 (S.D.N.Y. 2013) (denying sanctions despite client's "suspect" claims).

Accordingly, the record does not show that Leventhal failed to perform "an inquiry reasonable under the circumstances," Fed. R. Civ. P. 11(b), nor that Lawrence's claims were "utterly lacking in support," In re Sept. 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114, 124 (S.D.N.Y. 2007) (citation omitted); see Goldenberg v. St. Barnabas Hosp., 2005 WL 426701, at *7 (S.D.N.Y. Feb. 23, 2005) (denying sanctions where "there was a reasonable basis for plaintiff's counsel to have believed that [plaintiff's] allegations were grounded in fact when

he filed the . . . complaint"); Almeciga v. Ctr. for Investigative Reporting, Inc., 185 F. Supp. 3d 401, 427 (S.D.N.Y 2016) ("Rule 11 sanctions may not be imposed unless a particular . . . allegation is utterly lacking in support," not "where the evidentiary support is merely weak." (citations, marks, and alterations omitted).)

This Court recognizes that the date the photographs were created became apparent only after Leventhal filed suit and Lawrence testified. "When a district court examines the sufficiency of the investigation of facts and law, it is expected to avoid the wisdom of hindsight . . . ." Bradgate Assocs., Inc. v. Fellows, Read & Assocs., Inc., 999 F.2d 745, 752 (3d Cir. 1993) (citation and marks omitted); see also Healey v. Chelsea Res., Ltd., 947 F.2d 611, 625 (2d Cir. 1991) (describing that a court must ascertain an attorney's knowledge at the time the pleading was signed). Even if Lawrence contradicted herself in her deposition, "submission of inconsistent statements alone is insufficient to establish that a statement was false, or was filed for an improper purpose." Brown v. Artus, 647 F. Supp. 2d 190, 206 (N.D.N.Y. 2009). Based on the evidence supporting Lawrence's claims, including the 911 call produced in discovery, this Court cannot conclude that Leventhal had a duty to withdraw Lawrence's claims. Cf. Galin v. Hamada, 283 F. Supp. 3d 189, 202 (S.D.N.Y. 2017) (sanctioning plaintiff after discovery revealed that he had no viable claim).

For similar reasons, Rule 11 does not apply to Lawrence's conduct. "Where it is the party . . . and not the attorney, that is the target of Rule 11 motion, a subjective good faith test applies." Quadrozzi v. City of N.Y., 127 F.R.D. 63, 79 (S.D.N.Y. 1989). The evidence demonstrates that Lawrence or someone on her behalf staged photographs and that she represented them to be accurate depictions of her apartment at the time of the incident. But that

does not compel the conclusion that the August 2014 incident did not in fact occur. Thus, this Court cannot conclude that Lawrence "misl[ed] [her] attorney as to . . . the purpose of a lawsuit." See Mir v. Bogan, 2015 WL 1408891, at *21 (S.D.N.Y. Mar. 27, 2015) (citation omitted). While Lawrence committed egregious discovery misconduct, Rule 11 sanctions are unavailable.

II. Rule 26

Rule 26 provides a parallel to Rule 11 for productions made in discovery. Under Rule 26(g), an attorney's signature on a discovery response or objection certifies that after reasonable inquiry, the production is: (1) "complete and correct as of the time it is made"; (2) consistent with existing law; (3) "not interposed for any improper purpose"; and (4) not unduly burdensome. Fed. R. Civ. P. 26(g)(1). Violation "without substantial justification" requires a court to "impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." Fed. R. Civ. P. 26(g)(3). "Rule 26(g) imposes on counsel an affirmative duty to engage in pretrial discovery responsibly" and to "stop and think about the legitimacy of a discovery request, a response thereto, or an objection." Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 212 F.R.D. 178, 219 (S.D.N.Y. 2003) (citation and emphasis omitted).

In determining sanctions under Rule 26, a court considers whether the attorney's inquiry before a production "was objectively reasonable under the circumstances." Kiobel v. Royal Dutch Petroleum Co., 2009 WL 1810104, at *2 (S.D.N.Y. June 25, 2009). "In making her inquiry, an attorney may rely, when appropriate, on representations by her client or by other attorneys." Kiobel, 2009 WL 1810104, at *2. "Ultimately, what is reasonable is a matter for the

court to decide on the totality of the circumstances." Fed. R. Civ. P. 26 advisory committee's note.

Defendants argue that Lawrence provided the photos nearly a year after this litigation commenced without ever mentioning them previously. However, as Leventhal explained in camera, Lawrence told him about photographs depicting damage to her apartment from the very beginning, but claimed that she was not "tech-savvy" and did not know how to reproduce them. (Leventhal Decl. ¶ 9.) Leventhal repeatedly attempted to gain access to the devices containing the photos. (Leventhal Decl. ¶ 9.) Further, some of the photographs appear to show damage to Lawrence's apartment consistent with her testimony, including a mattress and couch torn open, and damage to other items. Therefore, a reasonable lawyer would not have doubted that they showed what Lawrence claimed. Finally, Leventhal explains that at the time he produced the photos he was unfamiliar with the process for checking a digital photograph's metadata, which entails right-clicking it and navigating to its properties. (Leventhal Decl. ¶ 15.)

Based on these facts, Leventhal's production of the photos may have been careless, but was not objectively unreasonable. Cf. Johnson v. BAE Sys., Inc., 307 F.R.D. 220, 226 (D.D.C. 2013) (sanctioning attorney for producing doctored medical records without any inspection or inquiry whatsoever). On the other hand, it is clear that Lawrence, or someone acting on her behalf, created these photographs to bolster her claims, and then she falsely testified about them. Accordingly, sanctions under Rule 26 are appropriate. See Fed. R. Civ. P. 26(g)(3) (sanctions under Rule 26 apply to both the signer and "the party on whose behalf the signer was acting"). But as described below, Lawrence's conduct is more properly construed as an attempted fraud on this Court, and is therefore analyzed under that standard.

III. Rule 37

Federal Rule of Civil Procedure 37 governs a party's failure to obey a discovery order or comply with discovery requests. See Fed. R. Civ. P. 37. It largely functions to "ensure that a party will not be able to profit from its own failure to comply" and "to secure compliance with the particular order at hand." Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979). In determining sanctions under Rule 37, a court considers "willfulness or bad faith of the noncompliant party; (b) the history, if any, of noncompliance; (c) the effectiveness of lesser sanctions; (d) whether the noncompliant party has been warned about the possibility of sanctions; (e) the client's complicity; and (f) prejudice to the moving party." Metro. Opera Ass'n, 212 F.R.D. at 220 (citation and marks omitted).

Rule 37 does not apply to this situation. This rule "provides generally for sanctions against parties or persons unjustifiably resisting discovery." Fed. R. Civ. P. 37 advisory committee's note; see Nieves v. City of N.Y., 208 F.R.D. 531, 535 (S.D.N.Y. 2002) (explaining that Rule 37 seeks in part to "obtain[] compliance with discovery orders"). Here, Leventhal did not fail to comply with discovery orders, to supplement an earlier response, or to preserve electronically stored information. Further, there is no showing that his actions were willful or part of a pattern of noncompliance. "Willful non-compliance is routinely found . . . where a party has repeatedly failed to produce documents in violation of the district court's orders." Doe v. Delta Airlines, Inc., 2015 WL 798031, at *8 (S.D.N.Y. Feb. 25, 2015) (citation omitted). Instead, Leventhal was unaware of Lawrence's actions and took corrective action after learning that the photographs were taken two years later. Defendants have not shown that Leventhal handled his discovery obligations in an unethical or willfully non-compliant manner.

Defendants also contend that Leventhal should have corrected the record before seeking leave to withdraw. But Leventhal spoke numerous times with Lawrence to understand what had happened and engaged ethics counsel to advise him. (Leventhal Decl. ¶¶ 27–41.) Leventhal also disavowed his prior representations concerning the photographs. It appears that Leventhal's need to withdraw precluded him from taking certain steps such as voluntarily dismissing some or all of Lawrence's claims.

IV. Inherent Power of Court

"Beyond the powers conferred expressly by rule and statute, a federal court has inherent power to sanction a party for bad faith litigation conduct." Cerruti 1881 S.A. v. Cerruti, Inc., 169 F.R.D. 573, 582–83 (S.D.N.Y. 1996); see also Briese Lichttechnik Vertriebs GmbH v. Langton, 2011 WL 280815, at *8 (S.D.N.Y. Jan. 10, 2011) ("[E]ven in the absence of [a court] order the court may impose sanctions for discovery misconduct as an assertion of its inherent powers.").

"Our judicial system generally relies on litigants to tell the truth . . . ." McMunn, 191 F. Supp. 2d at 445. Therefore, "[f]raud upon the court . . . seriously affects the integrity of the normal process of adjudication." Hargrove v. Riley, 2007 WL 389003, at *11 (E.D.N.Y. Jan. 31, 2007) (citation and marks omitted). "[T]ampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Shangold v. Walt Disney Co., 2006 WL 71672, at *4 (S.D.N.Y. Jan. 12, 2006) (citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944)).

A litigant must prove fraud upon the court by clear and convincing evidence. Passlogix, 708 F. Supp. 2d at 393. Defendants must establish the opposing party "has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case." McMunn, 191 F. Supp. 2d at 445 (citation omitted). A court also considers (1) if the misconduct was performed intentionally and in bad faith; (2) whether it prejudiced the injured party; (3) if there is a pattern of misbehavior; (4) whether and when the misconduct was corrected; and (5) whether it is likely to continue. Passlogix, 708 F. Supp. 2d at 394.

The creation of staged photos was the beginning of a sustained effort by Lawrence to mislead Defendants and this Court. A brief recapitulation is necessary. Lawrence told Leventhal early on that she had photos of her apartment on a cellphone. (Leventhal Decl. ¶ 9.) In September 2016, she provided photos to her attorney and represented to him that they were taken days after the incident. (Leventhal Decl. ¶ 15.) In her December 2016 deposition, she testified that the photos were taken by her son or a friend days after the incident. (Dec. Dep., 197:19–198:18, 203:3:10, 204:14.) She also testified that she was not suffering from any mental condition at the time of her deposition. (Dec. Dep., 9:20–23.) In April 2017, Lawrence reiterated that the photos were taken immediately after the incident, but now claimed to have taken most of them herself. (Apr. Dep., 265:8–10; 266:19–20.) It was only after Defendants discovered the metadata that Lawrence acknowledged that the photos were taken in 2016.

Lawrence's attempts to explain the photographs and her deposition testimony continue a pattern of evasion and untruths. First, she asserted the production was caused by conjunctivitis, and presented her prescription for eye drops. (ECF No. 105.) Lawrence's conjunctivitis does not explain the creation of 67 doctored photographs or her false statements in

two depositions. Only after this Court rejected that explanation did Lawrence contend that the production was due to mental illness. (See Lawrence Opp. Brief.) However, after providing that explanation, Lawrence submitted further documents in which she amended her deposition testimony and now contends that the photos were taken by her grandson as part of a school project. (Lawrence's Amended Answers to Deposition, ECF No. 132-1, at 76.[2])

These shifting explanations are as troubling as the photographs themselves. This Court does not know how it can credit any of Lawrence's explanations. In considering the factors relevant to sanctions, most, if not all, support a harsh sanction. First, it is clear that the photos were intentionally staged. Photographs do not create themselves, and Lawrence's belated attempts to explain them are not worthy of belief. From this Court's review of the photographs, it is clear that Lawrence or someone on her behalf intentionally staged scenes of her apartment, including ripped furniture, a couch turned over, a broken air-conditioner, and disassembled stereos. Whether Lawrence personally created the photographs or not, she embraced them and willingly testified that they accurately depicted the condition of her apartment as of August 2014. Second, her actions prejudiced Defendants. Third, her pattern of misbehavior appears likely to continue. See DAG Jewish Directories, Inc. v. Y&R Media, LLC, 2010 WL 3219292, at *5 (S.D.N.Y. Aug. 12, 2010) (intentional fraud on court and subsequent lies to cover it up showed that "further misconduct [was] likely"); McMunn, 191 F. Supp. 2d at 462 (litigant's "lies and misconduct will almost certainly continue in the future if this action is permitted to go forward . . . nullifying any chance for a fair adjudication of the merits").

Further, this Court warned Lawrence of the repercussions of her actions. In

[2] Although this letter is dated April 23, 2018, this Court did not receive it until June 4, 2018.

December 2017, it informed her that "this is a very serious and grave matter with respect to the production of th[e] photographs, the circumstances surrounding the creation of th[e] photographs, and related matters." (Dec. 8, 2017 Hr'g Tr., at 22:10–13.) Again, in February, this Court told her that if the photos were staged by her, it would be a "very, very serious charge." (Feb. Hr'g Tr., at 9:16.)

Finally, Lawrence's "misconduct did not concern a peripheral or an incidental matter[.] . . . Rather, [it] goes to the heart of the case by making it apparent that defendants can rely only on fraudulent or defective records . . . ." Cerruti 1881, 169 F.R.D. at 583. "[A]ll litigants, including pro ses, have an obligation to comply with court orders. When they flout that obligation, they, like all litigants, must suffer the consequences of their actions." McDonald v. Head Crim. Court Supervisor Officer, 850 F.2d 121, 124 (2d Cir. 1988).

Lawrence's deceptive conduct and shifting excuses have completely undermined her credibility. This Court has no way of knowing what story Lawrence would offer if this case went to trial. See Hargrove, 2007 WL 389003, at *11 (severe sanctions were warranted based on plaintiff's intentional document forgeries, which were submitted in discovery and again as exhibits to his motion). Any sanction less than dismissal, "such as a jury instruction, would be ineffective." See McMunn, 191 F. Supp. 2d at 462. And "merely excluding the fabricated evidence would not only fail to address . . . [P]laintiff's other misconduct . . . but would also send the [P]laintiff, and future litigants like [her], the message that they have everything to gain, and nothing to lose, by continuing to submit fabricated evidence." Slate v. Am. Broad. Cos., Inc., 941 F. Supp. 2d 27, 52 (D.D.C. 2013) (citation and marks omitted) ("Dismissal is particularly appropriate where a plaintiff seeks to enhance the merits of her case with fabricated

evidence and fictionalized testimony.”).

This Court has considered Lawrence’s explanation that the photographs were produced because of her mental illness. (See Lawrence Supp. Brief, at *1.) Courts consider mental illness as a factor in determining sanctions. See Pritchard v. Dow Agro Sci., 2009 WL 1813145, at *10 (W.D. Pa. June 25, 2009). Some courts have chosen to lessen sanctions based on a litigant’s mental illness. See Voltz v. Chrysler Grp. LLC—UAW Pension Plan, 63 F. Supp. 3d 770, 785 (N.D. Ohio 2014) (“[A] litigant’s mental illness weighs against certain discovery sanctions, like entry of default.”); Nowia-Pahlavi v. Haverty Furniture Cos., Inc., 2009 WL 1393475, at *4 (M.D. Fla. May 18, 2009) (finding it “inappropriate to sanction litigants for mental illness”). Others have dismissed a case despite a litigant’s mental illness. See Azkour v. Maucort & Little Rest Twelve, Inc., 2018 WL 502674, at *9 (S.D.N.Y. Jan. 18, 2018) (finding plaintiff’s conduct willful and holding that despite his mental illness, he must bear the consequences of his actions); Lundahl v. Hawkins, 2009 WL 2461220, at *7 (W.D. Tex. Aug. 10, 2009), report and recommendation adopted by 2009 WL 3617518 (W.D. Tex. Oct. 27, 2009) (recommending plaintiff be sanctioned despite that her actions “may have been influenced by [her] mental illness” because she knew she was not acting “in good faith”).

