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CASES, MATERIALS, AND QUESTIONS

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COLLINS v. VIRGINIA

584 U.S. ___ (2018)

JUSTICE SOTOMAYOR delivered the opinion of the Court.

This case presents the question whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein. It does not.

I

Officer Matthew McCall of the Albemarle County Police Department in Virginia saw the driver of an orange and black motorcycle with an extended frame commit a traffic infraction. The driver eluded Officer McCall's attempt to stop the motorcycle. A few weeks later, Officer David Rhodes of the same department saw an orange and black motorcycle traveling well over the speed limit, but the driver got away from him, too. The officers compared notes and concluded that the two incidents involved the same motorcyclist.

Upon further investigation, the officers learned that the motorcycle likely was stolen and in the possession of petitioner Ryan Collins. After discovering photographs on Collins' Facebook profile that featured an orange and black motorcycle parked at the top of the driveway of a house, Officer Rhodes tracked down the address of the house, drove there, and parked on the street. It was later established that Collins' girlfriend lived in the house and that Collins stayed there a few nights per week.[1]

From his parked position on the street, Officer Rhodes saw what appeared to be a motorcycle with an extended frame covered with a white tarp, parked at the same angle and in the same location on the driveway as in the Facebook photograph. Officer Rhodes, who did not have a warrant, exited his car and walked toward the house. He stopped to take a photograph of the covered motorcycle from the sidewalk, and then walked onto the residential property and up to the top of the driveway to where the motorcycle was parked. In order "to investigate further," Officer Rhodes pulled off the tarp, revealing a motorcycle that looked like the one from the speeding incident. He then ran a search of the license plate and vehicle identification numbers, which confirmed that the motorcycle was stolen. After gathering this information, Officer Rhodes took a photograph of the uncovered motorcycle, put the tarp back on, left the property, and returned to his car to wait for Collins.

Shortly thereafter, Collins returned home. Officer Rhodes walked up to the front door of the house and knocked. Collins answered, agreed to speak with Officer Rhodes, and admitted that

[1] Virginia does not dispute that Collins has Fourth Amendment standing.

the motor cycle was his and that he had bought it without title. Officer Rhodes then arrested Collins.

Collins was indicted by a Virginia grand jury for receiving stolen property. He filed a pretrial motion to suppress the evidence that Officer Rhodes had obtained as a result of the warrantless search of the motorcycle. Collins argued that Officer Rhodes had trespassed on the curtilage of the house to conduct an investigation in violation of the Fourth Amendment. The trial court denied the motion and Collins was convicted.

The Court of Appeals of Virginia affirmed. It assumed that the motorcycle was parked in the curtilage of the home and held that Officer Rhodes had probable cause to believe that the motorcycle under the tarp was the same motorcycle that had evaded him in the past. It further concluded that Officer Rhodes' actions were lawful under the Fourth Amendment even absent a warrant because "numerous exigencies justified both his entry onto the property and his moving the tarp to view the motorcycle and record its identification number."

The Supreme Court of Virginia affirmed on different reasoning. It explained that the case was most properly resolved with reference to the Fourth Amendment's automobile exception. Under that framework, it held that Officer Rhodes had probable cause to believe that the motorcycle was contraband, and that the warrantless search therefore was justified.

We granted certiorari. . . and now reverse.

II

The Fourth Amendment provides in relevant part 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." This case arises at the intersection of two components of the Court's Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home.

A

1

The Court has held that the search of an automobile can be reasonable without a warrant. . . .

The "ready mobility" of vehicles served as the core justification for the automobile exception for many years. *California v. Carney*, 471 U. S. 386, 390 (1985); *Chambers v. Maroney*. Later cases then introduced an additional rationale based on "the pervasive regulation of vehicles capable of traveling on the public highways." *Carney*, 471 U. S., at 392. As the Court explained in *South Dakota v. Opperman* (1976):

> "Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when

> license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order."

In announcing each of these two justifications, the Court took care to emphasize that the rationales applied only to automobiles and not to houses, and therefore supported "treating automobiles differently from houses" as a constitutional matter. *Cady v. Dombrowski*.

When these justifications for the automobile exception "come into play," officers may search an automobile without having obtained a warrant so long as they have probable cause to do so. *Carney*.

2

Like the automobile exception, the Fourth Amendment's protection of curtilage has long been black letter law. "[W]hen it comes to the Fourth Amendment, the home is first among equals.[] At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" To give full practical effect to that right, the Court considers curtilage—"the area 'immediately surrounding and associated with the home'"—to be "'part of the home itself for Fourth Amendment purposes.'" . . ..

When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Such conduct thus is presumptively unreasonable absent a warrant.

B

1

With this background in mind, we turn to the application of these doctrines in the instant case. As an initial matter, we decide whether the part of the driveway where Collins' motorcycle was parked and subsequently searched is curtilage.

According to photographs in the record, the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch. When Officer Rhodes searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house.

Just like the front porch, side garden, or area "outside the front window," *Jardines*, the driveway enclosure where Officer Rhodes searched the motorcycle constitutes "an area adjacent to the home and 'to which the activity of home life extends,'" and so is properly considered curtilage.

In physically intruding on the curtilage of Collins' home to search the motorcycle, Officer Rhodes not only invaded Collins' Fourth Amendment interest in the item searched, *i.e.*, the motorcycle, but also invaded Collins' Fourth Amendment interest in the curtilage of his home. The question before the Court is whether the automobile exception justifies the invasion of the curtilage.[2] The answer is no.

Applying the relevant legal principles to a slightly different factual scenario confirms that this is an easy case. Imagine a motorcycle parked inside the living room of a house, visible through a window to a passerby on the street. Imagine further that an officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? Surely not.

The reason is that the scope of the automobile exception extends no further than the automobile itself. Virginia asks the Court to expand the scope of the automobile exception to permit police to invade any space outside an automobile even if the Fourth Amendment protects that space. Nothing in our case law, however, suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant. Expanding the scope of the automobile exception in this way would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and "'untether'" the automobile exception "'from the justifications underlying'" it.

The Court already has declined to expand the scope of other exceptions to the warrant requirement to permit warrantless entry into the home. The reasoning behind those decisions applies equally well in this context. For instance, under the plain-view doctrine, "any valid warrantless seizure of incriminating evidence" requires that the officer "have a lawful right of access to the object itself." Had Officer Rhodes seen illegal drugs through the window of Collins' house, for example, assuming no other warrant exception applied, he could not have entered the house to seize them without first obtaining a warrant.

Similarly, it is a "settled rule that warrantless arrests in public places are valid," but, absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause. *Payton v. New York*. That is because being "'arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home.'" Likewise, searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.

Just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant, and just as an officer must have a lawful right of access in order to arrest a person in his home, so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception. The automobile exception does

[2] Helpfully, the parties have simplified matters somewhat by each making a concession. Petitioner concedes "for purposes of this appeal" that Officer Rhodes had probable cause to believe that the motorcycle was the one that had eluded him, and Virginia concedes that "Officer Rhodes searched the motorcycle[.]"

not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage.