Lawrence’s mental illness, while a mitigating factor, does not excuse her actions. Memory lapse does not explain manufactured exhibits and perjured testimony. This Court cautioned Lawrence that she needed to provide a credible explanation for her actions. (Feb. Hr’g Tr., at 13:1–4; 13:10–12.) She has failed to do so. As this Court stated in February, Lawrence may not be a lawyer, but she “know[s] the difference between giving honest testimony and providing honest exhibits as opposed to giving perjured testimony and manufacturing exhibits . .

. [b]ecause that's the difference between right and wrong." (Feb. Hr'g Tr., at 11:4–10.)

Whether dismissal is appropriate as a sanction is within the trial court's discretion. Dodson, 86 F.3d at 39. Although "dismissal is a harsh sanction to be used only in extreme situations . . . [w]hen faced with a fraud upon the court . . . such a[] powerful sanction is entirely appropriate." McMunn, 191 F. Supp. 2d at 461; see Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 469–70 (S.D.N.Y. 2010), abrogated on other grounds by Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012) ("[A] terminating sanction is justified in only the most egregious cases, such as where a party has engaged in perjury, tamper[ed] with evidence, or intentionally destroy[ed] evidence . . . ." (emphasis added)). Lawrence's conduct "requires that the policy favoring adjudication on the merits yield to the need to preserve the integrity of the courts." Shangold, 2006 WL 71672, at *1. Accordingly, this case is dismissed.

V. Attorneys' Fees

In addition to dismissal, Defendants seek attorneys' fees and costs. Specifically, they seek the reimbursement of 799.25 hours of work performed from September 27, 2016 to the present, amounting to $239,775 in fees and $1,657.85 in costs. (Jaffe Decl., ¶¶ 46–47.) Because this Court finds only Lawrence's behavior sanctionable, it considers Defendants' fee request based on her conduct.

"The deterrent effect of an award of attorney's fees is obviously dependent on the extent of the sanctioned party's resources. The poorer the offender, the smaller need be the sanction to ensure the desired deterrent effect." Kappenberger v. Oates, 663 F. Supp. 991, 994 (S.D.N.Y. 1987). "[I]t lies well within the district court's discretion to temper the amount to be

awarded against an offending [party] by a balancing consideration of [her] ability to pay." Oliveri, 803 F.2d at 1281; see also Serrano v. Shield Inst. of David, Inc., 1997 WL 167042, at *6 (S.D.N.Y. Apr. 9, 1997) ("Before awarding attorney's fees, a court should take into account the financial circumstances of the party to be sanctioned.").

Lawrence is a widow, rents an apartment, and as of November 2015 was unemployed. (See Exhibit U to Reply Decl. of Evan F. Jaffe in Supp. of Defs.' Mot. for Sanctions & Attorneys' Fees, ECF No. 134, at 8:18; 9:21; 10:19.) "An award in the amount required by Defendants would wreak financial ruin on Plaintiff[], and in the final analysis, dismissal of Plaintiff['s] lawsuit is the appropriate sanction that offers the closure that Defendants have earned." Shangold v. Walt Disney Co., 2006 WL 2884925, at *1 (S.D.N.Y. Oct. 11, 2006). Accordingly, this Court denies Defendants' request for attorneys' fees and costs. Indeed, an award of attorney's fees "would be a hollow victory . . . as it would likely be uncollectible." McMunn, 191 F. Supp. 2d at 462; see Slate, 941 F. Supp. 2d at 52 (imposing dismissal instead of fees as the pro se party would be unable to pay).

CONCLUSION

For the foregoing reasons, Defendants' motion for sanctions, attorneys' fees, and costs is granted in part and denied in part. As a sanction for Lawrence's fraud upon this Court, this action is dismissed. Defendants' motion for sanctions against Leventhal is denied. The Clerk of Court is directed to terminate all pending motions, mark this case as closed, and mail a copy of this Opinion & Order to Plaintiff.

SO ORDERED:

Dated: July 27, 2018
New York, New York

WILLIAM H. PAULEY III
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil No.: 20-cv-80148-SINGHAL/MATTHEWMAN

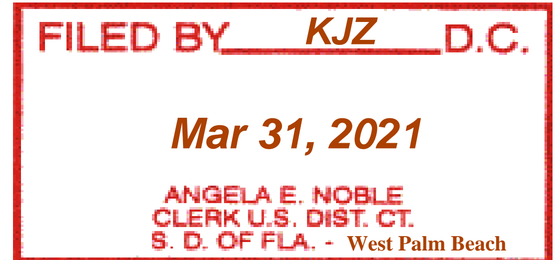
MEASURED WEALTH PRIVATE CLIENT GROUP, LLC, a New Hampshire limited liability company,

Plaintiff,

vs.

LEE ANNE FOSTER, an individual, *et al.*,

Defendants.
_________________________________/



ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL FORENSIC EXAMINATION [DE 154]

THIS CAUSE is before the Court upon Plaintiff, Measured Wealth Private Client Group, LLC's ("Plaintiff") Motion to Compel Forensic Examination of Defendant Lee Anne Foster's Mobile Phone ("Motion") [DE 154[1]]. The Motion was referred to the undersigned by the Honorable Raag Singhal, United States District Judge. *See* DE 34. Defendant, Lee Anne Foster ("Defendant"), has filed a response [DE 156], and Plaintiff has filed a reply [DE 162[2]]. The Court held a hearing on the Motion via Zoom video teleconference on March 16, 2021 and took the Motion under advisement. The Court also entered an Interim Order [DE 172] requiring the parties to further confer and file a Joint Notice. The Joint Notice filed on March 24, 2021 [DE 173] states that the parties were unable to reach any agreement. This Order now follows.

[1] The sealed exhibits to the Motion are at DE 155.
[2] The sealed exhibits to the reply are at DE 163.

The discovery issue currently pending before the Court is whether Plaintiff should be permitted to conduct a forensic examination of Defendant Lee Anne Foster's mobile phone to recover certain text messages and iMessages from the period of January 1, 2019 through December 31, 2019. In response, Defendant asserts that the temporal scope is too broad and would result in the production of irrelevant text messages and iMessages, that the discovery sought could be obtained from other individuals, and that Plaintiff's request for a forensic examination of her mobile phone for such a long time period is a mere fishing expedition. Defendant is concerned that the examination could uncover personal and private information unrelated to Plaintiff's claims.

The Court has carefully considered the relevant law, Plaintiff's Motion [DE 154], Defendant's response [DE 156], Plaintiff's reply [DE 162], the sealed materials filed by Plaintiff [DEs 155, 163], and the arguments of counsel for both parties at the hearing, as well the entire docket in this case. The Court makes the following findings.

First, despite Defendant's argument to the contrary, Plaintiff has properly propounded written discovery requests seeking certain text messages and iMessages from the time period of January 1, 2019 through December 31, 2019.[3] Additionally, the Court provided the parties with the opportunity to confer about the most recent requests for production propounded by Plaintiff and waited until the responses to the most recent requests for production were due before issuing this Order.

Second, text messages and iMessages responsive to Plaintiff's discovery requests from the

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[3] This is a different situation from when the Court ordered a forensic examination of Defendant Richard Kesner's cell phone because Plaintiff had not propounded discovery requests upon him outside of the April-July 2019 time period. Or, if Plaintiff had served discovery requests seeking text messages and iMessages for all of 2019, Plaintiff's counsel failed to make that argument at the discovery hearing.

period of January 1, 2019 through December 31, 2019, are relevant and proportional to the claims and defenses in this case, per Fed.R.Civ.P. 26(b)(1).

Third, Defendant currently possesses the same phone she possessed and utilized back in 2019 during the relevant time period. The Court wants to put an end to this discovery dispute and finds that a forensic examination, with necessary safeguards to protect Defendant's privacy, is the best way to accomplish that task.

Fourth, Defendant appears to have been obstructionist with regard to her production of text messages and iMessages during the discovery process. Based on the facts and arguments presented to the Court, it seems that Defendant agreed to produce certain text messages and iMessages at one time and then failed to do so. At this point, she has produced none of the text messages or iMessages sought by Plaintiff. The Court wants to ensure that all relevant and proportional discovery is produced in this case. All parties and their counsel in this case, including Defendant, must ensure that all relevant and proportional e-discovery sought has been appropriately preserved, searched for, and produced. Serious sanctions can issue if e-discovery preservation, search, or production is inadequate. *See, e.g.*, *DR Distributors, LLC*, No. 12 CV 50324, 2021 WL 185082, at *2 (N.D. Ill. Jan. 19, 2021).

Fifth, in light of the sealed filings, the Court finds that Plaintiff is not engaging in an improper fishing expedition in seeking the text messages and iMessages. Rather, Plaintiff has made a legitimate discovery request based on the production that Defendant has completed to date.

The Court wants to ensure complete production of all relevant requested documents in this case while concomitantly protecting Defendant's privacy as to the personal matters on her phone. Because Plaintiff has made a strong showing that additional relevant text messages and iMessages

may be recovered from Defendant's phone, forensic examination is appropriate in this case. *See Barton & Assocs., Inc. v. Liska*, No. 9:19-CV-81023, 2020 WL 8299750, at *1 (S.D. Fla. May 11, 2020) (finding that, because a defendant had failed to produce copies of any text messages during the non-compete period and had failed to preserve his phone, a forensic examination was warranted); *Health Mgmt. Assocs., Inc. v. Salyer*, No. 14-14337-CIV, 2015 WL 12778793, at *1 (S.D. Fla. Aug. 19, 2015) (finding that the plaintiff had made a sufficient demonstration of need for forensic examination when the devices at issue were likely to contain information relevant to the litigation and the defendant had failed to cooperate in discovery); *Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681, 687 (S.D. Fla. 2012) (finding a forensic examination to be warranted when the plaintiffs were either unwilling or unable to conduct a search of their computer systems for documents responsive to the defendant's discovery requests). Plaintiff has made a sufficient showing of need for the messages.[4] Further, the Court is concerned that Defendant's search of her phone was inadequate. The Court will utilize the protocols from the *Wynmoor* case, modified as necessary, in order to ensure protection of Defendant's privacy.

Based on the foregoing, it is hereby **ORDERED** as follows:

1. Plaintiff's Motion to Compel Forensic Examination [DE 154] is **GRANTED**.
2. Defendant shall submit the cellular phone that she used during the period between January 1, 2019 and December 31, 2019, for an independent forensic examination subject to the protocols described herein.

[4] The Court rejects Defendant's argument that Plaintiff can obtain the text messages and iMessages at issue from other individuals. Defendant is a party in this case and former Measured Wealth clients are not. Moreover, it is much more efficient for Plaintiff to conduct a forensic examination than to subpoena multiple non-parties.

3. An independent expert shall be appointed by the Court and shall mirror image and/or acquire all data present on Defendant's cell phone (to the extent it is possible, the independent expert shall conduct his or her examination in a manner that minimizes the disruption to Defendant).
4. The parties shall meet and confer regarding their designation of an independent forensic computer expert within seven (7) calendar days of the entry of this Order. The parties shall promptly notify the Court if they agree on an expert. If the parties cannot agree on the selection of an expert, each party shall submit its recommendation to the Court, and the Court will select the expert.
5. The appointed expert shall serve as an Officer of the Court. Thus, to the extent that this computer expert has direct or indirect access to information protected by attorney-client privilege, such disclosure will not result in any waiver of any party's attorney-client privilege.
6. The independent expert shall sign a confidential undertaking statement pursuant to the Court's Agreed Confidentiality and Protective Order [DE 51]. Additionally, the expert shall be allowed to hire other outside support, if necessary, in order to mirror image or acquire all data on Defendant's cell phone. Any outside support shall also be required to sign a confidential undertaking statement.
7. The expert shall mirror image Defendant's cell phone. If it is not feasible to create a mirror image of Defendant's cell phone data because of device security measures, the expert shall acquire as much data as possible from the device to allow the expert to recover text messages and iMessages.

8. The parties are to confer within ten (10) days of the date of this Order in an attempt to agree on search terms. If the parties cannot agree, each party shall submit its recommendation to the Court, and the Court will select the search terms. The Court will only determine search terms as a last resort since the parties have more detailed knowledge of the case. The parties' counsel should confer with the expert to the extent possible to arrive at reasonable and necessary search terms. This should be a collaborative effort among counsel and the expert with the goal being able to locate and produce all relevant text messages and iMessages from Defendant's phone during the time period at issue. The search terms should not be so broad as to elicit "junk" discovery and should not be so narrow as to exclude relevant discovery. The parties will provide the search terms ultimately agreed upon or ordered by the Court to the independent expert. The goal here is to only elicit text messages and iMessages from Defendant's cell phone which are relevant to the claims and defenses in this case. The Court expects and requires the parties and their counsel to confer and cooperate in this procedure.
9. Once the expert has mirror imaged or otherwise acquired the data from Defendant's cell phone, the expert shall search the mirror image or acquired data using the search terms. The results of the search terms and an electronic copy of all responsive documents shall be provided to Defendant's counsel.
10. Defendant's counsel shall review the search results provided by the independent expert and identify all documents to which she objects to disclosing to Plaintiff. Defendant shall produce all non-privileged responsive documents to Plaintiff and identify those

responsive documents not produced on a privilege log to the Plaintiff within ten (10) days of the date that Defendant receives the search results from the independent expert. Any privilege log produced shall comply strictly with the Local Rules for the Southern District of Florida. If Defendant is in doubt whether or not a certain message should be produced, she can seek leave to submit it to the Court for *in camera* review.

11. Plaintiff shall pay for all fees and costs of hiring the independent expert at this time. However, the Court will determine at a later date whether costs and expenses should be apportioned or otherwise paid by Defendant. For example, if the data recovered from Defendant's phones contains data or documents responsive to Plaintiff's prior requests for production which Defendant reasonably could have provided in the regular course of discovery without a forensic examination, the Court will revisit this issue of costs and consider charging Defendant for the fees and costs of the independent expert or imposing the fees and costs on the parties in a duly appropriate and apportioned manner.
12. The independent expert shall provide a signed affidavit detailing the steps he or she took to mirror image or acquire data from Defendant's phone and search the data for the search terms within five (5) days of providing Defendant with the results of the search for search terms.
13. The Court reserves jurisdiction to review *in camera* any documents that are subject to dispute between the parties.
14. From the date of this Order through the completion of the search, Defendant is required to maintain the phone at issue and shall not delete any texts or iMessages.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, in the Southern District of Florida, this 31st day of March, 2021.

WILLIAM MATTHEWMAN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SANDOZ, INC., *et ano.*, Plaintiffs, v. UNITED THERAPEUTICS CORP., *et ano.*, Defendants.	Civil Action No.: 19-cv-10170 **OPINION AND ORDER OF THE SPECIAL DISCOVERY MASTER REGARDING DEFENDANT'S MOTION TO COMPEL PLAINTIFF RAREGEN TO PRODUCE CONTEXTUAL TEXT MESSAGES**

LINARES, J.

This matter comes before the Special Master by way of a Letter dated April 28, 2021 ("Motion") from counsel for Defendant United Therapeutics Corporation ("UTC") seeking an Order compelling Plaintiff RareGen, LLC to produce additional context related cell phone text messages. The Special Master has reviewed the submissions, including the May 3, 2021 Opposition from RareGen, and the relevant controlling law. For the reasons set forth below, the Special Master hereby **GRANTS** the relief requested by the UTC.

I. DISCUSSION

The Special Master presumes that the parties are familiar with the facts surrounding the underlying action and claims. Accordingly, the Special Master will only recite the relevant procedural and factual background necessary to dispose of the dispute at hand.

UTC seeks an Order compelling plaintiff RareGen to produce contextual text messages according to the same rules adhered to by UTC and Sandoz and consistent with the Special

Master's March 29, 2021 Order. UTC asserts that RareGen has produced text messages that only hit on specific search terms and has objected to producing context-related messages, even though UTC and Sandoz have already done so. UTC argues that these text messages that lack any surrounding text messages to place them in context involve topics that are relevant to UTC's defenses, including Plaintiffs' alleged failure to negotiate a cartridge deal with Smiths and Plaintiffs' decision to launch generic treprostinil without a subcutaneous option. UTC argues it is simply asking that all of the parties be treated in the same manner.

RareGen does not dispute the relevancy of the contextual text messages. Rather, it argues that UTC's request is untimely because it did not file the instant Motion before the close of fact discovery.

In the March 29, 2021 Order, which Raregen correctly points out was directed only to UTC, not Raregen, the Special Master ordered UTC to produce context-related text messages. Up until that Order, UTC had taken the position, like RareGen does here, that it only had to produce text messages that hit directly on search terms. Once the Order was issued, UTC immediately requested that RareGen likewise produce context related text messages. UTC made that request to Raregen the day after the Special Master's March 29, 2021 Order and before the April 2, 2021 end date for fact discovery. See, Exhibit F to Motion. The parties met and conferred, and when the issue could not be resolved, UTC raised it with the Special Master by email on April 15, 2021. The Special Master then issued a briefing schedule, and UTC filed the instant Motion in accordance with that schedule on April 28, 2021.

While it is true that, generally, motions to compel must be filed within the scheduled time for discovery, F.R.C.P. 37 provides no deadline for the filing of a motion to compel. *Altana Pharma AG v. Teva Pharms, USA, Inc.*, 2010 WL 451168, at *2 (D.N.J. Feb. 5, 2010). Every

case is distinguishable, particularly as to discovery matters which are very fact specific. In this particular case, in the interest of fairness to the parties and in light of the prior Order and Opinion on this topic, the Special Master holds that the Motion is not untimely. UTC made the request that is the subject of the instant Motion before the end of fact discovery. Expert discovery is ongoing and there is no trial date. UTC moved promptly to try to resolve the issue with Raregen, and when that did not occur, it promptly raised the issue with the Special Master. There was no undue delay by UTC.

Accordingly, the Special Master holds that RareGen shall produce context-related text messages for each of the messages UTC has identified in Exhibit C to the Motion, including the preceding text message or responding text message, if they exist. If they do not exist, RareGen must so state, and provide an explanation based on information available to it why they do not exist.

To be clear, the Special Master is not re-opening fact discovery or extending the fact discovery end date. Rather, the Special Master is permitting this limited fact discovery to proceed, in fairness to the parties and under the particular circumstances set forth above.

II. ORDER

For the foregoing reasons, it is on this 10th day of June 2020,

ORDERED that, within ten (10) days, RareGen shall produce context-related text messages for each of the messages UTC has identified in Exhibit C to the Motion, including the preceding text message or responding text message, if they exist. If they do not exist, RareGen must so state, and provide an explanation based on information available to it why they do not exist.

SO ORDERED.

/s/ *Jose L. Linares*

Hon. Jose L. Linares, U.S.D.J. (Ret.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDREA ROSSBACH, Plaintiff,	:	19cv5758 (DLC)
-v-	:	OPINION AND ORDER
MONTEFIORE MEDICAL CENTER, NORMAN MORALES, and PATRICIA VEINTIMILLA, Defendants.	:	

APPEARANCES:

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DENISE COTE, District Judge:

The defendants in this employment discrimination case have moved to dismiss this action, as well as for the imposition of monetary sanctions against plaintiff Andrea Rossbach, her counsel Daniel Altaras, and the Derek Smith Law Group ("DSLG"), her counsel's law firm. Their motion is based on this Court's finding, following an evidentiary hearing, that Rossbach had

fabricated documentary evidence she produced during discovery in this action. For the following reasons, the motion to dismiss is granted, and monetary sanctions are imposed on Rossbach, Altaras, and the DSLG.

Background

The facts set forth in this Opinion are derived from this Court's March 11, 2021 Opinion and Order granting partial summary judgment to the defendants, see Rossbach v. Montefiore Medical Center, No. 19cv5758 (DLC), 2021 WL 930710 (S.D.N.Y. Mar. 11, 2021) (the "2021 Opinion"), the Court's findings of fact at the April 22, 2021 evidentiary hearing in this case, and the parties' submissions made in conjunction with the April 22 evidentiary hearing. Familiarity with the 2021 Opinion is presumed.

I. Rossbach's Claims and the Events Leading to the Evidentiary Hearing

Rossbach filed this lawsuit on June 16, 2019. Her complaint alleges federal, state, and New York City discrimination and tort claims arising from two related sets of events. Rossbach alleged that she was subjected to a campaign of sexual harassment by defendant Norman Morales, her supervisor. The complaint also alleges that, after she objected to Morales' sexual harassment, Morales and defendant Patricia

Veintimilla retaliated against her, which culminated in her firing by Montefiore. The defendants moved on November 20, 2020 for summary judgment on some of Rossbach's claims -- primarily those related to Rossbach's discharge -- and the 2021 Opinion largely granted that motion. Most of the claims stemming from Morales' alleged sexual harassment remained for trial.

On March 15, 2021, the defendants sought leave to move to dismiss Rossbach's remaining claims with prejudice and for sanctions against Rossbach and her counsel. As a basis for this relief, the defendants alleged that certain documentary evidence produced during discovery had been fabricated, citing a forensic analysis of that evidence. The defendants further alleged that Rossbach had spoliated evidence and committed perjury at her deposition in this case. Later that day, Rossbach was ordered to notify the Court if she intended to engage a forensic expert to analyze the disputed evidence. On March 19, Rossbach informed the Court that she intended to engage an expert, and the Court ordered the parties to submit their respective expert reports in anticipation of an evidentiary hearing. Those reports were submitted on April 16.

II. The Evidentiary Hearing and the Court's Findings of Fact Regarding to the Disputed Evidence

On April 22, the Court held an evidentiary hearing regarding the allegations of fabrication of evidence.[1] Daniel L. Regard II and Joseph Caruso testified as forensic experts for the defendants and Rossbach, respectively, and Rossbach also testified. The Court received the expert reports of Regard and Caruso as their direct testimony, and they were subject to cross examination regarding that testimony at the hearing. Rossbach was subject to both direct and cross examination at the hearing. At the conclusion of the hearing, the Court found by clear and convincing evidence that Rossbach had fabricated the disputed text message evidence and had given false testimony about how the evidence had been produced. As a result, the defendants' request to move to dismiss and for sanctions was granted. The Court's findings of fact are outlined below.

A. The Allegations Against Morales and the Disputed Evidence

In her complaint, Rossbach alleged that Morales, who was one of her supervisors, subjected her to, among other things, a series of unwanted sexual comments and to unwanted sexual touching. Rossbach never made a formal complaint regarding this

[1] Due to the ongoing COVID-19 pandemic, the evidentiary hearing was, with the consent of the parties, conducted via videoconference.

alleged conduct,[2] however, and there is very little documentary evidence that supports her claims. The primary piece of documentary evidence supporting Rossbach's allegation that she was sexually harassed by Morales is the following image that purports to depict a series of text messages sent by Morales to Rossbach.

This image is a fabrication.

The image was produced to the defendants twice. The image was first produced to the defendants during discovery on May 20,

[2] Rossbach claims that she orally complained about Morales' sexual harassment to Patricia Veintimilla, a supervisor, and to her union representative, but there is no written documentation of these complaints.

2020 as a PDF file entitled "P000104.pdf." After Rossbach's deposition on October 29, 2020, the defendants requested the image in its original format, and Rossbach produced a JPEG file entitled "P000371.jpg." The two images are in all material respects identical, save for their computer file format.

B. Chronology of Events Surrounding the Disputed Evidence

Rossbach claimed that she received the text messages displayed in the image from Morales on the iPhone 5 that she used during 2017. She testified during her deposition that during 2017 her iPhone 5 developed "severe screen cracks." During the last few days of November 2017, soon after the date of the final alleged text message from Morales, her iPhone 5 developed an "ink bleed" effect on its screen and she was unable to view text messages.[3] During December 2017, Rossbach replaced her iPhone 5 with a new iPhone X. She stored the iPhone 5 in a drawer in her home. She claimed she was unable to transfer data from her iPhone 5 to her iPhone X.

[3] In a March 19, 2021 declaration (the "March 19 Declaration") and at the evidentiary hearing in this case, Rossbach changed her story. She claimed that the phone did not, in fact, have an ink bleed effect on its screen until 2020, when she dropped the phone onto a tile floor in her kitchen. Her Declaration and her testimony at the evidentiary hearing were given after she learned that the defendants had raised questions about the authenticity of the image.

On January 5, 2018, Montefiore fired Rossbach, and in May 2018, she filed a complaint regarding Montefiore with the Equal Employment Opportunity Commission ("EEOC"). In March 2019, the EEOC gave Rossbach a right-to-sue letter, and in June 2019, Rossbach filed the instant lawsuit. A pretrial scheduling order was issued on January 14, 2020.

At Rossbach's October 29, 2020 deposition, she testified about receiving the text messages from Morales. She also testified about the creation of the image of those messages, claiming that, because the iPhone 5 "screen was extremely damaged," she could not take a screen shot of the Morales text messages on her iPhone 5, but that she took a picture of her iPhone 5 screen with her iPhone X and sent the picture to Altaras. She confirmed that the passcode for the iPhone 5 is 0620, and that she had given the iPhone 5 to her attorney. After the deposition, counsel for the defendants requested from Altaras the original image provided by Rossbach, and Altaras produced to the defendants the P000317.jpg file.

In the March 19 Declaration, submitted after the defendants notified the plaintiff that they were contesting the authenticity of the text messages, Rossbach changed her explanation of the state of her iPhone 5. She claimed that in March 2020, she sought to recover the text messages from Morales

stored on her moribund iPhone 5, and that she attempted to take a screen shot of the text messages but was unable to do so because the iPhone 5's screen was broken and flickered erratically. Instead, she placed a finger on the screen of the iPhone 5 to prevent it from flickering and used the camera feature of her iPhone X to take a picture of the screen of her iPhone 5 at a moment when the screen was not flickering. She then used the iPhone X to send the photograph to her counsel, who produced it to the defendants' counsel in PDF format as P000104.pdf. The image as produced does not show any signs of a cracked screen, an ink bleed, flickering, or Rossbach's finger.

In the March 19 Declaration, Rossbach also averred that, in September 2020, the iPhone X that she had used to take the picture of her iPhone 5 screen began to malfunction. She took her iPhone X to a retail store operated by her cell phone service provider, where she was informed that the iPhone X could not be repaired and that she would need to trade it in for a new phone. She disposed of her iPhone X and did not maintain a copy of the data stored on her iPhone X. The defendants were not afforded the opportunity to examine the iPhone X or its contents.

The defendants sought the production of Rossbach's iPhone 5 for a forensic evaluation. Rossbach provided the iPhone 5 to

Altaras, and on October 7, a courier retrieved the iPhone 5 from Altaras' home. The phone was delivered to Consilio, a forensic services provider, along with a handwritten note that read "Passcode: 0620." Consilio staff observed that the screen of the iPhone 5 was cracked but that there was no apparent "ink bleed" or flickering on the screen. The forensic evaluation process required Consilio staff to first unlock the iPhone 5 by entering its passcode. The evaluator attempted to unlock the device by using the "0620" passcode, but the device did not unlock and displayed a message stating that the device would be disabled for ten minutes. A Consilio evaluator then made a second attempt to unlock the device by entering the "0620" passcode, but the device displayed a message that the "0620" passcode was incorrect and that the device would be permanently disabled if more than 10 failed attempts to unlock it were made. Counsel for the defendants asked Rossbach to provide the correct passcode for the iPhone 5 at her October 29 deposition, and Rossbach testified that the passcode was "0620." Because Rossbach did not provide the correct passcode to unlock her iPhone, Consilio staff were unable to unlock it and conduct a forensic evaluation.

As noted, Rossbach provided her March 19 Declaration after defense counsel had notified Altaras of their conclusion that

the images of the purported text messages were a fabrication. Defense counsel engaged Regard to assess the authenticity of the images after receiving the P000317.jpg file from Altaras. On February 11, Altaras and defense counsel met with Regard. At the meeting, Regard described the basis for his conclusion that the image was a fabrication, including the obvious point that the P000317.jpg image did not show any cracks on the screen of her iPhone 5. After that meeting, Rossbach provided the March 19 Declaration in which she claimed, contrary to her deposition testimony, that at the time she took a photograph of her iPhone 5 screen, it was not cracked. She instead asserted that the iPhone 5's screen flickered erratically at the time she took the photograph of the screen. Rossbach's March 19 Declaration claims that the cracks and the "ink bleed" only developed when she dropped the iPhone 5, which was after she took the photograph of the iPhone 5 with her iPhone X. Rossbach had not mentioned the purported flickering issue in her deposition testimony.

C. Findings of Fact Regarding Fabrication and Spoliation

The evidence that Rossbach fabricated the text message evidence is overwhelming. The Court's findings of fact at the April 22 hearing included the following.

First, the P000317.jpg image produced by the plaintiff is not consistent with Rossbach's testimony regarding its creation. At her deposition, she explicitly stated that in 2017, her iPhone 5 had developed severe screen cracks that rendered it effectively unusable and that it developed an "ink bleed" that left her unable to view text messages. She further testified that as a result, she could not use the screen shot function on the iPhone to document the text messages purportedly sent by Morales, and that she instead had to photograph her iPhone 5 screen with her iPhone X in order to transmit this evidence to her attorney. But no screen cracks or ink bleed are visible in the document she contends is a photograph of the picture she took of her iPhone 5 screen, and those artifacts would have been visible in any authentic photograph of an iPhone 5 damaged in the way she described.

Moreover, her testimony regarding the state of her iPhone 5 changed in material ways over time. She testified in her deposition that the iPhone 5 had screen cracks in 2017. After the defendants called into question the authenticity of the image produced to them, she submitted the March 19 Declaration in which she repudiated her prior claim that the iPhone 5 had screen cracks in 2017. She instead claimed that the iPhone 5 was unusable because of a screen flicker in 2017. Additionally,

she testified at the April 22 hearing that the screen cracks and "ink bleed" described in her deposition did not develop until she accidentally dropped the iPhone 5 after delivering the image to Altaras in 2020. By themselves, these inconsistent statements undermined the credibility of her testimony regarding the image.

Second, while Rossbach claimed that the disputed image was a photograph of her iPhone 5 screen taken with an iPhone X, it was not. The P000317.jpg image file, which was purportedly the original photograph taken by Rossbach and provided to Altaras, lacked characteristic metadata attached to photographs taken with the iPhone X.[4] The absence of this metadata indicates that the image is not a photograph taken by an iPhone X. Additionally, analysis of the image's color characteristics, as well as a visual assessment of the image, indicates that it is not a photograph at all.