As noted, the rationales underlying the automobile exception are specific to the nature of a vehicle and the ways in which it is distinct from a house. The rationales thus take account only of the balance between the intrusion on an individual's Fourth Amendment interest in his vehicle and the governmental interests in an expedient search of that vehicle; they do not account for the distinct privacy interest in one's home or curtilage. To allow an officer to rely on the automobile exception to gain entry into a house or its curtilage for the purpose of conducting a vehicle search would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application. Indeed, its name alone should make all this clear enough: It is, after all, an exception for automobiles.

Given the centrality of the Fourth Amendment interest in the home and its curtilage and the disconnect between that interest and the justifications behind the automobile exception, we decline Virginia's invitation to extend the automobile exception to permit a warrantless intrusion on a home or its curtilage.

III

A

Virginia argues that this Court's precedent indicates that the automobile exception is a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage. Specifically, Virginia points to two decisions that it contends resolve this case in its favor. Neither is dispositive or persuasive.

First, Virginia invokes *Scher v. United States*, 305 U. S. 251 (1938). In that case, federal officers received a confidential tip that a particular car would be transporting bootleg liquor at a specified time and place. The officers identified and followed the car until the driver "turned into a garage a few feet back of his residence and within the curtilage." As the driver exited his car, an officer approached and stated that he had been informed that the car was carrying contraband. The driver acknowledged that there was liquor in the trunk, and the officer proceeded to open the trunk, find the liquor, arrest the driver, and seize both the car and the liquor. Although the officer did not have a search warrant, the Court upheld the officer's actions as reasonable.

Scher is inapposite. Whereas Collins' motorcycle was parked and unattended when Officer Rhodes intruded on the curtilage to search it, the officers in *Scher* first encountered the vehicle when it was being driven on public streets, approached the curtilage of the home only when the driver turned into the garage, and searched the vehicle only after the driver admitted that it contained contraband. *Scher* by no means established a general rule that the automobile exception permits officers to enter a home or its curtilage absent a warrant. The Court's brief analysis referenced *Carroll*, but only in the context of observing that, consistent with that case, the "officers properly could have stopped" and searched the car "just before [petitioner] entered the garage," a proposition the petitioner did "not seriously controvert." The Court then explained that the officers

did not lose their ability to stop and search the car when it entered "the open garage closely followed by the observing officer" because "[n]o search was made of the garage." It emphasized that "[e]xamination of the automobile accompanied an arrest, without objection and upon admission of probable guilt," and cited two search-incident-to-arrest cases. *Scher*'s reasoning thus was both case specific and imprecise, sounding in multiple doctrines, particularly, and perhaps most appropriately, hot pursuit. The decision is best regarded as a factbound one, and it certainly does not control this case.

Second, Virginia points to *Labron*, where the Court upheld under the automobile exception the warrantless search of an individual's pickup truck that was parked in the driveway of his father-in-law's farmhouse. But *Labron* provides scant support for Virginia's position. Unlike in this case, there was no indication that the individual who owned the truck in *Labron* had any Fourth Amendment interest in the farmhouse or its driveway, nor was there a determination that the driveway was curtilage.

B

Alternatively, Virginia urges the Court to adopt a more limited rule regarding the intersection of the automobile exception and the protection afforded to curtilage. Virginia would prefer that the Court draw a bright line and hold that the automobile exception does not permit warrantless entry into "the physical threshold of a house or a similar fixed, enclosed structure inside the curtilage like a garage." Requiring officers to make "case-by-case curtilage determinations," Virginia reasons, unnecessarily complicates matters and "raises the potential for confusion and . . . error."

The Court, though, has long been clear that curtilage is afforded constitutional protection. As a result, officers regularly assess whether an area is curtilage before executing a search. Virginia provides no reason to conclude that this practice has proved to be unadministrable, either generally or in this context. Moreover, creating a carveout to the general rule that curtilage receives Fourth Amendment protection, such that certain types of curtilage would receive Fourth Amendment protection only for some purposes but not for others, seems far more likely to create confusion than does uniform application of the Court's doctrine.

In addition, Virginia's proposed rule rests on a mistaken premise about the constitutional significance of visibility. The ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible. So long as it is curtilage, a parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully enclosed garage.

Finally, Virginia's proposed bright-line rule automatically would grant constitutional rights to those persons with the financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage. See *United States v. Ross* ("[T]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion").

IV

For the foregoing reasons, we conclude that the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein. We leave for resolution on remand whether Officer Rhodes' warrantless intrusion on the curtilage of Collins' house may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement. The judgment of the Supreme Court of Virginia is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

[Mr. Justice Thomas's concurring opinion is omitted.]

[Justice Thomas concurred on the ground that the Court correctly analyzed existing precedent, but that the Court's power to impose the exclusionary rule on the states should be reconsidered in an appropriate case.]

JUSTICE ALITO, dissenting.

The Fourth Amendment prohibits "unreasonable" searches. What the police did in this case was entirely reasonable. The Court's decision is not.

On the day in question, Officer David Rhodes was standing at the curb of a house where petitioner, Ryan Austin Collins, stayed a couple of nights a week with his girlfriend. From his vantage point on the street, Rhodes saw an object covered with a tarp in the driveway, just a car's length or two from the curb. It is undisputed that Rhodes had probable cause to believe that the object under the tarp was a motorcycle that had been involved a few months earlier in a dangerous highway chase, eluding the police at speeds in excess of 140 mph. Rhodes also had probable cause to believe that petitioner had been operating the motorcycle and that a search of the motorcycle would provide evidence that the motorcycle had been stolen.

If the motorcycle had been parked at the curb, instead of in the driveway, it is undisputed that Rhodes could have searched it without obtaining a warrant. Nearly a century ago, this Court held that officers with probable cause may search a motor vehicle without obtaining a warrant. . . . The principal rationale for this so-called automobile or motor-vehicle exception to the warrant requirement is the risk that the vehicle will be moved during the time it takes to obtain a warrant. *California v. Carney*. We have also observed that the owner of an automobile has a diminished expectation of privacy in its contents.

So why does the Court come to the conclusion that Officer Rhodes needed a warrant in this case? Because, in order to reach the motorcycle, he had to walk 30 feet or so up the driveway of the house rented by petitioner's girlfriend, and by doing that, Rhodes invaded the home's "curtilage." The Court does not dispute that the motorcycle, when parked in the driveway, was just as mobile as it would have been had it been parked at the curb. Nor does the Court claim that Officer Rhodes's short walk up the driveway did petitioner or his girlfriend any harm. Rhodes did not damage any property or observe anything along the way that he could not have seen from the street. But, the Court insists, Rhodes could not enter the driveway without a warrant, and therefore

his search of the motorcycle was unreasonable and the evidence obtained in that search must be suppressed.

An ordinary person of common sense would react to the Court's decision the way Mr. Bumble famously responded when told about a legal rule that did not comport with the reality of everyday life. If that is the law, he exclaimed, "the law is a ass—a idiot." C. Dickens, Oliver Twist 277 (1867).