Third, the image does not depict text messages as they would appear on an iPhone 5. The iPhone text message application that the image purports to depict is a component of the iPhone operating system ("OS"), which means that the version

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[4] Metadata is "[i]nformation describing the history, tracking, or management of an electronic file." Fed. R. Civ. P. 26(f) advisory committee's note (2006).

of the iPhone OS used on a given iPhone determines the visual characteristics of text messages displayed on that iPhone. The last version of the iPhone OS supported by the iPhone 5 is version 10.[5] For instance, certain characteristics of the font and icons in the iPhone text message application will be consistent on all iPhones using OS 10.[6] But the image produced by Rossbach and Altaras contains characteristics not consistent with OS 10 or any other version of the iPhone OS available on the iPhone 5. These include the icon depicting the phone's level of battery charge; the font size and style in the header; the icons in the lower portion of the header; the design of a "heart eyes" emoji in the purported message from Morales to

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[5] As a point of comparison, the most recently released version of the iPhone is the iPhone 12. See https://www.apple.com/iphone/. The most recent version of the iPhone OS is version 14, which can be utilized only by the iPhone 6s and newer iPhone models. See https://www.apple.com/ios/ios-14/.

[6] Rossbach's expert Caruso agreed that all iPhones using the same OS have the same default interface characteristics. But he added that an iPhone user may adopt a non-standard interface configuration for their phone by changing the device's settings or "jailbreaking" the device to allow for modifications not approved by Apple. Caruso, however, did not testify that a settings change or jailbreaking of an iPhone 5 could produce the specific interface anomalies that Regard described, did not examine Rossbach's iPhone 5, and did not interview Rossbach to ask whether she had jailbroken her phone. Moreover, Rossbach did not testify that she had changed her iPhone's interface settings or that her iPhone was jailbroken. She also testified that she lacked technical savvy.

Rossbach;[7] and the icon for the iMessage Apps feature in the footer.

More to the point, the image contained elements that are not consistent with <u>any</u> iPhone OS. For instance, the contact bar displayed in the image shows Morales' full first and last name, while an authentic iPhone OS image would display only his first name. The blank text entry box at the bottom of the image is also inconsistent with an image of an authentic iPhone interface, because all versions of the iPhone OS show the words "iMessage" or "Text Message" in an empty text entry box, depending on the protocol that the iPhone will use to send the message. Finally, the font used in the image differs, albeit subtly, from that used to display text messages on iPhones.

In sum, the evidence at the evidentiary hearing conclusively demonstrated that the image was not of text messages received on an iPhone 5, that it was not a photograph taken by an iPhone X, that the image is not an authentic representation of how text messages received on an iPhone would be displayed, and that the image was not even a photograph. As

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[7] The "heart eyes" emoji depicted in the image is the version displayed on iPhones running OS 13 or later. Because the visual characteristics of a text message displayed on an iPhone depend on the iPhone's OS, this version of the emoji is not displayed on iPhones running OS 10, even if the text message is sent from an iPhone running OS 13 or later to an iPhone running OS 10. As noted above, the iPhone 5 is not capable of running OS 13.

a result, there is clear and convincing evidence that Rossbach fabricated the image and engaged in perjury and spoliation to prevent discovery of that fabrication.

III. Recent Procedural History

At the April 22, 2021 evidentiary hearing, the Court granted the defendants' request to move to dismiss and for sanctions. The Court proposed two scheduling options for the briefing of those motions: one proposed scheduling option required prompt briefing of the defendants' motions, while the other proposed scheduling option was elongated to give counsel for the parties the opportunity to confer regarding a resolution of this action. Upon a representation from Altaras that an opportunity to confer could be fruitful, the Court adopted an elongated schedule for the briefing of those motions. The parties did not reach an agreement, and on May 27, the defendants timely filed a motion to dismiss and a motion for sanctions.

Rossbach opposed those motions on June 3. With her opposition, Rossbach included an 18-page expert declaration dated June 3, 2021 ("Caruso Declaration") and a declaration from Altaras that attached purported new evidence of Morales' harassment of Rossbach and one of her female colleagues. The motions became fully submitted on June 10.

Discussion

The defendants have moved for sanctions in the form of dismissal of the plaintiff's remaining claims in this action, as well as monetary sanctions against the plaintiff, her counsel, and her counsel's law firm. They also seek an award of attorneys' fees and costs stemming from their investigation into the fabrication of the text messages and the litigation of their resulting motion for sanctions.

I. Legal Framework

The defendants have moved for sanctions on several distinct grounds: the Court's inherent power; Title 28, United States Code, Section 1927; and Rule 37(e) of the Federal Rules of Civil Procedure.[8] This Opinion sets out the legal framework underlying each basis for sanctions before analyzing the defendants' motion.

A. Inherent Power

"Every district court has the inherent power to supervise and control its own proceedings and to sanction counsel or a litigant." Mitchell v. Lyons Pro. Servs., Inc., 708 F.3d 463,

[8] The defendants have also moved for sanctions under Rule 11, Fed. R. Civ. P. When a party seeks Rule 11 sanctions, it must serve the motion on the party against whom it seeks sanctions, "but [the motion] must not be filed or presented to the court if the challenged paper . . . is withdrawn" within 21 days. Fed. R. Civ. P. 11(c)(2). Since the defendants have not complied with Rule 11's procedural requirements, Rule 11 sanctions may not be imposed in this case.

467 (2d Cir. 2013) (citation omitted). "Indeed . . . district judges have an obligation to act to protect the public, adversaries, and judicial resources from litigants and lawyers who show themselves to be serial abusers of the judicial system." Liebowitz v. Bandshell Artist Mgmt., No. 20-2304-CV, 2021 WL 3118938, at *7 (2d Cir. July 23, 2021). A district court's inherent power to sanction includes the power to "sanction a party . . . to deter abuse of the judicial process and prevent a party from perpetrating a fraud on the court." Yukos Cap. S.A.R.L. v. Feldman, 977 F.3d 216, 235 (2d Cir. 2020). Fraud on the court occurs when "a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate the action." Id. (citation omitted).

A district court may use its inherent power to sanction a plaintiff by dismissing her case with prejudice, Shepherd v. Annucci, 921 F.3d 89, 98 (2d Cir. 2019), or by imposing monetary sanctions against a party or her counsel, International Technologies Marketing, Inc. v. Verint Systems, Ltd., 991 F.3d 361, 367 (2d Cir. 2021). "Because of its potency, however, a court's inherent power must be exercised with restraint and discretion." Id. at 368 (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)). Before a court may invoke its inherent

power to sanction, the party facing sanctions must be provided with "adequate notice and opportunity to be heard." Shepherd, 921 F.3d at 97.[9] When the sanction is dismissal with prejudice, it must be supported by "clear evidence of misconduct and a high degree of specificity in the factual findings." Mitchell, 708 F.3d at 467 (citation omitted). The Court must find "willfulness, bad faith, or reasonably serious fault," id. (citation omitted), and must also consider "whether a lesser sanction would [be] appropriate," Shepherd, 921 F.3d at 98 (citation omitted).

B. Section 1927

The defendants seek sanctions against plaintiff's counsel pursuant to § 1927, which provides that

> [a]ny attorney . . . admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. This provision allows a court to impose sanctions against both Altaras and his law firm, DSLG. Huebner v. Midland Credit Mgmt., Inc., 897 F.3d 42, 55 n.8 (2d Cir. 2018).

[9] Rossbach and her counsel have been afforded adequate notice and opportunity to be heard in this case, and do not contend otherwise.

Section 1927 sanctions may only be imposed "when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose." Johnson v. Univ. of Rochester Med. Ctr., 642 F.3d 121, 125 (2d Cir. 2011) (citation omitted). As is the case for sanctions imposed pursuant to a court's inherent power, a court must provide notice and opportunity to be heard before imposing § 1927 sanctions. Id. at 126. Before imposing monetary sanctions under § 1927, "a court must find clear evidence that (1) the offending party's claims were entirely without color, and (2) the claims were brought in bad faith -- that is, motivated by improper purposes such as harassment or delay." Huebner, 897 F.3d at 55 (citation omitted). When an attorney continues to defend a complaint even after learning of facts rendering the complaint "fatal[ly] flaw[ed]," he has engaged in bad faith conduct sanctionable under § 1927. Liebowitz, 2021 WL 3118938, at *10.

C. Rule 37(e)

Finally, the defendants seek dismissal as a sanction pursuant to Rule 37(e), Fed. R. Civ. P. That rule permits a court to "dismiss the action" if "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take

reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery" and the court finds "that the party acted with the intent to deprive another party of the information's use in the litigation."

II. Analysis

A. Dismissal

An application of the aforementioned principles indicates that dismissal of this action is warranted as an exercise of this Court's inherent power to sanction and deter fraud on the Court.[10] Rossbach willfully and in bad faith fabricated evidence in this action and attempted to mislead the Court regarding her actions. There is overwhelming evidence that the image purporting to depict text messages was inauthentic and intentionally fabricated. In sum, Rossbach engaged in an "unconscionable scheme calculated to interfere with the judicial

[10] In the alternative, dismissal is also proper under Fed. R. Civ. P. 37(e). The evidence adduced at the hearing indicated that Rossbach intentionally deprived the defendants of access to the electronically stored information on her iPhone 5 by refusing to provide the correct passcode for the device. She even provided a false passcode when asked to provide the correct passcode for the device while she was under oath at her deposition. Rossbach also disposed of her iPhone X while this litigation was pending and did not maintain a copy of its data, even though she knew that it contained potentially relevant electronically stored information. This knowing and intentional spoliation was intended to deprive the defendants of their ability to investigate Rossbach's claims in preparation for trial. In its own right, Rossbach's spoliation warrants dismissal.

system's ability impartially to adjudicate the action." Feldman, 977 F.3d at 235 (citation omitted); see also King v. First American Investigations, Inc., 287 F.3d 91, 95 (2d Cir. 2002) (defining "fraud on the court" as "fraud which seriously affects the integrity of the normal process of adjudication" and "does or attempts to defile the court itself") (citation omitted).

Given the severity and willfulness of her conduct, dismissal with prejudice is the only appropriate sanction for her actions. Overwhelming evidence indicates that Rossbach sought to defraud the Court and the defendants through a willful and persistent campaign of fabrication, spoliation and perjury. A lesser sanction -- such as a monetary sanction, the exclusion of evidence, or an appropriate instruction to the jury at trial -- would be insufficient to remedy the impact of this misconduct or to deter future misconduct.

Moreover, if this case were to proceed to trial, the result is highly likely to be the same as if the Court were to dismiss this action now. Since there is limited, if any, documentary evidence of Rossbach's claims of workplace harassment, the outcome of any trial would turn on a jury's assessment of the credibility of Rossbach, Morales, and other key witnesses. But given that the jury would learn at trial of Rossbach's campaign

of willful fabrication and deception regarding this very claim, no reasonable juror would credit Rossbach's testimony. A trial in this case would therefore be a pointless waste of judicial resources and impose an expensive and undue burden on the defendants.

In her submission in opposition to the defendants' motions to dismiss and for sanctions, Rossbach offers almost no argument as to why a sanction of dismissal is not warranted. Instead of acknowledging either the overwhelming evidence of fabrication or even her conflicting explanations about the retrieval of the text messages, she devotes her opposition almost entirely to an effort to relitigate the expert testimony at the April 22 evidentiary hearing and to describe evidence of other alleged misconduct by Morales.[11]

Through the Caruso Declaration, Rossbach seeks to introduce new evidence that purports to demonstrate the authenticity of the image. This Declaration is untimely. The parties were required to exchange expert reports in advance of the hearing and those reports constituted the direct testimony of their experts at the hearing. The defendants' expert report was

[11] Altaras attempted to introduce some of this evidence at the April 22 hearing. The Court excluded this evidence because it was not disclosed to the defendants during discovery or, indeed, at any point before the April 22 evidentiary hearing.

submitted on April 16, and Rossbach submitted her expert declaration on April 19. If Rossbach wished to introduce a supplemental expert report in support of her contention that the disputed image is an authentic representation of text messages sent to her by Morales, she should have done so in advance of the April 22 hearing or requested an adjournment of the hearing to prepare and produce the supplemental report. She did neither. At the hearing, Altaras had an opportunity to cross-examine Regard and confront his evidence of fabrication. Rossbach's belated attempt to relitigate the April 22 evidentiary hearing is improper.

Moreover, this purported new evidence in the Caruso Declaration is unpersuasive on its own terms. At the April 22 evidentiary hearing, Caruso proffered largely similar testimony as to steps Rossbach could have taken to configure her iPhones in a manner that produced the visual anomalies identified by Regard. The Court rejected that testimony as speculative then, and it is no more persuasive as reframed in the Caruso Declaration. There is no basis in the record to find that Rossbach did, or even was capable of doing, the maneuvers Caruso conjures up to explain some of the many discrepancies between the image Rossbach produced and how iPhones typically function. Rossbach has failed to show that the evidentiary hearing should

be reopened, a request she does not even make, or that the findings made at the conclusion of the hearing should be revisited.[12]

In opposition to this motion, Rossbach also seeks to distract attention from her fabrication, spoliation, and perjury. She reiterates how Morales harassed her at work and offers additional evidence in support of this claim, including an image of text messages that Morales purportedly sent to one of Rossbach's colleagues in 2015 (the "2015 Messages"). This evidence was not produced to the defendants in discovery and was excluded from the April 22 evidentiary hearing because it was not produced in discovery or even disclosed to the defendants in advance of the hearing. Moreover, the 2015 Messages are not supported by any document from their recipient authenticating them.

[12] The Caruso Declaration fails to address many of the indicia of fabrication on which the Court relied at the hearing, including the absence of visible damage in the purported photograph of the text messages and the elements of the image that are inconsistent with the display of text messages on any version of the iPhone OS. Where Caruso does address indicia on which the Court relied, his analysis is often demonstrably faulty. For instance, Caruso premises much of his argument on his contention that versions of the iPhone OS subsequent to version 10 can run on an iPhone 5. But his source for that claim explicitly states that subsequent versions of the OS, such as versions 11 and 12, are incompatible with the iPhone 5 because the iPhone 5 has a 32-bit microprocessor and recent versions of the iPhone OS can be used only on iPhones with 64-bit microprocessors. See https://www.digitaltrends.com/mobile/how-to-get-ios-12/.

Even if Rossbach had laid a proper foundation for consideration of the 2015 Messages, however, they do not suggest that Rossbach should not be sanctioned for her own misconduct in this lawsuit. The issue presented by the defendants' motion for sanctions is not whether Morales harassed Rossbach or one of her colleagues but is instead whether Rossbach fabricated evidence central to her claims in this litigation. The evidence of Rossbach's fabrication is overwhelming.

Rossbach also claims that, in holding an evidentiary hearing and making findings of fact regarding her fabrication, the Court erred in making credibility determinations reserved for the jury. This argument may be easily rejected. A federal district court "has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud." Chambers, 501 U.S. at 44. That power includes the power to take testimony and reach factual conclusions. See Liebowitz, 2021 WL 3118938, at *9 (affirming a district court's sanctions order that was based on the district court's independent "review[] of the record and evaluat[ion of] the demeanor of the witnesses at [an] evidentiary hearing").