The Fourth Amendment is neither an "ass" nor an "idiot." Its hallmark is reasonableness, and the Court's strikingly unreasonable decision is based on a misunderstanding of Fourth Amendment basics.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects." A "house," for Fourth Amendment purposes, is not limited to the structure in which a person lives, but by the same token, it also does not include all the real property surrounding a dwelling. Instead, a person's "house" encompasses the dwelling and a circumscribed area of surrounding land that is given the name "curtilage." *Oliver v. United States*, 466 U. S. 170, 180 (1984). Land outside the curtilage is called an "open field," and a search conducted in that area is not considered a search of a "house" and is therefore not governed by the Fourth Amendment. Ascertaining the boundaries of the curtilage thus determines only whether a search is governed by the Fourth Amendment. The concept plays no other role in Fourth Amendment analysis.

In this case, there is no dispute that the search of the motorcycle was governed by the Fourth Amendment, and therefore whether or not it occurred within the curtilage is not of any direct importance. The question before us is not whether there was a Fourth Amendment search but whether the search was reasonable. And the only possible argument as to why it might not be reasonable concerns the need for a warrant. For nearly a century, however, it has been well established that officers do not need a warrant to search a motor vehicle on public streets so long as they have probable cause. Thus, the issue here is whether there is any good reason why this same rule should not apply when the vehicle is parked in plain view in a driveway just a few feet from the street.

In considering that question, we should ask whether the reasons for the "automobile exception" are any less valid in this new situation. Is the vehicle parked in the driveway any less mobile? Are any greater privacy interests at stake? If the answer to those questions is "no," then the automobile exception should apply. And here, the answer to each question is emphatically "no." The tarp-covered motorcycle parked in the driveway could have been uncovered and ridden away in a matter of seconds. And Officer Rhodes's brief walk up the driveway impaired no real privacy interests.

In this case, the Court uses the curtilage concept in a way that is contrary to our decisions regarding other, exigency-based exceptions to the warrant requirement. Take, for example, the "emergency aid" exception. See *Brigham City v. Stuart*. When officers reasonably believe that a person inside a dwelling has urgent need of assistance, they may cross the curtilage and enter the building without first obtaining a warrant. The same is true when officers reasonably believe that

a person in a dwelling is destroying evidence. See *Kentucky v. King*. In both of those situations, we ask whether "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." We have not held that the need to cross the curtilage independently necessitates a warrant, and there is no good reason to apply a different rule here.

It is no answer to this argument that the emergency-aid and destruction-of-evidence exceptions require an inquiry into the practicality of obtaining a warrant in the particular circumstances of the case. Our precedents firmly establish that the motor-vehicle exception, unlike these other exceptions, "has no separate exigency requirement." It is settled that the mobility of a motor vehicle categorically obviates any need to engage in such a case-specific inquiry. Requiring such an inquiry here would mark a substantial alteration of settled Fourth Amendment law.

This does not mean, however, that a warrant is never needed when officers have probable cause to search a motor vehicle, no matter where the vehicle is located. While a case-specific inquiry regarding *exigency* would be inconsistent with the rationale of the motor-vehicle exception, a case-specific inquiry regarding *the degree of intrusion on privacy* is entirely appropriate when the motor vehicle to be searched is located on private property. After all, the ultimate inquiry under the Fourth Amendment is whether a search is reasonable, and that inquiry often turns on the degree of the intrusion on privacy. Thus, contrary to the opinion of the Court, an affirmance in this case would not mean that officers could perform a warrantless search if a motorcycle were located inside a house. In that situation, the intrusion on privacy would be far greater than in the present case, where the real effect, if any, is negligible.

I would affirm the decision dissent.

QUESTIONS AND NOTES

1. Why didn't the automobile exception apply here?
2. Is this case simply Coolidge redux? If so, why didn't the Court rely more heavily on it?
3. On remand is there any way that Virginia could win on exigent circumstances grounds?
4. Do you agree with Justice Alito's analogy to Dickens' Mr. Bumble analogy? Why? Why not?
5. Is the dispute between the Court and Alito essentially about where the added Fourth Amendment protection of the house ends? If so, who got it right?
6. Would it have mattered to Alito if the motorcycle was in a closed garage? How about a garage with the door open? How about a carport?

Insert p. 307 (after question 11)

BIRCHFIELD v. NORTH DAKOTA
195 S. Ct. 560

Opinion

JUSTICE ALITO delivered the opinion of the Court.

Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year. To fight this problem, all States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) that exceeds a specified level. But determining whether a driver's BAC is over the legal limit requires a test, and many drivers stopped on suspicion of drunk driving would not submit to testing if given the option. So every State also has long had what are termed "implied consent laws." These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State's drunk-driving laws.

In the past, the typical penalty for noncompliance was suspension or revocation of the motorist's license. The cases now before us involve laws that go beyond that and make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired. The question presented is whether such laws violate the Fourth Amendment's prohibition against unreasonable searches.

II

A

Petitioner Danny Birchfield accidentally drove his car off a North Dakota highway on October 10, 2013. A state trooper arrived and watched as Birchfield unsuccessfully tried to drive back out of the ditch in which his car was stuck. The trooper approached, caught a strong whiff of alcohol, and saw that Birchfield's eyes were bloodshot and watery. Birchfield spoke in slurred speech and struggled to stay steady on his feet. At the trooper's request, Birchfield agreed to take several field sobriety tests and performed poorly on each. He had trouble reciting sections of the alphabet and counting backwards in compliance with the trooper's directions.

Believing that Birchfield was intoxicated, the trooper informed him of his obligation under state law to agree to a BAC test. Birchfield consented to a roadside breath test. The device used for this sort of test often differs from the machines used for breath tests administered in a police station and is intended to provide a preliminary assessment of the driver's BAC. Because the reliability of these preliminary or screening breath tests varies, many jurisdictions do not permit their numerical results to be admitted in a drunk-driving trial as evidence of a driver's BAC. In North Dakota, results from this type of test are "used only for determining whether or not a

further test shall be given." In Birchfield's case, the screening test estimated that his BAC was 0.254%, more than three times the legal limit of 0.08%.

The state trooper arrested Birchfield for driving while impaired, gave the usual Miranda warnings, again advised him of his obligation under North Dakota law to undergo BAC testing, and informed him, as state law requires, that refusing to take the test would expose him to criminal penalties. In addition to mandatory addiction treatment, sentences range from a mandatory fine of $500 (for first-time offenders) to fines of at least $2,000 and imprisonment of at least one year and one day (for serial offenders). These criminal penalties apply to blood, breath, and urine test refusals alike.

Although faced with the prospect of prosecution under this law, Birchfield refused to let his blood be drawn. Just three months before, Birchfield had received a citation for driving under the influence, and he ultimately pleaded guilty to that offense. This time he also pleaded guilty—to a misdemeanor violation of the refusal statute—but his plea was a conditional one: while Birchfield admitted refusing the blood test, he argued that the Fourth Amendment prohibited criminalizing his refusal to submit to the test. The State District Court rejected this argument and imposed a sentence that accounted for his prior conviction. The sentence included 30 days in jail (20 of which were suspended and 10 of which had already been served), 1 year of unsupervised probation, $1,750 in fine and fees, and mandatory participation in a sobriety program and in a substance abuse evaluation.

On appeal, the North Dakota Supreme Court affirmed.

B

On August 5, 2012, Minnesota police received a report of a problem at a South St. Paul boat launch. Three apparently intoxicated men had gotten their truck stuck in the river while attempting to pull their boat out of the water. When police arrived, witnesses informed them that a man in underwear had been driving the truck. That man proved to be William Robert Bernard, Jr., petitioner in the second of these cases. Bernard admitted that he had been drinking but denied driving the truck (though he was holding its keys) and refused to perform any field sobriety tests. After noting that Bernard's breath smelled of alcohol and that his eyes were bloodshot and watery, officers arrested Bernard for driving while impaired.

Back at the police station, officers read Bernard Minnesota's implied consent advisory, which like North Dakota's informs motorists that it is a crime under state law to refuse to submit to a legally required BAC test. Aside from noncriminal penalties like license revocation, test refusal in Minnesota can result in criminal penalties ranging from no more than 90 days' imprisonment

and up to a $1,000 fine for a misdemeanor violation to seven years' imprisonment and a $14,000 fine for repeat offenders,

The officers asked Bernard to take a breath test. After he refused, prosecutors charged him with test refusal in the first degree because he had four prior impaired-driving convictions. First-degree refusal carries the highest maximum penalties and a mandatory minimum 3-year prison sentence.

The Minnesota District Court dismissed the charges on the ground that the warrantless breath test demanded of Bernard was not permitted under the Fourth Amendment. The Minnesota Court of Appeals reversed, and the State Supreme Court affirmed that judgment. Based on the longstanding doctrine that authorizes warrantless searches incident to a lawful arrest, the high court concluded that police did not need a warrant to insist on a test of Bernard's breath.

C

A police officer spotted our third petitioner, Steve Michael Beylund, driving the streets of Bowman, North Dakota, on the night of August 10, 2013. The officer saw Beylund try unsuccessfully to turn into a driveway. In the process, Beylund's car nearly hit a stop sign before coming to a stop still partly on the public road. The officer walked up to the car and saw that Beylund had an empty wine glass in the center console next to him. Noticing that Beylund also smelled of alcohol, the officer asked him to step out of the car. As Beylund did so, he struggled to keep his balance.

The officer arrested Beylund for driving while impaired and took him to a nearby hospital. There he read Beylund North Dakota's implied consent advisory, informing him that test refusal in these circumstances is itself a crime. Unlike the other two petitioners in these cases, Beylund agreed to have his blood drawn and analyzed. A nurse took a blood sample, which revealed a blood alcohol concentration of 0.250%, more than three times the legal limit.

Given the test results, Beylund's driver's license was suspended for two years after an administrative hearing. Beylund appealed the hearing officer's decision to a North Dakota District Court, principally arguing that his consent to the blood test was coerced by the officer's warning that refusing to consent would itself be a crime. The District Court rejected this argument, and Beylund again appealed.

The North Dakota Supreme Court affirmed. In response to Beylund's argument that his consent was insufficiently voluntary because of the announced criminal penalties for refusal, the court relied on the fact that its then-recent Birchfield decision had upheld the constitutionality of those penalties.

III

As our summary of the facts and proceedings in these three cases reveals, the cases differ in some respects. Petitioners Birchfield and Beylund were told that they were obligated to submit to a blood test, whereas petitioner Bernard was informed that a breath test was required. Birchfield and Bernard each refused to undergo a test and was convicted of a crime for his refusal. Beylund complied with the demand for a blood sample, and his license was then suspended in an administrative proceeding based on test results that revealed a very high blood alcohol level.

Despite these differences, success for all three petitioners depends on the proposition that the criminal law ordinarily may not compel a motorist to submit to the taking of a blood sample or to a breath test unless a warrant authorizing such testing is issued by a magistrate. If, on the other hand, such warrantless searches comport with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant. And by the same token, if such warrantless searches are constitutional, there is no obstacle under federal law to the admission of the results that they yield in either a criminal prosecution or a civil or administrative proceeding. We therefore begin by considering whether the searches demanded in these cases were consistent with the Fourth Amendment.

IV

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."

The Amendment thus prohibits "unreasonable searches," and our cases establish that the taking of a blood sample or the administration of a breath test is a search. The question, then, is whether the warrantless searches at issue here were reasonable.

"[T]he text of the Fourth Amendment does not specify when a search warrant must be obtained." But "this Court has inferred that a warrant must [usually] be secured." This usual requirement, however, is subject to a number of exceptions.

We have previously had occasion to examine whether one such exception—for "exigent circumstances"—applies in drunk-driving investigations. The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant. It permits, for instance, the warrantless entry of private property when there is a need to provide urgent aid to those inside, when police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence.

In Schmerber v. California, we held that drunk driving may present such an exigency. There, an officer directed hospital personnel to take a blood sample from a driver who was receiving treatment for car crash injuries. The Court concluded that the officer "might reasonably have believed that he was confronted with an emergency" that left no time to seek a warrant because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops." On the specific facts of that case, where time had already been lost taking the driver to the hospital and investigating the accident, the Court found no Fourth Amendment violation even though the warrantless blood draw took place over the driver's objection.

More recently, though, we have held that the natural dissipation of alcohol from the bloodstream does not always constitute an exigency justifying the warrantless taking of a blood sample. That was the holding of Missouri v. McNeely, 569 U. S. ___, where the State of Missouri was seeking a per se rule that "whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent." We disagreed, emphasizing that Schmerber had adopted a case-specific analysis depending on "all of the facts and circumstances of the particular case." We refused to "depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State."

While emphasizing that the exigent-circumstances exception must be applied on a case-by-case basis, the McNeely Court noted that other exceptions to the warrant requirement "apply categorically" rather than in a "case-specific" fashion. One of these, as the McNeely opinion recognized, is the long-established rule that a warrantless search may be conducted incident to a lawful arrest. But the Court pointedly did not address any potential justification for warrantless testing of drunk-driving suspects except for the exception "at issue in th[e] case," namely, the exception for exigent circumstances.

In the three cases now before us, the drivers were searched or told that they were required to submit to a search after being placed under arrest for drunk driving. We therefore consider how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests.

V

A

The search-incident-to-arrest doctrine has an ancient pedigree. Well before the Nation's founding, it was recognized that officers carrying out a lawful arrest had the authority to make a warrantless search of the arrestee's person. An 18th-century manual for justices of the peace provides a representative picture of usual practice shortly before the Fourth Amendment's adoption:

"[A] thorough search of the felon is of the utmost consequence to your own safety, and the benefit of the public, as by this means he will be deprived of instruments of mischief, and evidence may probably be found on him sufficient to convict him, of which, if he has either time or opportunity allowed him, he will besure [sic] to find some means to get rid of." The Conductor Generalis 117 (J. Parker ed. 1788) (reprinting S. Welch, Observations on the Office of Constable 19 (1754)).

One Fourth Amendment historian has observed that, prior to American independence, "[a]nyone arrested could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well." W. Cuddihy, The Fourth Amendment: Origins and Original Meaning: 602-1791, p. 420 (2009).

No historical evidence suggests that the Fourth Amendment altered the permissible bounds of arrestee searches. On the contrary, legal scholars agree that "the legitimacy of body searches as an adjunct to the arrest process had been thoroughly established in colonial times, so much so that their constitutionality in 1789 can not be doubted."