B. Monetary Sanctions

A monetary sanction is also imposed against Rossbach pursuant to this Court's inherent power. Rossbach's willful

misconduct in fabricating evidence and destroying evidence of that fabrication caused the defendants to incur the significant expense of investigating her actions and litigating the evidentiary hearing and their motion for sanctions. At no point has she expressed remorse for her fabrication, spoliation, and perjury. In an effort to "restore the prejudiced part[ies] to the same position [they] would have been in" absent Rossbach's misconduct, West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (citation omitted), the Court imposes against Rossbach a sanction in the amount of the defendants' attorneys' fees, costs, and expenses associated with addressing Rossbach's fabrication, including the attorneys' fees incurred in litigating the instant sanctions motion.[13] See Liebowitz, 2021 WL 3118938, at *13 (noting that the Second Circuit has repeatedly affirmed monetary sanctions that "include the attorney's fees incurred in litigating the sanctions motion").

The same monetary sanction is also imposed on Altaras and DSLG. In this case, Altaras "negligently or recklessly failed to perform his responsibilities as an officer of the court." Wilder v. GL Bus Lines, 258 F.3d 126, 130 (2d Cir. 2001). Among

[13] Since this attorney's fees sanction is "compensatory rather than punitive," it may be imposed without the "enhanced procedural protections associated with criminal procedure." Liebowitz, 2021 WL 3118938, at *7 (citation omitted).

other obligations imposed by the New York Rules of Professional Conduct, a lawyer must not "offer or use evidence that the lawyer knows to be false," and if "the lawyer's client . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." N.Y. Rules of Prof. Con. 3.3(a)(3). Lawyers are also forbidden from "knowingly us[ing] perjured testimony or false evidence" or "participat[ing] in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." N.Y. Rules of Prof. Con. 3.4(a). If a lawyer "knows or reasonably should know that the representation will result in a violation of" the Rules of Professional Conduct, the lawyer "shall withdraw from the representation of a client." N.Y. Rules of Prof. Con. 1.16(b)(1).

Corroboration for Rossbach's claim of sexual harassment rested largely on the three text messages allegedly sent to Rossbach and received on her iPhone 5. At many points in this litigation, Altaras had an opportunity to conduct a reasonable investigation of his client's claims and to ensure that he was not misleading either his adversary or the Court. After the defendants met with Altaras in February 2021 and presented him with evidence that Rossbach had fabricated the image, Altaras

had the opportunity and obligation to conduct a reasonable investigation regarding the authenticity of the image and, if necessary, withdraw from his representation of Rossbach to ensure that he was not complicit in the use of false evidence. Similarly, Rossbach provided inconsistent sworn testimony regarding the creation of the image on three occasions -- in her deposition, in the March 19 Declaration, and at the evidentiary hearing -- and Altaras had both the opportunity and the obligation to ensure that his client had not provided perjurious testimony and, if necessary, to withdraw from his representation of Rossbach in order to avoid suborning perjury. Altaras has not shown that he proceeded responsibly at any of those points. And at no point has he tried to mitigate the harm done by his client.

When this action was filed, Altaras failed to take sufficient steps to ensure that the Rossbach iPhones, and the data stored on them, was preserved, thereby allowing his client to spoliate critical evidence. Even after the defendants put Altaras on notice that his client had likely fabricated critical evidence in this case, he failed to obtain the correct passcode for the iPhone 5 from Rossbach or to otherwise properly investigate the authenticity of the disputed image. Ignoring the inconsistencies between her deposition testimony and her

subsequent sworn testimony and the implication that his client had committed perjury at her deposition, he filed her false March 19 Declaration with the Court and then elicited more false testimony from Rossbach at the evidentiary hearing. In advance of the hearing, he submitted an expert declaration that was largely unresponsive to the evidence of his client's fabrication. At the evidentiary hearing and in the context of this motion, he attempted to introduce evidence of questionable provenance that had not been produced during discovery or even before the hearing. This was an unprofessional attempt to sandbag his adversary. Prior to the evidentiary hearing, he also filed a frivolous motion for sanctions against the defendants, and in the wake of the evidentiary hearing, he improperly sought to relitigate issues that should have been addressed at the hearing.

Altaras also "unreasonably and vexatiously" multiplied proceedings in this case. 28 U.S.C. § 1927. Even after he was made aware that his client had likely fabricated evidence, he made no serious effort to investigate the allegations, and if necessary to withdraw from his representation of his client. Instead, even after he should have realized that Rossbach's complaint was based on her false allegations, he stood by the complaint. He submitted to the Court his client's false

Declaration and a largely speculative expert declaration that did not address key evidence of fabrication identified by the defendants' expert. He also submitted a frivolous motion for sanctions against the defendants which necessitated a response from the defendants.

In his defense, Altaras asserts that he advised Rossbach of her duty to preserve evidence at the beginning of this case, that no one can be blamed for spoliation of the iPhone 5 because the iPhone 5 suffered a cracked screen when it fell on the floor and it was this damage to the iPhone 5 (as opposed to the failure to provide the correct password) that prevented Consilio from conducting a forensic examination of the iPhone 5, and that the defendants should have requested access to the iPhone X before Rossbach exchanged it for a new iPhone. Altaras further asserts that Rossbach's conflicting testimony was not evidence of perjury or willful misconduct, but instead a clarification, and in any event can only be assessed for its honesty by a jury. But for the reasons described above, none of these arguments is responsive to the issues at stake here. If anything, they suggest that Altaras still fails to understand the nature of his obligations as an officer of the court.

In short, at every step of these proceedings, Altaras failed to take reasonable steps to preserve critical evidence

and failed to recognize the gravity of his client's misconduct and its implications for his own duties. He instead burdened the defendants and this Court by suborning his client's perjury and making frivolous and procedurally improper legal and factual arguments. A monetary sanction against Altaras and DSLG is warranted,[14] and the Court imposes a monetary sanction under its inherent power and § 1927. As with the monetary sanction against Rossbach, the monetary sanction shall be in the amount of the defendants' attorneys' fees, costs, and expenses associated with addressing Rossbach's misconduct.

Conclusion

The Court dismisses this action with prejudice as an exercise of its inherent power to sanction and pursuant to Fed. R. Civ. P. 37(e). A monetary sanction in the amount of the defendants' attorneys' fees, costs, and expenses associated with addressing Rossbach's fabrication is also assessed jointly and severally against Rossbach, Altaras, and DSLG as an exercise of

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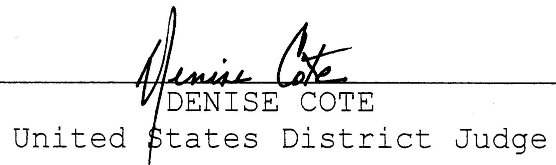
[14] In a strikingly similar recent case, another court in this District imposed monetary sanctions against DSLG after an attorney affiliated with the firm facilitated a client's misrepresentations to the court and failed to correct or investigate those misrepresentations even after they were brought to the attorney's attention. Doe v. East Side Club, LLC, No. 18cv11324 (KPF), 2021 WL 2709346, at *21-25 (S.D.N.Y. July 1, 2021). This repeated misconduct provides further support for the imposition of a significant monetary sanction against DSLG.

the Court's inherent power and 28 U.S.C. § 1927. A scheduling order addressing the calculation of the monetary sanction accompanies this Opinion.

Dated: New York, New York
August 5, 2021



DENISE COTE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE PORK ANTITRUST LITIGATION This Document Relates To: All Class Actions	Case No. 18-cv-1776 (JRT/HB) **ORDER ON MOTION TO COMPEL HORMEL AND HORMEL CUSTODIANS TO PRODUCE RESPONSIVE TEXT MESSAGE CONTENT**

HILDY BOWBEER, United States Magistrate Judge

This matter is before the court on Class Plaintiffs' Motion to Compel Hormel to Produce Responsive Text Message Content and to Enforce Subpoenas to Hormel Custodians. [ECF No. 883.] Plaintiffs seek an order: (1) compelling defendant Hormel Foods Corporation to produce the text message content of its currently employed custodians, including backup content stored on cloud services; (2) declaring Hormel had at the outset of the litigation an obligation to image text message content from all of its custodians' mobile devices and cloud backups, and an accompanying order for Hormel to do so now; and to the extent necessary (3) enforcing the subpoenas to the Hormel custodians for the same material. For the reasons set forth below, the Court grants in part and denies in part the motion.

I. Background

Plaintiffs in this coordinated multidistrict litigation, which includes several putative plaintiff classes and a number of "direct action plaintiffs," allege that Defendants, among America's largest pork producers and integrators, conspired to limit

the supply of pork and thereby fix prices in violation of federal and state antitrust law. (See Oct. 20, 2020 Am. Mem. Op. & Ord. at 2 [ECF No. 520].) They allege Defendants were able to carry out the conspiracy in two ways: 1) by exchanging detailed, competitively sensitive, and closely guarded non-public information about prices, capacity, sales, volume, and demand through Agri Stats—a private service that gathers data from Defendants and produces market reports for paying subscribers; and 2) by signaling the need to cut production through public statements aimed at one another. (*Id.* at 6.) Plaintiffs allege that through these mechanisms, Defendants stabilized or increased the price of pork products from 2009 to the present.

In 2018, Class Plaintiffs requested that Hormel preserve data from personal cell phones of five company executives, James Snee, Jim Sheehan, Thomas Day, Steven Binder, and Cory Bollum, through forensic imaging. (Hormel Ex. 2 [ECF No. 929-1].) After objecting on several grounds, Hormel agreed to forensically image the phones. (Hormel Ex. 3 [ECF No. 929-2]; Hormel Ex. 4 [ECF No. 929-3].)

In 2019, Hormel and the Plaintiffs agreed to an ESI Protocol [ECF No. 292] and a Protocol for Preservation of Phone Records (Hormel Ex. 5 [ECF No. 929-4]). The Preservation Protocol applied to Hormel and its document custodians. Hormel initially identified seven document custodians. (Hormel Ex. 6 at 4 [ECF No. 929-5].) As a result of negotiations concluding in November 2020, the custodians now number thirty. (*See* Hormel Ex. 9 [ECF No. 929-8].) Seventeen are current employees; thirteen are former employees. (Custodians' Mem. at 2 [ECF No. 925].)

In November 2018, Plaintiffs served their first requests for production, in part seeking communications and meetings between the Defendants or related to the lawsuit's subject matter, and information regarding supply, demand, and price of pork products. (Bourne Decl. Ex. 5 at Requests 3–8, 14–19 [ECF Nos. 888-2].) It defined "document" to include text messages and cloud backups or archived text message data. (Bourne Decl. Ex. 5 at Definitions ¶¶ 8, 10.) Hormel objected that it did not have possession, custody, or control of the custodians' personal cell phone data. (Bourne Decl. Ex. 13 at 20 [ECF No. 888-2].) Hormel responded to the same effect to Plaintiffs' November 2020 interrogatories, which sought further information about the make, model, and use of the custodians' cell phones, though Hormel did provide the cell phone numbers of the custodians. (Bourne Decl. Ex. 4 at 20–23 [ECF 887-1].) On April 19, 2021, Plaintiffs asked whether Hormel had produced the text messages of two custodians' cell phones, to which Hormel responded that it did not have possession, custody, or control over those phones, so it would not produce those messages. (Bourne Decl. Ex. 6 [ECF No. 888-2].) Plaintiffs complained that Hormel had not alerted them earlier that it disclaimed control over those cell phones and insisted that Hormel produce the texts. (Bourne Decl. Exs. 7, 9 [ECF No. 888-2].) Hormel replied that it had complied with its duties under the phone record preservation protocol and general preservation obligation related to the personal cell phones outside its control. (Bourne Decl. Exs. 8, 10 [ECF No. 888-2].)

While disagreeing with Hormel, Plaintiffs also subpoenaed the custodians directly for the information. (Bourne Decl. Ex. 17 [ECF No. 888-2].) The custodians' counsel interviewed each custodian to determine whether they might have potentially responsive

communications on their cell phones. (Stephens Decl. ¶ 5 [ECF No. 926].) All of the custodians responded that they were currently using different phones from the phones they had used during the relevant time-period (January 1, 2008 – August 17, 2018). (Bourne Decl. Ex. 2.)[1] As summarized by the custodians' counsel,

> Of the thirty Subpoena Recipients, only a small group reported using their personal cell phones for work-related text communications external to Hormel during the relevant time period. More than half of those reported having their devices previously imaged. None of the Subpoena Recipients reported having any text communications with anyone outside of Hormel regarding supply and demand conditions in the pork industry. The vast majority of the Subpoena Recipients either did not use text messaging for work related communications or only used text messaging for communications with other Hormel employees.

(Stephens Decl. ¶ 8.) Somewhat more detail is provided in the information that was attached to the declaration of Plaintiffs' counsel. For purposes of this motion, the custodians' responses to the question of whether and to what extent they used their personal cell phones for work purposes and/or texted for work purposes, generally fell into five categories:

- Rarely communicated by text message for work-related matters: Cory Bollum, Donald Temperley, Eric Steinbach, Glenn Leitch, Holly LaVallie, James Fiala, and Jose Rojas.
- Did not communicate by text outside Hormel: Paul Bogle, Nathan Annis, Jerry Aldwell, Mark Coffey, Neal Hull, Steven Binder, Steven Venenga, and William Snyder, and Al Lieberum.

[1] Exhibit 2 to the Bourne Declaration [ECF No. 888-2 at 12–162] are the full letters and objections transmitted to Plaintiffs' counsel by the custodians through their counsel. Exhibit 1 to that declaration [ECF No. 888-2 at 1–11] is a chart created by Plaintiffs' counsel summarizing the responses. The Court notes that none of the subpoena responses included (or were required to include) sworn declarations by the custodians.

- Did not use text for communications of the nature sought by the subpoena: Jim Sheehan, Thomas Day, Jeff Ettinger, Jody Feragen, and James Snee.
- Never texted about work-related matters: Paul Peil, Lance Hoefflin, Alan Meiergerd, Jana Haynes, Jennifer Johnson, Michael Gyarmaty, Bryan Farnsworth, and Jesse Hyland.
- Never used their personal cell phone at all for work-related communications: Jessica Chenoweth.

(Bourne Decl. Ex. 1.) All custodians objected to the subpoenas. (Bourne Decl. Ex. 2.)

In further negotiations, Plaintiffs and the custodians discussed imaging the phones and allowing a forensic search with mutually agreed upon search terms. (Stephens Decl. ¶ 10.) Plaintiffs proposed that all phones be searched for all text messages sent to or received from 781 phone numbers associated with individuals affiliated with Hormel or any other Defendant or any of the other identified pork integrators, plus remaining texts containing any of 330 keywords, following which the custodians' counsel would review the results and produce relevant messages. (*Id.*, Ex. B [ECF No. 926-2]; Bourne Decl. ¶ 12 [ECF No. 887], Ex. 16 [ECF No. 888-2].) Plaintiffs demanded, however, that all "inter-defendant" text messages be produced without a further relevance review, on the ground that all such messages were relevant. (Stephens Decl. Ex. B.)

Ultimately, the custodians maintained that Plaintiffs had not shown that all thirty custodians were likely to have texts responsive to the subpoenas, and that the proposed searches were overly broad and unduly burdensome. (Stephens Decl. ¶ 17.) The two sides also disagreed about which of them would bear the costs of the proposed searches. (Stephens Decl. ¶¶ 10, 17, Ex. B.)

Failing to reach an agreement with Hormel or the custodians, Plaintiffs filed this motion. Plaintiffs move this Court to compel Hormel to produce text message content

relevant to its conspiracy claims within Hormel's possession, custody, or control, in response to its requests for production seeking that information. They seek the same relief with regard to the custodians they subpoenaed.