Few reported cases addressed the legality of such searches before the 19th century, apparently because the point was not much contested. In the 19th century, the subject came up for discussion more often, but court decisions and treatises alike confirmed the searches' broad acceptance.

When this Court first addressed the question, we too confirmed (albeit in dicta) "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 evidence of crime." The exception quickly became a fixture in our Fourth Amendment case law. But in the decades that followed, we grappled repeatedly with the question of the authority of arresting officers to search the area surrounding the arrestee, and our decisions reached results that were not easy to reconcile.

We attempted to clarify the law regarding searches incident to arrest in Chimel v. California, a case in which officers had searched the arrestee's entire three-bedroom house. Chimel endorsed a general rule that arresting officers, in order to prevent the arrestee from obtaining a weapon or destroying evidence, could search both "the person arrested" and "the area 'within his immediate control.'" "[N]o comparable justification," we said, supported "routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself."

Four years later, in United States v. Robinson, we elaborated on Chimel's meaning. We noted that the search-incident-to-arrest rule actually comprises "two distinct propositions": "The first is that a search may be made of the person of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee." After a thorough

review of the relevant common law history, we repudiated "case-by-case adjudication" of the question whether an arresting officer had the authority to carry out a search of the arrestee's person. The permissibility of such searches, we held, does not depend on whether a search of a particular arrestee is likely to protect officer safety or evidence: "The 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." Instead, the mere "fact of the lawful arrest" justifies "a full search of the person." In Robinson itself, that meant that police had acted permissibly in searching inside a package of cigarettes found on the man they arrested.

Our decision two Terms ago in Riley v. California, reaffirmed "Robinson's categorical rule" and explained how the rule should be applied in situations that could not have been envisioned when the Fourth Amendment was adopted. Riley concerned a search of data contained in the memory of a modern cell phone. "Absent more precise guidance from the founding era," the Court wrote, "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.'"

Blood and breath tests to measure blood alcohol concentration are not as new as searches of cell phones, but here, as in Riley, the founding era does not provide any definitive guidance as to whether they should be allowed incident to arrest.[3] Lacking such guidance, we engage in the same mode of analysis as in Riley: we examine "the degree to which [they] intrud[e] upon an individual's privacy and . . . the degree to which [they are] needed for the promotion of legitimate governmental interests.'"

B

We begin by considering the impact of breath and blood tests on individual privacy interests, and we will discuss each type of test in turn.

1

Years ago we said that breath tests do not "implicat[e] significant privacy concerns." Skinner. That remains so today.

First, the physical intrusion is almost negligible. Breath tests "do not require piercing the skin" and entail "a minimum of inconvenience." As Minnesota describes its version of the breath test,

[3] At most, there may be evidence that an arrestee's mouth could be searched in appropriate circumstances at the time of the founding. See W. Cuddihy, Fourth Amendment: Origins and Original Meaning: 602-1791, p. 420 (2009). Still, searching a mouth for weapons or contraband is not the same as requiring an arrestee to give up breath or blood.

the process requires the arrestee to blow continuously for 4 to 15 seconds into a straw-like mouthpiece that is connected by a tube to the test machine. Independent sources describe other breath test devices in essentially the same terms. The effort is no more demanding than blowing up a party balloon.

Petitioner Bernard argues, however, that the process is nevertheless a significant intrusion because the arrestee must insert the mouthpiece of the machine into his or her mouth. But there is nothing painful or strange about this requirement. The use of a straw to drink beverages is a common practice and one to which few object

Nor, contrary to Bernard, is the test a significant intrusion because it "does not capture an ordinary exhalation of the kind that routinely is exposed to the public" but instead "'requires a sample of "alveolar" (deep lung) air.'" Humans have never been known to assert a possessory interest in or any emotional attachment to any of the air in their lungs. The air that humans exhale is not part of their bodies. Exhalation is a natural process—indeed, one that is necessary for life. Humans cannot hold their breath for more than a few minutes, and all the air that is breathed into a breath analyzing machine, including deep lung air, sooner or later would be exhaled even without the test.

In prior cases, we have upheld warrantless searches involving physical intrusions that were at least as significant as that entailed in the administration of a breath test. Just recently we described the process of collecting a DNA sample by rubbing a swab on the inside of a person's cheek as a "negligible" intrusion. Maryland v. King. We have also upheld scraping underneath a suspect's fingernails to find evidence of a crime, calling that a "very limited intrusion." A breath test is no more intrusive than either of these procedures.

Second, breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath. In this respect, they contrast sharply with the sample of cells collected by the swab in Maryland v. King. Although the DNA obtained under the law at issue in that case could lawfully be used only for identification purposes, the process put into the possession +of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained. A breath test, by contrast, results in a BAC reading on a machine, nothing more. No sample of anything is left in the possession of the police.

Finally, participation in a breath test is not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest. The act of blowing into a straw is not inherently embarrassing, nor are evidentiary breath tests administered in a manner that causes embarrassment. Again, such tests are normally administered in private at a police station, in a patrol car, or in a mobile testing facility, out of public view. Moreover, once placed under arrest, the individual's expectation of privacy is necessarily diminished.

For all these reasons, we reiterate what we said in Skinner: A breath test does not "implicat[e] significant privacy concerns."

2

Blood tests are a different matter. They "require piercing the skin" and extract a part of the subject's body. And while humans exhale air from their lungs many times per minute, humans do not continually shed blood. It is true, of course, that people voluntarily submit to the taking of blood samples as part of a physical examination, and the process involves little pain or risk. Nevertheless, for many, the process is not one they relish. It is significantly more intrusive than blowing into a tube. Perhaps that is why many States' implied consent laws, including Minnesota's, specifically prescribe that breath tests be administered in the usual drunk-driving case instead of blood tests or give motorists a measure of choice over which test to take.

In addition, a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.

C

Having assessed the impact of breath and blood testing on privacy interests, we now look to the States' asserted need to obtain BAC readings for persons arrested for drunk driving.

1

The States and the Federal Government have a "paramount interest . . . in preserving the safety of . . . public highways." Although the number of deaths and injuries caused by motor vehicle accidents has declined over the years, the statistics are still staggering.

Alcohol consumption is a leading cause of traffic fatalities and injuries. During the past decade, annual fatalities in drunk-driving accidents ranged from 13,582 deaths in 2005 to 9,865 deaths in 2011.

JUSTICE SOTOMAYOR's partial dissent suggests that States' interests in fighting drunk driving are satisfied once suspected drunk drivers are arrested, since such arrests take intoxicated drivers off the roads where they might do harm. But of course States are not solely concerned with neutralizing the threat posed by a drunk driver who has already gotten behind the wheel. They also have a compelling interest in creating effective "deterrent[s] to drunken driving" so such individuals make responsible decisions and do not become a threat to others in the first place.

The laws at issue in the present cases—which make it a crime to refuse to submit to a BAC test—are designed to provide an incentive to cooperate in such cases, and we conclude that they serve a very important function.

2

Petitioners and JUSTICE SOTOMAYOR contend that the States and the Federal Government could combat drunk driving in other ways that do not have the same impact on personal privacy. Their arguments are unconvincing.

The chief argument on this score is that an officer making an arrest for drunk driving should not be allowed to administer a BAC test unless the officer procures a search warrant or could not do so in time to obtain usable test results. The governmental interest in warrantless breath testing, JUSTICE SOTOMAYOR claims, turns on "'whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.'"

This argument contravenes our decisions holding that the legality of a search incident to arrest must be judged on the basis of categorical rules. In Robinson, for example, no one claimed that the object of the search, a package of cigarettes, presented any danger to the arresting officer or was at risk of being destroyed in the time that it would have taken to secure a search warrant. The Court nevertheless upheld the constitutionality of a warrantless search of the package, concluding that a categorical rule was needed to give police adequate guidance: "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." 414 U. S., at 235, 94 S. Ct. 467, 38 L. Ed. 2d 427; cf. Riley, ("If 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"

It is not surprising, then, that the language JUSTICE SOTOMAYOR quotes to justify her approach comes not from our search-incident-to-arrest case law, but a case that addressed routine home searches for possible housing code violations.

In advocating the case-by-case approach, petitioners and JUSTICE SOTOMAYOR cite language in our McNeely opinion. But McNeely concerned an exception to the warrant requirement—for exigent circumstances—that always requires case-by-case determinations. That was the basis for our decision in that case. Although JUSTICE SOTOMAYOR contends that the categorical search-incident-to-arrest doctrine and case-by-case exigent circumstances doctrine are actually parts of a single framework, in McNeely the Court was careful to note that the decision did not address any other exceptions to the warrant requirement.

Petitioners and JUSTICE SOTOMAYOR next suggest that requiring a warrant for BAC testing in every case in which a motorist is arrested for drunk driving would not impose any great burden on the police or the courts. But of course the same argument could be made about searching through objects found on the arrestee's possession, which our cases permit even in the absence of a warrant. What about the cigarette package in Robinson? What if a motorist arrested for drunk driving has a flask in his pocket? What if a motorist arrested for driving while under the influence of marijuana has what appears to be a marijuana cigarette on his person? What about an unmarked bottle of pills?

If a search warrant were required for every search incident to arrest that does not involve exigent circumstances, the courts would be swamped. And even if we arbitrarily singled out BAC tests incident to arrest for this special treatment, as it appears the dissent would do, the impact on the courts would be considerable. The number of arrests every year for driving under the influence is enormous—more than 1.1 million in 2014. Particularly in sparsely populated areas, it would be no small task for courts to field a large new influx of warrant applications that could come on any day of the year and at any hour. In many jurisdictions, judicial officers have the authority to issue warrants only within their own districts, and in rural areas, some districts may have only a small number of judicial officers.

North Dakota, for instance, has only 51 state district judges spread across eight judicial districts. Those judges are assisted by 31 magistrates, and there are no magistrates in 20 of the State's 53 counties. At any given location in the State, then, relatively few state officials have authority to issue search warrants.[6] Yet the State, with a population of roughly 740,000, sees nearly 7,000 drunk-driving arrests each year. With a small number of judicial officers authorized to issue warrants in some parts of the State, the burden of fielding BAC warrant applications 24 hours per day, 365 days of the year would not be the light burden that petitioners and JUSTICE SOTOMAYOR suggest.

In light of this burden and our prior search-incident-to-arrest precedents, petitioners would at a minimum have to show some special need for warrants for BAC testing. It is therefore appropriate to consider the benefits that such applications would provide. Search warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought.

How well would these functions be performed by the warrant applications that petitioners propose? In order to persuade a magistrate that there is probable cause for a search warrant, the

[6] North Dakota Supreme Court justices apparently also have authority to issue warrants statewide. See ND Op. Atty. Gen. 99-L-132, p. 2 (Dec. 30, 1999). But we highly doubt that they regularly handle search-warrant applications, much less during graveyard shifts.

officer would typically recite the same facts that led the officer to find that there was probable cause for arrest, namely, that there is probable cause to believe that a BAC test will reveal that the motorist's blood alcohol level is over the limit. As these three cases suggest, see Part II, supra, the facts that establish probable cause are largely the same from one drunk-driving stop to the next and consist largely of the officer's own characterization of his or her observations—for example, that there was a strong odor of alcohol, that the motorist wobbled when attempting to stand, that the motorist paused when reciting the alphabet or counting backwards, and so on. A magistrate would be in a poor position to challenge such characterizations.

As for the second function served by search warrants—delineating the scope of a search—the warrants in question here would not serve that function at all. In every case the scope of the warrant would simply be a BAC test of the arrestee. ("[I]n light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate"). For these reasons, requiring the police to obtain a warrant in every case would impose a substantial burden but no commensurate benefit.

Petitioners advance other alternatives to warrantless BAC tests incident to arrest, but these are poor substitutes. Relying on a recent NHTSA report, petitioner Birchfield identifies 19 strategies that he claims would be at least as effective as implied consent laws, including high-visibility sobriety checkpoints, installing ignition interlocks on repeat offenders' cars that would disable their operation when the driver's breath reveals a sufficiently high alcohol concentration, and alcohol treatment programs. But Birchfield ignores the fact that the cited report describes many of these measures, such as checkpoints, as significantly more costly than test refusal penalties. Moreover, the same NHTSA report, in line with the agency's guidance elsewhere, stresses that BAC test refusal penalties would be more effective if the consequences for refusal were made more severe, including through the addition of criminal penalties.

3

Petitioner Bernard objects to the whole idea of analyzing breath and blood tests as searches incident to arrest. That doctrine, he argues, does not protect the sort of governmental interests that warrantless breath and blood tests serve. On his reading, this Court's precedents permit a search of an arrestee solely to prevent the arrestee from obtaining a weapon or taking steps to destroy evidence. In Chimel, for example, the Court derived its limitation for the scope of the permitted search—"the area into which an arrestee might reach"—from the principle that officers may reasonably search "the area from within which he might gain possession of a weapon or destructible evidence." Stopping an arrestee from destroying evidence, Bernard argues, is critically different from preventing the loss of blood alcohol evidence as the result of the body's metabolism of alcohol, a natural process over which the arrestee has little control.

The distinction that Bernard draws between an arrestee's active destruction of evidence and the loss of evidence due to a natural process makes little sense. In both situations the State is justifiably concerned that evidence may be lost, and Bernard does not explain why the cause of the loss should be dispositive. And in fact many of this Court's post-Chimel cases have recognized the State's concern, not just in avoiding an arrestee's intentional destruction of evidence, but in "evidence preservation" or avoiding "the loss of evidence" more generally. Riley. This concern for preserving evidence or preventing its loss readily encompasses the inevitable metabolization of alcohol in the blood.

Nor is there any reason to suspect that Chimel's use of the word "destruction" was a deliberate decision to rule out evidence loss that is mostly beyond the arrestee's control. The case did not involve any evidence that was subject to dissipation through natural processes, and there is no sign in the opinion that such a situation was on the Court's mind.