Plaintiffs also seek a declaration that Hormel had from the outset of the litigation an obligation to image text message content from all of its custodians' mobile devices and cloud backups, and an accompanying order for Hormel to do so now.

II. Whether Hormel Can Be Compelled to Produce Its Employees' Text Message Data

Parties may obtain discovery that is

> relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). Rule 34 requires the production of any relevant and responsive documents in the responding party's possession, custody, or control, including text message content. *See, e.g.*, *Paisley Park v. Boxill*, 330 F.R.D. 226, 234 (D. Minn. 2019). Here, Hormel alleges that it does not have the requisite "possession, custody, or control" over the text messages sent by and to its employees on their personally-owned cell phones.

A. The Meaning of "Control"

Plaintiffs claim Hormel has failed to identify and produce relevant text message content from its document custodians over which Hormel has control. (Pls.' Mem. at 8

[ECF No. 885].) Hormel disputes control. While the Eighth Circuit has not weighed in, district courts in this Circuit have applied varying definitions of "control." Some have interpreted "control" to mean the legal right to obtain the documents. *See, e.g., Beyer v. Medico Ins. Group,* Case No. 08-CV-5058, 2009 WL 736759, at *5 (D.S.D. Mar. 17, 2009) ("The rule that has developed is that if a party 'has the legal right to obtain the document' then the document is within that party's 'control' and, thus, subject to production under Rule 34." (internal citation omitted)).

Other courts, including courts in this District, have held that "control" may also include the "practical ability" to obtain the documents. *See, e.g., Afremov v. Sulloway & Hollis, P.L.LC.*, Case No. 09-cv-03678 (PSJ/JSM), 2011 WL 13199154, at *2 (D. Minn. Dec. 2, 2011) ("'Control' encompasses actual physical possession of the documents, but also the legal right or practical ability to demand the documents from a third party."); *In re Hallmark Cap. Corp.*, 534 F. Supp. 2d 981, 982 (D. Minn. 2008) ("documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action"); *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 636 (D. Minn. 2000) (stating that "under Rule 34, control does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action" (quotations omitted), and directing the defendant to produce not only documents in its physical possession but also those that it was "capable of obtaining upon demand"); *New Alliance Bean & Grain Co. v. Anderson*

Commodities, Inc., Case No. 8:12-CV-197, 2013 WL 1869832, at *3 (D. Neb. May 2, 2013) ("documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action"); *Handi-Craft v. Action Trading, S.A.,* Case No. 4:02-CV-1731, 2003 WL 26098543, at *6 (E.D. Mo. Nov. 25, 2003) (holding that "the appropriate test is not of legal entitlement, but of control or practical ability to obtain the documents").

Where the practical ability test is applied, the burden of demonstrating that the party from whom discovery is sought has the practical ability to obtain the documents at issue lies with the party seeking discovery. *New Alliance Bean & Grain,* 2013 WL 1869832, at *5. In assessing whether a party has the practical ability to obtain documents from a non-party, courts have focused on the "mutuality" of the responding party's relationship with the document owner, including whether the documents sought are considered records which the party is apt to request and obtain in the normal course of business, or whether the prior history of the case demonstrates cooperation by the non-party, including the production of documents and other assistance in conducting discovery, and the non-party has a financial interest in the outcome of the litigation. *See Afremov*, 2011 WL 13199154, at *2 (D. Minn. Dec. 2, 2011) (collecting cases). The undersigned has also applied a practical ability analysis in ruling on a motion seeking to compel a U.S.-based party to produce documents in the possession of a Brazilian affiliate. Order, *M-I Drilling Fluids UK Ltd. v. Dynamic Air Inc.*, 14-cv-4857 (D. Minn. Nov. 13, 2015) [ECF No. 171].

That said, the Eighth Circuit has never decided whether the "legal right" or "practical ability" standard should govern, and other circuits are split on the issue. *See generally,* The Sedona Conference, Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control," 17 Sedona Conf. J. 467, 482-92 (2016) (collecting cases). Indeed, in part because of that variability, the Sedona Conference has urged adoption of a consistent, "reliable, objective approach" that defines control "as the legal right to obtain and produce the Documents and ESI on demand." *Id.* at 528. The Sedona Conference has criticized the "practical ability" standard on several grounds, including that its imprecision "has resulted in inconsistent and, at times, inequitable results in many contexts." *Id.* It describes the standard as "inherently vague," "unevenly applied," having the potential to lead to "disparate results," and potentially leading to inequitable or even "futile" results. To that last point, the commentary cites by way of example one court's observation that even if it were to order a party employer to collect and turn over personal emails of its employees, the moving party had not identified any authority under which the employer could *force* the employees to turn them over. *Id.* at 542 n. 126, citing *Matthew Enter., Inc. v. Chrysler Grp. LLC,* Case No. 13-cv-04236-BLF, 2015 WL 84982256 (N.D. Cal. Dec. 10, 2015).

Relatedly, the Ninth Circuit has recognized that "[o]rdering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents." *In re Citric Acid Litig.*, 191 F.3d 1090, 1108 (9th Cir. 1999). And yet, a strong argument can be made that if a party's relationship with a non-party is such that the former routinely

obtains certain kinds of documents from the latter in the ordinary course of business, and perhaps has already even leveraged that access to obtain documents for its own use in the litigation, fairness would require that it also be required to do so for purposes of responding to discovery. Order, *M-I Drilling*, 14-cv-4857, at 7–9.

In this case, however, the Court need not choose between the "legal right" and "practical ability" standard because, for the reasons discussed below, it finds that regardless of the standard applied, Plaintiffs have not shown that Hormel has control over text messages on the personally-owned phones of its employees.

B. Whether Hormel's BYOD Policy Gives Hormel Control Over Text Messages on Personally-Owned Cell Phones

Plaintiffs argue that Hormel has control of the custodians' personal text messages because its "bring your own device" (BYOD) requires employees to use their cell phones to conduct business, and Hormel controls all data on those phones through the BYOD policy and the ability afforded as a result of that policy to wipe all data on personally-owned phones whenever it deems necessary. (Pls.' Mem. at 9–11.) Hormel responds that the BYOD policy does not give it the legal authority to access, view, image, or control the text messages, and therefore it lacks control over those messages. (Hormel Mem. at 12–13.)

Hormel has had a BYOD policy since at least 2011.[2] (*See* Bourne Decl. Ex. 14 [ECF No. 887-1]; Hormel Ex. 1 [ECF No. 930].) The policy allows employees to use their personally-owned cell phones to interact remotely with certain Hormel corporate

systems. (*See* Hormel Ex. 1 § A.) It also provides for employees who have a defined business need to be reimbursed for mobile device service for a personally-owned phone, although the employee is responsible for all costs associated with purchasing and maintaining the phone and any accessories, as well as the costs of any application downloads or purchases. (Hormel Ex. 1 at 4, 5 § B; Morrison Decl. ¶¶ 10, 15–16 [ECF No. 928].) Hormel claims ownership of all "data that is sourced from Hormel systems and synced between the mobile device and its servers." (*See* Hormel Ex. 1 at 6 § F; Morrison Decl. ¶¶ 7–8.) Such data "primarily consists of company email, calendars, and contacts (if set up through an employee's corporate email account)," but does not include "text messages or other information on a personally-owned device." (Morrison Decl. ¶¶ 8–9.) The policy does not explicitly assert ownership, control, or ability to access, inspect, copy, image, or limit personal text messages. (*See* Hormel Ex. 1 § F.)

Hormel requires an employee who accesses Hormel data using their personal phone to install the MobileIron application. (Morrison Decl. ¶¶ 11, 14, 18.) MobileIron prevents an employee from copying or backing up Hormel-owned data residing on their phone. (Morrison Decl. ¶¶ 13–14.) It does not interfere with or limit the employee's ability to copy, delete, or back up text messages, nor does it enable Hormel to access or image text messages. (Morrison Decl. ¶¶ 18–20.) Through the BYOD policy, Hormel reserves the right to remotely remove MobileIron and the company data controlled by MobileIron, or to remotely wipe (i.e. factory reset) the phone in order to wipe all Hormel-

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[2] The conspiracy allegedly began in 2009 and none of the parties address pre-BYOD policy communications.

owned data, but the policy warns that such a wipe may delete all data the phone, including personal data such as text messages. (Hormel Ex. 1 § F; Morrison Decl. ¶¶ 11–12.) However, following a wipe, the employee may freely restore any personal data he or she had previously backed up to external storage. (Morrison Decl. ¶ 17.)

Plaintiffs read the BYOD policy's provision that "[a]ll approved employees will be expected to use a personally-owned mobile device" to mean that all Hormel employees are required to own personal cell phones and to use them for business. (Pls.' Mem. at 8.) Plaintiffs misconstrue the policy by taking this statement out of its context. An employee must request Hormel's permission to use a personally-owned cell phone to access Hormel's systems, and may request that Hormel reimburse the employee for monthly carrier service charges. Hormel will approve such a request if it concludes the employee has a "defined business need" to use the phone in the ordinary course of his or her work for the company. (*See* Hormel Ex. 1 § A, App. A.) However, nothing in the policy appears to require any employee to use a personally-owned phone to conduct work, and nothing in the policy requires any employee who uses a personally-owned phone to use text messaging to conduct work.

Plaintiffs next argue Hormel's remote wipe ability gives it control over employee texts, but the Court disagrees. The MobileIron application does not give Hormel the ability to access, inspect, copy, or image text messages; it only gives Hormel the ability to wipe those messages as part of a remote factory reset of the phone if Hormel concludes the security of its own data on the phone has been put at risk and if it cannot limit the wipe to only company data. Similarly, the BYOD policy does not assert Hormel's

ownership over any data other than data "sourced from Hormel systems and synced between the mobile device and its servers"—which does not include text messages (except, perhaps, if the employee copied data sourced from a Hormel system and embedded it in a text)—nor does it assert Hormel's right to demand that its employees allow it to access or inspect any other data. Hormel's right and ability to remotely wipe an entire phone is for the sole and express purpose of removing company data—such as in response to the phone being lost or stolen. The company's ability to wipe personal data from a personally-owned device by resetting the device to a factory floor state in order to purge company data does not give the company control—legal or practical—over that personal data. The Sedona Conference has taken the position that an employer does not legally control personal text messages despite a BYOD policy when the policy does not assert employer ownership over the texts and the employer cannot legally demand access to the texts. The Sedona Conference, *Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations*, 19 Sedona Conf. J. 495, 531 (2018).

The Court is not persuaded otherwise by *H.J. Heinz Co. v. Starr Surplus Lines Ins. Co*. Case No. 2:15-cv-00631-AJS, 2015 WL 12791338, at *4 (W.D. Pa. July 28, 2015), *report and recommendation adopted*, 2015 WL 12792025 (W.D. Pa. July 31, 2015). (Pls.' Mem. at 9–10.) The special master in *Heinz* concluded that since Heinz's BYOD program provided that all company information and emails on both company-owned and personally-owned mobile devices were the sole property of the company, the company had custody and control of its own data on those devices. The special master did not,

however, suggest that the control extended to any personal data on the phone. 2015 WL 12791338 at *4. Notably, the special master was not required to resolve the question of whether Heinz had control over text messages on personally-owned phones because the only such custodian specifically before the special master stated he did not use his personal phone to send or receive text messages related to substantive Heinz business. And while the special master recommended that the company be required to interview other custodians about the existence of any potentially relevant text messages on their phones and to produce such messages if they existed, it is not clear whether that requirement was limited to the scope of the underlying reasoning—i.e., text messages on company-owned phones and text messages on personally-owned phones that contained company data—or whether the special master assumed Heinz could require that its employees produce for inspection, review, and production text messages on personally-owned phones that did not include company-owned data (and if so, on what legal basis). Nothing in the special master's report and recommendation suggested, as Plaintiffs do here, that the company had overall control over text messages on an personally-owned cell phones.

Therefore, the Court is not persuaded by Plaintiffs' arguments that the BYOD policy gives Hormel control over the text messages on personally-owned cell phones.

C. Whether the Relationship Between Hormel and the Custodians Gives Hormel Control Over Text Messages on Personally-Owned Cell Phones

Plaintiffs argue that even if the BYOD policy did not give Hormel the legal right to demand access to text messages on personally-owned phones, the relationship between

it and its employees gives it the practical ability to demand access to that data. Plaintiffs argue Hormel could have asked all of its custodians to give it access to text messages and all custodians likely would have agreed. They base that argument in part on the fact that Hormel had previously asked for and received permission to *image* (although not to inspect, copy, or produce the content of) the personal cell phones of five executive custodians: James Snee, Jim Sheehan, Thomas Day, Steven Binder, and Cory Bollum. (Tr. at 15–16 [ECF No. 945].) (Hormel Exs. 2–3; Bourne Ex. 1.)

The Court disagrees. It is one thing to show that a responding party may *ask* for documents in the possession of someone with whom it has a relationship, but quite another to conclude that the party has the practical ability to *demand* such documents, and therefore has "control" over them. The Court is particularly sensitive to this distinction in the context of the employment relationship. While one might argue that the employees' fear for their job security or interest in the financial well-being of the company will incentivize them to say "yes" to turning over their text messages for inspection and possible production is not, in the opinion of the undersigned, the kind of "practical ability" contemplated by that standard. Practical ability to demand access to documents has generally been found where the relationship between the party and non-party, and the types of data or documents at stake, give rise to the conclusion that the non-party would give (and often, has given) the party access to those data and documents in the ordinary course of business. *See, e.g.,* Order, *M-I Drilling*, 14-cv-4857, at 7–9*; Camden Iron & Metal, Inc. v. Marubeni Amer. Corp.,* 138 F.R.D. 438, 443 (D.N.J. 1991) ("The proper inquiry here is whether the documents sought are considered records which

[the defendant subsidiary] is apt to request [from the non-party parent] and obtain in its normal course of business."); *Cooper Indus., Inc. v. British Aerospace,* 102 F.R.D. 918, 919–20 (S.D.N.Y. 1984) (holding that where the defendant was the distributor and servicer of the non-party affiliate's planes, it must produce certain documents in the possession of the affiliate, and noting that the documents sought "all relate to the planes that defendant works with every day; it is inconceivable that defendant would not have access to these documents and the ability to obtain them for its usual business.").

Here, there is no evidence that in the ordinary course of business Hormel seeks, needs, or expects to gain access to the content of employees' text messages on their personally-owned phones. That five executives agreed to have their phones imaged for the purpose of preserving the data does not establish that Hormel has the practical ability to demand that it be allowed to inspect or produce the data, and it is no evidence at all that other custodians would be amenable to doing so. Plaintiffs contend that at least those custodians who are currently employed by Hormel will wish to help their employer in this case. (Tr. at 15–16.) But while those custodians may feel a sense of company loyalty and/or have an interest in the company's financial health, it goes too far to extrapolate from that a practical ability on Hormel's part to demand access to the data on their phones. *Cf. U.S. Intern. Trade Com'n v. ASAT, Inc.,* 411 F.3d 245, 255 (D.C. Cir. 2005) (rejecting the "untenable position" that simply because the parent may have a financial interest in the outcome of litigation involving its subsidiary, the subsidiary has the ability to control its parent's documents).

Similarly, the fact that Hormel employees willingly responded to questions from Hormel's counsel regarding whether and to what extent they conducted company business by use of personal text messages, (Tr. at 30–31), does not establish a practical ability to demand that the data on those telephones be turned over to Hormel for imaging, review and production. While Hormel owns, and therefore may have a legal right to demand, company data that resides on a personal cell phone—even if that data may reside in a text message—what Plaintiffs are demanding here is that Hormel leverage that putative right in order to demand access to *all* text messages so that it can review and produce those deemed responsive to discovery in this case, regardless of whether they include company data over which Hormel claims ownership per the BYOD policy. The Court shares the Sedona Conference's view that "organizations should not be compelled to terminate or threaten employees who refuse to turn over their devices for preservation or collection." 19 Sedona Conf. J. at 531.

Accordingly, the Court denies Plaintiff's motion insofar as it seeks to compel Hormel to collect, review, and produce responsive text messages on its employees' personally-owned cell phones.

III. Whether Plaintiffs' Subpoenas to Hormel's Employees and Former Employees Should Be Enforced

Plaintiffs also move that the Court enforce their subpoenas directed to the custodians for text message information in their phones and cloud backups. (Pls.' Mem. at 14.) The scope of discovery for a Rule 45 subpoena is the same as the scope of discovery under Rules 34 and 26 and is subject to the same constraints on relevance and

proportionality. *See* Fed. R. Civ. P. 34(c), 45; *Mille Lacs Band of Ojibwe v. Cty. of Mille Lacs*, No. 17-cv-5155 (SRN/LIB), 2020 WL 1847574, at *5 (D. Minn. Apr. 13, 2020); *Shukh v. Seagate Tech., LLC*, 295 F.R.D. 228, 236 (D. Minn. 2013). A person subject to a subpoena may object to the subpoena, as the custodians did here, in which case the requesting party may move the court to compel production. Fed. R. Civ. P. 45(d)(2)(B). (Custodians' Mem. at 7–8 [ECF No. 925].)

Under Rule 45(d)(1), even if the subpoena seeks relevant information, discovery is not permitted where it imposes an undue burden on the subpoenaed person, considering the same factors as those relied on for proportionality in Rule 26(b). *See Misc. Docket Matter No. 1 v. Misc. Docket Matter No. 2*, 197 F. 3d 922, 925 (8th Cir. 1999); *see also Deluxe Fin. Servs., LLC v. Shaw*, Case No. 16-cv-3065 (JRT/HB), 2017 WL 7369890, at *4 (D. Minn. Feb. 13, 2017) ("These considerations are echoed in the proportionality factors set forth in the amended Rule 26(b)(1)."). Concern for the burden on a non-party subject to a subpoena carries special weight when balancing competing needs. *Id.* The Court must quash or modify a subpoena that imposes an undue burden on the non-party or requests irrelevant information. Fed. R. Civ. P. 45(c)(3)(A)(iv).

Neither party bears a rigid evidentiary burden in this dispute. The advisory committee notes for the 2015 amendments to Rule 26 advise that the parties and the Court bear "collective" responsibility to consider relevance and proportionality/undue burden. A party requesting production should be able to explain the ways the requested information bears on the issues of the case, while the person resisting production will ordinarily have much better or the only information about the burden and expense of

production. *Id.* The Court does not place the burden of proving relevance or proportionality/undue burden on any party, but instead considers all the information brought by the parties to determine the appropriate scope of the subpoenas. *Deluxe Fin. Servs., LLC v. Shaw*, Case No. 16-cv-3065 (JRT/HB), 2017 WL 7369890, at *4 (D. Minn. Feb. 13, 2017).[3]

Plaintiffs' subpoenas made seven requests, and all custodians gave substantively the same response to each. (*See* Bourne Decl. Ex. 2.) Plaintiffs do not identify the specific requests for which they seek the motion to compel, but their arguments address the information requested by Requests 1 and 5, and they do not raise any issues with the

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[3] Hormel and the custodians object at the outset that Plaintiffs did not engage in good faith meet-and-confer efforts prior to filing this motion. (Hormel Mem. at 27; Custodians' Mem. at 10–11 [ECF No. 925].) "Before filing a motion . . . the moving party must, if possible, meet and confer with the opposing party in a good-faith effort to resolve the issues raised by the motion," and certify the same to the Court alongside its motion. D. Minn. L.R. 7.1, 37.1; *see also* Fed. R. Civ. P. 37(a)(1). This obligation is only fulfilled when parties have engaged in a genuine and good-faith discussion about each discovery request that is in dispute. *Mgmt. Registry, Inc. v. A.W. Companies, Inc.*, Case No. 17-cv-05009 (JRT/KMM), 2019 WL 2024538, at *1 (D. Minn. May 8, 2019).

Based on the record of the parties' communications, the Court overrules this objection. Before this motion was filed, Plaintiffs and Hormel exchanged numerous emails and letters arguing their opposing positions regarding whether Hormel had control over its custodians' personal cell phones, whether it met its obligations to preserve text message data, and whether it had to produce that data. (*See* Bourne Decl. Exs. 6–10 [ECF No. 888-2].) In addition, the record reflects that after the custodians received the subpoenas, their counsel "participated in meet and confer communications with opposing counsel including four letters, several e-mails, and two telephone conferences" on June 1 and August 2. (Stephens Decl. ¶¶ 9–18.) The parties' descriptions of their telephone meetings, and the letters and emails in the record, show an effort by both to explain their positions and concerns, and explore possible compromises, but finally conclude that they were too far apart. (*Id.*; Exs. A–G.) The exchanges show both sides engaged in a genuine discussion over these issues but refused to concede their positions after bringing factual and legal arguments to bear. This satisfies the meet-and-confer requirement.

custodians' responses to the other requests. (*Compare* Pls.' Mem. at 14-16, *with*, Bourne Decl. Ex. 17 Requests 1–7.) The Court accordingly confines its review to Requests Nos. 1 and 5. Those requests and the custodians' responses are as follows:

> **Request No. 1**: Produce a copy of each Text Message that you sent or received during the Relevant Time Period with an Employee or Representative of a Pork Integrator, or any other individual with whom you communicated about supply and demand conditions in the Pork industry.
>
> **Response:** [The custodian] objects to this request as vague and ambiguous, and overbroad and unduly burdensome to the extent it seeks information not relevant to any party's claims or defenses in this litigation, and is disproportionate to the needs of the case. [The custodian] objects to this request to the extent it imposes an undue burden on a non-party by seeking "each Text Message" exchanged with the identified individuals over a ten-year period that ended three years ago. [The custodian] further objects to this request to the extent it seeks information equally available from another source that would be less burdensome and more appropriate under the circumstances. Subject to and without waiving the foregoing objections, [the custodian] is not aware of any documents responsive to this request.
>
> **Request No. 5**: Documents sufficient to show, and provide access to the forensic vendor for collection purposes, the location, date, and scope of any archived copies of your cellphone data, such as iTunes archives or iCloud archives.
>
> **Response**: [The custodian] objects to this request as vague and ambiguous, and overbroad and unduly burdensome to the extent it seeks information not relevant to any party's claims or defenses in this litigation, and is disproportionate to the needs of the case. [The custodian] objects to this request to the extent it imposes an undue burden on a non-party by seeking all archived cellphone data over an unreasonably long period of time.

(Bourne Decl. Ex. 2.) The custodians' explained their objections further in letters attached to the responses and during the motion hearing and in their memorandum opposing Plaintiffs' motion. (*Id.*; Custodians' Mem. at 10; Tr. at 45–48.) They objected that the subpoenas seek irrelevant information, are ambiguous and vague, and that information sought was equally available from their cell phone service providers; the subpoenas imposed an undue burden on them; the definition of "pork integrator" was overbroad and unduly burdensome; Plaintiffs had not shown that responsive texts were likely to exist on their phones or data backups; and there was no adequate protective order to protect private and confidential information on their phones.[4] (*See, e.g.*, Bourne Decl. Ex 2 at ECF 13–14, 18–19. *See also* Custodians' Mem. at 9–11; Tr. at 45–48.)

A. Whether the Custodians' Have Adequately Demonstrated That They Do Not Have Responsive Texts

Counsel for the custodians argue they have undertaken reasonable steps to investigate whether unique responsive information exists on any custodian's cell phone; both Hormel and the custodians argue that those inquiries have suggested that no such information exists, while Plaintiffs have not shown reason to conclude to the contrary. (Hormel Mem. at 25–28; Custodian's Mem. at 9–10; *see generally* Stephens Decl.)

A court may deny a motion to compel when the information sought is "almost certainly nonexistent or the object of pure speculation." *Struzyk v. Prudential Ins. Co. of*

[4] Hormel raises objections to the subpoenas in its memorandum. (Hormel Mem. at 28–29.) Hormel is not subject to the subpoenas nor moving for a protective order, so it lacks standing to quash or modify the subpoenas. *Shukh v. Seagate Tech., LLC*, 295 F.R.D. 228, 236 (D. Minn. 2013). The Court will consider its arguments only to the extent they shed additional light or support for or against the custodians' objections.

Am., Case No. 99-1736 (JRT/FLN), 2003 WL 21302966, at *2 (D. Minn. May 16, 2003). A court will do so when evidence shows that the responding party has searched for the information but cannot find it or disclaims its existence after the search, and the movant shows no evidence to suggest the information exists. *See id.* (denying motion to compel where responding party argued that it produced all responsive documents and presented detailed affidavits of its efforts to locate any responsive documents, while the movant presented no contrary evidence); *Johnson v. Charps Welding & Fabricating, Inc.*, Case No. 14-cv-2081 (RHK/LIB), 2017 WL 9516243, at *11 (D. Minn. Mar. 3, 2017) (denying in part motion to compel where responding party agreed to produce certain responsive documents, argued that no additional related documents existed, and presented an affidavit describing the creation and storage of the documents, while the movant presented no contrary evidence); *compare Farmers Ins. Exch. v. West*, Case No. 11-cv-2297 (PAM/JJK), 2012 WL 12894845, at *5 (D. Minn. Sept. 21, 2012) (granting in part motion to compel where responding party disclaimed the existence of responsive documents, but the record failed to show that the party searched for them and the movant presented evidence suggesting that the documents existed).

This standard strikes a balance between two interests in discovery. A responding party has a duty under the Federal Rules of Civil Procedure to affirmatively, reasonably search for responsive information available to it. *Farmers Ins. Exch.*, 2012 WL 12894845, at *5. But once it fulfills that responsibility, "[t]he Court must accept, at face value, a party's representation that it has fully produced all materials that are discoverable . . . because the Court has no means to test the veracity of such avowals."

Bombardier Recreational Prod., Inc. v. Arctic Cat, Inc., Case No. 12-cv-2706 (MJD/LIB), 2014 WL 5685463, at *7 (D. Minn. Sept. 24, 2014).

Here, the custodians' counsel interviewed the custodians to ascertain whether it was likely that potentially relevant and responsive texts would be on their phones. They represent that in those interviews, all of the custodians disclaimed on one basis or another having any texts that might be responsive. (Bourne Decl. Exs. 1, 2; Stephens Decl. ¶¶ 5–8.) But with the exception of Jessica Chenowith, who stated unequivocally that she *never* used her personal cell phones for work-related communications, the Court cannot conclude from the responses that adequate steps were taken to describe to the custodians what kinds of communications might be relevant and responsive information in the context of this complex litigation, or to test the accuracy of their recall about whether, at some point over the relevant period or periods, they sent or received relevant or responsive texts.

Granted, the evidence that responsive texts *do* exist is quite weak. Plaintiffs declare under oath that they obtained records from a telephone service provider showing custodians Eric Steinbach, Holly LaVallie, James Fiala, Michael Gyarmaty, and Steven Venenga texted work-related contacts. (Pls.' Mem. at 15–16; Bourne Decl. ¶¶ 18–20.) But the provider had no information about the content of the messages, and the fact that the texts were sent to or from work-related contacts does not mean the content of the texts was work-related, let alone that the content was relevant to the claims or defenses in this case. Plaintiffs also argue that certain of the custodians—Paul Bogle, Corwyn Bollum, Jessica Chenoweth, Lance Hoefflin, Paul Peil, Jose Rojas, and Donald Temperley—

worked with Agri Stats and/or managed the throughput of pork in Hormel's operations, suggesting that they are more likely to have responsive texts. (Hormel Exs. 6, 8 at 2.) Several of them—Bogle, Bollum, Rojas, and Temperley—also implied or acknowledged in their subpoena responses that they used text messaging for business to some degree. (Bourne Decl. Ex. 1.)

Provided Chenowith submits to Plaintiffs a sworn declaration reiterating her unequivocal representation that she did not use her personal cell phone for work related communications at all, the Court concludes Chenowith has adequately shown that responsive texts on her cell phone or in her archived data are "almost certainly nonexistent or the object of pure speculation." *Struzyk*, 2003 WL 21302966, at *2. Unlike the other custodians, Chenowith alone appears to have observed a clear boundary about the use of her personal cell phone, and could say without qualification that she did not use it in any manner for work purposes. Plaintiffs have offered no evidence to the contrary. Accordingly, the Court will not enforce the subpoena directed to Chenowith with regard to Requests Nos. 1 and 5.

But as to the remaining custodians, the Court is not satisfied that the inquiries made by counsel and the resulting representations by the custodians adequately demonstrate that there was a reasonable search for responsive texts such that the Court can conclude such texts are almost certainly nonexistent. *See Farmers Ins. Exch.*, 2012 WL 12894845, at *5. All custodians but Chenowith either acknowledge they might have used their cell phones for work related communications, even if only minimally, or they made no representations at all on that subject. Nothing suggests the custodians did, or

were asked to do, anything beyond consulting their memories about whether they might have sent or received responsive or relevant texts, or even that they understood the full scope of what kinds of communications that might encompass. No evidence suggests that anything was done to test their memories, which is particularly problematic given that the time periods are in some instances years in the past and text-messaging is by its very nature short, quick, often reactive, and therefore unlikely to be particularly memorable.

Since for all custodians other than Chenowith, the evidence does not show a reasonable search or that responsive texts are "almost certainly nonexistent or the object of pure speculation" *Struzyk*, 2003 WL 21302966, at *2, this argument does not provide a basis for the Court to decline to enforce Requests Nos. 1 and 5 as to those custodians.

B. Whether the Court Should Decline to Enforce the Requests Because They Are Vague or Ambiguous, or Because the Information is Available From Other Sources

The Court overrules the custodians' objections regarding vagueness and ambiguity, including with respect to the definition of "pork integrator," because they provide no arguments, explanation, or evidence to support those objections. *Mead Corp. v. Riverwood Nat. Res. Corp.*, 145 F.R.D. 512, 515 (D. Minn. 1992) ("[A]n objection to a discovery request cannot be merely conclusory, and . . . intoning the 'overly broad and burdensome' litany, without more, does not express a valid objection.") Though the Court does not place an evidentiary burden on those objections, the Court cannot determine the grounds on which the custodians base these objections without some explanation to support them. Moreover, vagueness and ambiguity objections, even if

otherwise well-taken, can be addressed in a meaningful meet-and-confer. These objections are therefore overruled.

The Court also overrules the objection that the information sought is equally available from the cell phone providers. Plaintiffs declare under oath that they obtained records from a telephone service carrier showing that custodians Eric Steinbach, Holly LaVallie, James Fiala, Michael Gyarmaty, and Steven Venenga sent texts to work-related contacts. (Pls.' Mem. at 15–16; Tr. at 13; Bourne Decl. ¶¶ 18–20.) The carrier did not record the content of any text messages, so the information is not available from that source. (Tr. at 14.) Plaintiffs also point out that carrier data would not reveal iMessage to iMessage content, as that content is only available on the respective iPhones. (Tr. at 51.) The custodians do not offer any concrete support for their claim that the content of any relevant and responsive text messages would be available from any other source. Thus, the record fails to substantiate this objection.