Bernard attempts to derive more concrete support for his position from Schmerber. In that case, the Court stated that the "destruction of evidence under the direct control of the accused" is a danger that is not present "with respect to searches involving intrusions beyond the body's surface." Bernard reads this to mean that an arrestee cannot be required "to take a chemical test" incident to arrest, but by using the term "chemical test," Bernard obscures the fact that Schmerber's passage was addressed to the type of test at issue in that case, namely a blood test. The Court described blood tests as "searches involving intrusions beyond the body's surface," and it saw these searches as implicating important "interests in human dignity and privacy." Although the Court appreciated as well that blood tests "involv[e] virtually no risk, trauma, or pain," its point was that such searches still impinge on far more sensitive interests than the typical search of the person of an arrestee. But breath tests, unlike blood tests, "are not invasive of the body," and therefore the Court's comments in Schmerber are inapposite when it comes to the type of test Bernard was asked to take. Schmerber did not involve a breath test, and on the question of breath tests' legality, Schmerber said nothing.

Finally, Bernard supports his distinction using a passage from the McNeely opinion, which distinguishes between "easily disposable evidence" over "which the suspect has control" and evidence, like blood alcohol evidence, that is lost through a natural process "in a gradual and relatively predictable manner." Bernard fails to note the issue that this paragraph addressed. McNeely concerned only one exception to the usual warrant requirement, the exception for exigent circumstances, and as previously discussed, that exception has always been understood to involve an evaluation of the particular facts of each case. Here, by contrast, we are concerned with the search-incident-to-arrest exception, and as we made clear in Robinson and repeated in McNeely itself, this authority is categorical. It does not depend on an evaluation of the threat to officer safety or the threat of evidence loss in a particular case.[7]

Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for

drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.

We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

Neither respondents nor their amici dispute the effectiveness of breath tests in measuring BAC. Breath tests have been in common use for many years. Their results are admissible in court and are widely credited by juries, and respondents do not dispute their accuracy or utility. What, then, is the justification for warrantless blood tests?

One advantage of blood tests is their ability to detect not just alcohol but also other substances that can impair a driver's ability to operate a car safely. A breath test cannot do this, but police have other measures at their disposal when they have reason to believe that a motorist may be under the influence of some other substance (for example, if a breath test indicates that a clearly impaired motorist has little if any alcohol in his blood). Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not. See McNeely.

A blood test also requires less driver participation than a breath test. In order for a technician to take a blood sample, all that is needed is for the subject to remain still, either voluntarily or by being immobilized. Thus, it is possible to extract a blood sample from a subject who forcibly resists, but many States reasonably prefer not to take this step. North Dakota, for example, tells us that it generally opposes this practice because of the risk of dangerous altercations between police officers and arrestees in rural areas where the arresting officer may not have backup. Under current North Dakota law, only in cases involving an accident that results in death or serious injury may blood be taken from arrestees who resist.

It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

A breath test may also be ineffective if an arrestee deliberately attempts to prevent an accurate reading by failing to blow into the tube for the requisite length of time or with the necessary force. But courts have held that such conduct qualifies as a refusal to undergo testing, and it may be prosecuted as such. And again, a warrant for a blood test may be sought.

Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.[8]

VI

Having concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them. It is well established that a search is reasonable when the subject consents. Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.

It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

Respondents and their amici all but concede this point. North Dakota emphasizes that its law makes refusal a misdemeanor and suggests that laws punishing refusal more severely would present a different issue. Borrowing from our Fifth Amendment jurisprudence, the United States suggests that motorists could be deemed to have consented to only those conditions that are "reasonable" in that they have a "nexus" to the privilege of driving and entail penalties that are proportional to severity of the violation. But in the Fourth Amendment setting, this standard does not differ in substance from the one that we apply, since reasonableness is always the touchstone of Fourth Amendment analysis. And applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.

VII

Our remaining task is to apply our legal conclusions to the three cases before us.

[8] JUSTICE THOMAS partly dissents from this holding, calling any distinction between breath and blood tests "an arbitrary line in the sand." Adhering to a position that the Court rejected in *McNeely*, JUSTICE THOMAS would hold that both breath and blood tests are constitutional with or without a warrant because of the natural metabolization of alcohol in the bloodstream. Yet JUSTICE THOMAS does not dispute our conclusions that blood draws are more invasive than breath tests, that breath tests generally serve state interests in combating drunk driving as effectively as blood tests, and that our decision in *Riley* calls for a balancing of individual privacy interests and legitimate state interests to determine the reasonableness of the category of warrantless search that is at issue. Contrary to JUSTICE THOMAS's contention, this balancing does not leave law enforcement officers or lower courts with unpredictable rules, because it is categorical and *not* "case-by-case," *post*, at 3. Indeed, today's decision provides very clear guidance that the Fourth Amendment allows warrantless breath tests, but as a general rule does not allow warrantless blood draws, incident to a lawful drunk-driving arrest.

Petitioner Birchfield was criminally prosecuted for refusing a warrantless blood draw, and therefore the search he refused cannot be justified as a search incident to his arrest or on the basis of implied consent. There is no indication in the record or briefing that a breath test would have failed to satisfy the State's interests in acquiring evidence to enforce its drunk-driving laws against Birchfield. And North Dakota has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search. Unable to see any other basis on which to justify a warrantless test of Birchfield's blood, we conclude that Birchfield was threatened with an unlawful search and that the judgment affirming his conviction must be reversed.

Bernard, on the other hand, was criminally prosecuted for refusing a warrantless breath test. That test was a permissible search incident to Bernard's arrest for drunk driving, an arrest whose legality Bernard has not contested. Accordingly, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had no right to refuse it.

Unlike the other petitioners, Beylund was not prosecuted for refusing a test. He submitted to a blood test after police told him that the law required his submission, and his license was then suspended and he was fined in an administrative proceeding. The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests. Because voluntariness of consent to a search must be "determined from the totality of all the circumstances," we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory.[9]

We accordingly reverse the judgment of the North Dakota Supreme Court and remand the case for further proceedings not inconsistent with this opinion. We affirm the judgment of the Minnesota Supreme Court in Bernard. And we vacate the judgment of the North Dakota Supreme Court in Birchfield and remand the case for further proceedings not inconsistent with this opinion.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, concurring in part and dissenting in part.

I join the majority's disposition of Birchfield, and Beylund, in which the Court holds that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement does not permit warrantless blood tests. But I dissent from the Court's disposition of Bernard v. Minnesota, in which the Court holds that the same exception permits warrantless breath tests. Because no governmental interest categorically makes it impractical for an officer to obtain a

[9] If the court on remand finds that Beylund did not voluntarily consent, it will have to address whether the evidence obtained in the search must be suppressed when the search was carried out pursuant to a state statute.

warrant before measuring a driver's alcohol level, the Fourth Amendment prohibits such searches without a warrant, unless exigent circumstances exist in a particular case.[1]

I

A

As the Court recognizes, the proper disposition of this case turns on whether the Fourth Amendment guarantees a right not to be subjected to a warrantless breath test after being arrested. 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."

The "ultimate touchstone of the Fourth Amendment is 'reasonableness.'" A citizen's Fourth Amendment right to be free from "unreasonable searches" does not disappear upon arrest. Police officers may want to conduct a range of searches after placing a person under arrest. They may want to pat the arrestee down, search her pockets and purse, peek inside her wallet, scroll through her cellphone, examine her car or dwelling, swab her cheeks, or take blood and breath samples to determine her level of intoxication. But an officer is not authorized to conduct all of these searches simply because he has arrested someone. Each search must be separately analyzed to determine its reasonableness.