C. Whether Imaging the Phones and Searching the Data Imposes an Undue Burden and is Disproportionate to the Needs of the Case

The custodians object that the very imposition of the requests for cell phone data imposes an undue burden on the custodians that is disproportionate to the needs of the case. (*See, e.g.*, Bourne Decl. Ex. 2 at ECF 13–14, 18–19. *See also* Custodians' Mem. at 9–11; Tr. at 45–48.). Undue burden in the subpoena context relies on similar factors to proportionality in the broader context of a motion to compel, though courts have heightened concern for and reluctance to impose discovery burdens on a non-party compared to a party. *Deluxe Fin. Servs.*, 2017 WL 7369890, at *4. Any order

compelling compliance with a subpoena "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(ii).

> An objection that discovery is overly broad and unduly burdensome must be supported by affidavits or offering evidence revealing the nature of the burden and why the discovery is objectionable. It is not sufficient to simply state that the discovery is overly broad and burdensome, nor is a claim that answering the discovery will require the objecting party to expend considerable time and effort analyzing 'huge volumes of documents and information' a sufficient factual basis for sustaining the objection.

Abhe & Svoboda, Inc. v. Hedley, Case No. 15-cv-1952 (WMW/BRT), 2016 WL 11509914, at *3 n.5 (D. Minn. Mar. 15, 2016). Though the non-party resisting a subpoena is often in the best position to provide information to sustain its objection, the Court will examine all evidence in the record. *Id.* at *3.

The custodians argue burden along several lines. They allege that they have an estimate of between $65,000 and $85,000 in total to image all thirty phones[5], that imaging each phone will take between three hours and more than a day based on the amount of data on the phone, and that some number of them live out of state or in rural Minnesota and will have to mail their phones to Hormel's third-party forensic imaging provider. (Custodians' Mem. at 10; Tr. at 45–48.) They also argue the production will capture significant amounts of private and confidential information unrelated to this case. (*Id.*) The Court addresses these concerns in order.

First, as to the costs or time to image the phones, there are no affidavits or other evidence of record establishing the amount of data on any individual custodian's phone or the estimated time or cost to image it. Furthermore, it is not entirely clear to the Court that the cell phones would need to be imaged in their entirety, or whether text messages in particular can be extracted more economically. Nor is it clear to the Court that all cell phones would need to be imaged, given that currently used cell phones were not in use during the period from January 1, 2008 – August 17, 2018 and messaging data from prior phones may not have been carried over to the new phone. Furthermore, the custodians acknowledge that they have no estimate of the number of texts that might be captured and reviewed for relevance under Plaintiffs' proposed search method, nor do they seem to have explored other means of capturing and filtering the data more cost-effectively, so the Court cannot assess the time or cost for that aspect of the production process. The Court accepts in the abstract that the imaging may be costly, but it has no information on how custodians calculated their cost estimate or how much it might cost any particular custodian.

That said, the Court agrees with the custodians that of all the players in this mix, the individual custodians are least equipped to bear the financial burden of having their cell phones imaged. As discussed below in Section III.D., the Court will compel the custodians to search for and produce text messages within certain parameters, and to preserve data in the event this production, or other discovery, reveals a basis to expand

[5] The Court assumes that this estimate does not include the cost for imaging the five phones that were already imaged by Hormel. Obviously, if it does, this total cost

the search. Consequently, the Court directs Plaintiffs' counsel, Hormel's counsel, and the custodians' counsel to meet and confer regarding which devices should be imaged, or from which devices text messaging data should be extracted by other means, taking into account the time period during which those devices were in service and whether older data was carried over.

In addition, to the extent the result of those discussions results in the imaging of any cell phones, or the forensic extraction of text messaging data by other means, the Court exercises its discretion and orders that the reasonable costs associated with that imaging or data extractions must be split equally between the Class Plaintiffs, on the one hand, and Hormel, on the other. The Court further orders that the reasonable costs associated with conversion and storage of any data obtained from those phones as well as conversion and storage of any data obtained from archives or cloud storage be borne equally by the Class Plaintiffs and Hormel. The Court finds this cost-sharing arrangements appropriate as to Plaintiffs because Rule 45(d)(1) clearly places on the party serving the subpoena the obligation to avoid imposing undue burden or expense on the person subject to the subpoena. It finds this arrangement appropriate as to Hormel because its BYOD policy not only allowed but to some extent financially supported the use of personal cell phones for work purposes, and so it is appropriate that it share in the cost of harvesting and storing the data so that it can be ascertained whether there are relevant and responsive work-related texts.

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estimate overstates that aspect of the burden.

The Court also recognizes that being deprived of a phone for more than a day either to mail it in and image it, or simply image it, may be inconvenient, and perhaps burdensome. But no evidence suggests which custodians will have to mail their phones rather than drop them off in person, or that it will take more than a day rather than three hours to image any custodian's phone. Nor is it clear that the custodians have explored alternatives to "mailing in" their phones.[6]. In short, the Court cannot sustain these aspects of each custodian's burden in the absence of evidence showing how the burden actually, rather than theoretically, would fall on the custodians and that the custodians have diligently explored alternatives that would reduce that burden.

As for the privacy concerns, the Court accepts as a matter of common knowledge that modern smart phones store a tremendous amount of their owner's personal, private, or confidential information. But the custodians have not persuaded the Court that that concern cannot be managed through targeted searches. Plaintiffs allege that forensic imaging vendors can target specific phone applications or types of data, in which case a vendor could image only the messages saved in communication apps on the phone. (Tr. at 52.) The custodians have done nothing to persuade the Court that they have explored the options for more targeted data extraction and come up empty-handed. Furthermore, the Court is aware that reputable forensic imaging vendors employ strict protocols to

[6] Plaintiffs suggest, for example, that it is possible to mail imaging kits to custodians for whom mailing their phone or travelling to Hormel would be burdensome. (Tr. at 50.) To the extent the custodians are arguing that having to mail in their phones is the necessary result of working with Hormel's vendor, it undercuts their complaint regarding monetary burden, as it suggests strongly that Hormel and not the individual custodians will be paying for the imaging in any event.

protect data within their control, and in any event, as will be discussed below, the Court's order will provide that only relevant and responsive information will be delivered to Plaintiffs, reducing the risk that a custodian's personal confidential information will be transmitted. Finally, the information may be produced subject to the protective order in this case, further minimizing any risk of public disclosure of private information. Thus, the Court finds the custodians' privacy concerns, while understandable, are manageable and not a basis for declining to enforce Requests Nos. 1 and 5 of the subpoenas.

D. Whether the Court Should Decline to Enforce Requests Nos. 1 and 5 on the Grounds That They Are Overly Broad and Seek Irrelevant Information

The Court concludes that while Requests Nos. 1 and 5 seek some relevant information, they extend beyond the bounds of relevance and must therefore be narrowed to target relevant and proportional information.

The Court observes at the outset that it is unclear on the face of Request No. 1 whether it seeks the production of all texts on the custodians' phones exchanged with other Hormel employees, Defendants' employees, and employees of other pork integrators (defined as any of the Defendants and any of over sixty other named companies), regardless of content, or whether the phrase "about supply and demand conditions in the Pork industry" at the end of the request qualifies and limits not only the second clause of the request but the first as well. (Bourne Decl. Ex. 17 Definitions ¶ 14, Request 1.) Request No. 5 does not, on its face, actually seek texts, but seeks information from which a "forensic vendor" could gain access to all archived copies of the custodians' cell phone data, including relevant text messages, in locations like cloud

backups, older cell phones, or non-internet archives, without regard to subject matter. (Bourne Decl. Ex. 17 Request 1.)

Plaintiffs proposed a search method that sheds some light on their intended scope. Plaintiffs propose that *all* texts exchanged with any number on a list of 781 phone numbers associated with individuals affiliated with Hormel or any other Defendant or any of the other identified pork integrators, be produced without regard to content. As to all other texts, they propose a key term search, the results of which would be reviewed for relevance by the custodians' counsel. (Bourne Decl. ¶ 12 [ECF No. 887], Ex. 16 [ECF No. 888-2].) This same protocol would, presumably, be applied to both data residing on the cell phones and data gathered from other locations pursuant to Request No. 5. Plaintiffs argue that all texts exchanged with any of the 781 numbers are presumptively relevant as "work-related texts," so they do not need relevance review before production, while any other texts are less likely to be relevant, so a keyword search to narrow the universe, followed by a relevance review of all "hits" is appropriate. (Pls.' Mem. at 15.)

Unquestionably some of the information encompassed by each request is relevant. Request No. 1 seeks text messages between Defendants' employees about pork supply, demand, and pricing (the subject matter of the conspiracy) during the relevant time-period, and between Defendants and other pork integrators. Plaintiffs argue these messages are relevant to help Plaintiffs understand the tone, language, and content of Defendants' communications about that subject matter, and potentially to reveal substance of the alleged conspiracy, and neither Hormel nor the custodians argue persuasively to the contrary. Request No. 5 similarly includes within its scope some

relevant information, insofar as the custodians have changed phones and prior relevant messages may be saved in the custodians' archives, cloud backups, or older phones. While Hormel and the custodians dispute whether it is likely that any relevant texts will be found on the cell phones, they do not seriously disagree that *if* there are texts pertaining to pork supply, demand, and pricing, that were sent during the relevant time period among Hormel employees, or between Hormel employees and other pork integrators, those texts would likely be relevant and responsive to discovery in this case.

But not all texts to all individuals on the 781 phone numbers connected to Defendants and pork integrators will involve this subject matter, and Plaintiffs do not satisfactorily explain why the Court should presume otherwise. The evidence does not show that the custodians texted those numbers only (if at all) about the relevant subject matter, as opposed to other work-related topics or even non-work topics like social plans. Just because there may be some relevant texts within a data set does not make all texts within that set presumptively relevant.

For the same reasons, Request No. 5 also sweeps too broadly in effectively demanding access to all archived text messaging data from all of the custodians' phones.

Furthermore, the time-period of the requested production, January 1, 2008 – August 17, 2018, was not tailored to the job responsibilities of the individual custodians, and therefore also is overly broad. The custodians held different job duties at different times throughout this period, and some of them retired during that period. (*See, e.g.*, Hormel Ex. 10 at 5, Ex. 11 [ECF Nos. 929-9, -10].) The parties designated each custodian based on relevant job duties held during specific subsets of the period of the

alleged conspiracy. (*See, e.g.*, Hormel Ex. 8 at 2, Ex. 10 at 5, Ex. 11 [ECF Nos. 929-7, -9, -10].) Their text data within those time periods are potentially a source of relevant communications, but those distinctions were ignored by Plaintiffs' subpoena requests, which were "one-size-fits-all." While that uniform time frame makes good sense for efficient conduct of party discovery, it is not as appropriate for individual custodians whose confidential personal information is at stake, nor is it proportional in view of the narrower time periods within which these individuals were in relevant roles and therefore may have had relevant communications (if at all).

Accordingly, the Court will enforce the subpoenas as to Requests Nos. 1 and 5 (for all custodians except Chenowith) and orders the custodians (other than Chenowith) to search for and produce relevant text messages within a modified scope and subject to a modified search protocol, as follows: Each subpoena will be limited to the time period or periods within which that custodian held the position that resulted in his or her being identified as a custodian. Plaintiffs' counsel, Hormel's counsel, and the custodian's counsel shall meet and confer to confirm they have a common understanding on that subject. The text messaging data, including data extracted from the custodians' current phones, older phones, or archive or backup data from those phones, must be searched first to identify all texts that were sent to or received from any number on the list of 781 phone numbers identified by Plaintiffs within the time period or periods pertaining to that custodian. The number of resulting texts for each custodian must be reported to Plaintiffs' counsel. The custodian's counsel may then choose to manually review all of the resulting texts for that custodian for relevance; however, the custodian's counsel may

meet and confer with Plaintiffs' counsel about a threshold volume of messages for a custodian that would trigger the application of search terms (to be negotiated between counsel), the results of which further filtering would then be reviewed for relevance by the custodian's counsel.

The Court does not rule out the possibility that review by Plaintiffs of the resulting text message production, or other discovery in this case, may provide a more concrete basis upon which to justify an expanded search for relevant messages beyond what the Court has permitted here. Accordingly, the custodians are further ordered to preserve all text messaging data and all archived and cloud-stored text messaging data for the period January 1, 2008 – August 17, 2018, until December 31, 2022, or until such other date as may be agreed upon by the parties or ordered by the Court. Relatedly, Chenowith is also ordered to preserve all text messages, including all archived and cloud-stored messages, from the period January 1, 2008 – August 17, 2018 (or, in the alternative, to arrange at Hormel's and Plaintiffs' shared expense to have such text messages imaged and preserved).

IV. Hormel's Preservation Duty Did Not Extend to Imaging Personally-Owned Cell Phones and Archiving Cloud Backups

Plaintiffs assert that Hormel knew or should have known that its custodians were conducting substantive work-related business over text message so that it was under an obligation to image those phones and preserve cloud backups at the start of the litigation; they request a declaration that Hormel had an obligation at the start of litigation to preserve its custodians' text message content by imaging their phones and preserving

their cloud backup data, and an order compelling Hormel to do so now. (Pls.' Mem. at 11–14.) The duty to preserve evidence arises when a party knows or should have known that the evidence in its control is relevant to current or reasonably foreseeable litigation, at which point the party must take reasonable steps to preserve it. *Paisley Park*, 330 F.R.D. at 232; Fed. R. Civ. P. 37(e). "The duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence." *Paisley Park*, 330 F.R.D. at 232. The duty "extends to those persons likely to have relevant information – the key players in the case, and applies to unique, relevant evidence that might be useful to the adversary." *Id.* at 233.

Whether a party has taken reasonable steps to preserve information is a factual inquiry considering the context of the case, the information sought, and the steps taken. *See id.* at 233–35 (holding that the defendants unreasonably failed to preserve their personal text messages by purging their phone data even though they texted for work purposes and knew of pending litigation involving their business); *In re Petters Co., Inc.*, 606 B.R. 803, 822 (Bankr. D. Minn. 2019).

Here, however, the Court has found Hormel did not control the text messages on the personally-owned cell phones of its custodians. It did communicate litigation holds to reasonably anticipated custodians and Plaintiffs have not shown that those holds were inadequate to communicate to those custodians that they should preserve relevant information under their own control, including text messaging data. (Hormel Mem. at 21–22.) The Court therefore denies Plaintiffs' motion for a "declaration" that Hormel

had a duty to do more than it did.[7] Plaintiffs' concerns for preservation going forward are addressed by the Court's order described above in Section III.D.

Accordingly, based on all the files, records, and proceedings, **IT IS HEREBY ORDERED** that Class Plaintiffs' Motion to Compel Hormel To Produce Responsive Text Message Content and to Enforce Subpoenas to Hormel Custodians [ECF No. 883] is **GRANTED IN PART** and **DENIED IN PART** as described fully herein.

Dated: March 31, 2022

*_/s Hildy Bowbeer_*
HILDY BOWBEER
United States Magistrate Judge

[7] The Court does not address Hormel's argument that Plaintiffs did not follow proper procedure to request a declaratory judgment. (Hormel Mem. at 18.)