Both before and after a person has been arrested, warrants are the usual safeguard against unreasonable searches because they guarantee that the search is not a "random or arbitrary ac[t] of government agents," but is instead "narrowly limited in its objectives and scope." Warrants provide the "detached scrutiny of a neutral magistrate, and thus ensur[e] an objective determination whether an intrusion is justified." And they give life to our instruction that the Fourth Amendment "is designed to prevent, not simply to redress, unlawful police action." Steagald

Because securing a warrant before a search is the rule of reasonableness, the warrant requirement is "subject only to a few specifically established and well-delineated exceptions." To determine whether to "exempt a given type of search from the warrant requirement," this Court traditionally "assess[es], 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." Riley In weighing "whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether

[1] Because I see no justification for warrantless blood or warrantless breath tests, I also dissent from the parts of the majority opinion that justify its conclusions with respect to blood tests on the availability of warrantless breath tests.

the public interest justifies the type of search in question," but, more specifically, "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."

Applying these principles in past cases, this Court has recognized two kinds of exceptions to the warrant requirement that are implicated here: (1) case-by-case exceptions, where the particularities of an individual case justify a warrantless search in that instance, but not others; and (2) categorical exceptions, where the commonalities among a class of cases justify dispensing with the warrant requirement for all of those cases, regardless of their individual circumstances.

Relevant here, the Court allows warrantless searches on a case-by-case basis where the "exigencies" of the particular case "make the needs of law enforcement so compelling that a warrantless search is objectively reasonable" in that instance. The defining feature of the exigent circumstances exception is that the need for the search becomes clear only after "all of the facts and circumstances of the particular case" have been considered in light of the "totality of the circumstances." Exigencies can include officers' "need to provide emergency assistance to an occupant of a home, engage in 'hot pursuit' of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause."

Exigencies can also arise in efforts to measure a driver's blood alcohol level. In Schmerber v. California, for instance, a man sustained injuries in a car accident and was transported to the hospital. While there, a police officer arrested him for drunk driving and ordered a warrantless blood test to measure his blood alcohol content. This Court noted that although the warrant requirement generally applies to postarrest blood tests, a warrantless search was justified in that case because several hours had passed while the police investigated the scene of the crime and Schmerber was taken to the hospital, precluding a timely securing of a warrant.

This Court also recognizes some forms of searches in which the governmental interest will "categorically" outweigh the person's privacy interest in virtually any circumstance in which the search is conducted. Relevant here is the search-incident-to-arrest exception. That exception allows officers to conduct a limited postarrest search without a warrant to combat risks that could arise in any arrest situation before a warrant could be obtained: "'to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape'" and to "'seize any evidence on the arrestee's person in order to prevent its concealment or destruction.'" Riley, (quoting Chimel). That rule applies "categorical[ly]" to all arrests because the need for the warrantless search arises from the very "fact of the lawful arrest," not from the reason for arrest or the circumstances surrounding it. United States v. Robinson.

Given these different kinds of exceptions to the warrant requirement, if some form of exception is necessary for a particular kind of postarrest search, the next step is to ask whether the governmental need to conduct a warrantless search arises from "threats" that "'lurk in all custodial arrests'" and therefore "justif[ies] dispensing with the warrant requirement across the

board," or, instead, whether the threats "may be implicated in a particular way in a particular case" and are therefore "better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." Riley.

To condense these doctrinal considerations into a straightforward rule, the question is whether, in light of the individual's privacy, a "legitimate governmental interest" justifies warrantless searches—and, if so, whether that governmental interest is adequately addressed by a case-by-case exception or requires by its nature a categorical exception to the warrant requirement.

B

This Court has twice applied this framework in recent terms. Riley v. California, addressed whether, after placing a person under arrest, a police officer may conduct a warrantless search of his cell phone data. California asked for a categorical rule, but the Court rejected that request, concluding that cell phones do not present the generic arrest-related harms that have long justified the search-incident-to-arrest exception. The Court found that phone data posed neither a danger to officer safety nor a risk of evidence destruction once the physical phone was secured. The Court nevertheless acknowledged that the exigent circumstances exception might be available in a "now or never situation." It emphasized that "[i]n 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" the rare needs that would require an on-the-spot search.

Similarly, Missouri v. McNeely applied this doctrinal analysis to a case involving police efforts to measure drivers' blood alcohol levels. In that case, Missouri argued that the natural dissipation of alcohol in a person's blood justified a per se exigent circumstances exception to the warrant requirement—in essence, a new kind of categorical exception. The Court recognized that exigencies could exist, like in Schmerber, that would justify warrantless searches. But it also noted that in many drunk driving situations, no such exigencies exist. Where, for instance, "the warrant process will not significantly increase the delay" in testing "because an officer can take steps to secure a warrant" while the subject is being prepared for the test, there is "no plausible justification for an exception to the warrant requirement." The Court thus found it unnecessary to "depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State."[3]

[3] The Court quibbles with our unremarkable statement that the categorical search-incident-to-arrest doctrine and the case-by-case exigent circumstances doctrine are part of the same framework by arguing that a footnote in *McNeely* was "careful to note that the decision did not address any other exceptions to the warrant requirement." That footnote explains the difference between categorical exceptions and case-by-case exceptions generally. It does nothing to suggest that the two forms of exceptions should not be considered together when analyzing whether it is reasonable to exempt categorically a particular form of search from the Fourth Amendment's warrant requirement.

It should go without saying that any analysis of whether to apply a Fourth Amendment warrant exception must necessarily be comparative. If a narrower exception to the warrant requirement adequately satisfies the governmental needs asserted, a more sweeping exception will be overbroad and could lead to unnecessary and "unreasonable searches" under the Fourth Amendment.

II

The States do not challenge McNeely's holding that a categorical exigency exception is not necessary to accommodate the governmental interests associated with the dissipation of blood alcohol after drunk-driving arrests. They instead seek to exempt breath tests from the warrant requirement categorically under the search-incident-to-arrest doctrine. The majority agrees. Both are wrong.

As discussed above, regardless of the exception a State requests, the Court's traditional framework asks whether, in light of the privacy interest at stake, a legitimate governmental interest ever requires conducting breath searches without a warrant—and, if so, whether that governmental interest is adequately addressed by a case-by-case exception or requires a categorical exception to the warrant requirement. That framework directs the conclusion that a categorical search-incident-to-arrest rule for breath tests is unnecessary to address the States' governmental interests in combating drunk driving.

A

Beginning with the governmental interests, there can be no dispute that States must have tools to combat drunk driving. But neither the States nor the Court has demonstrated that "obtaining a warrant" in cases not already covered by the exigent circumstances exception "is likely to frustrate the governmental purpose[s] behind [this] search."

First, the Court cites the governmental interest in protecting the public from drunk drivers. But it is critical to note that once a person is stopped for drunk driving and arrested, he no longer poses an immediate threat to the public. Because the person is already in custody prior to the administration of the breath test, there can be no serious claim that the time it takes to obtain a warrant would increase the danger that drunk driver poses to fellow citizens.

Second, the Court cites the governmental interest in preventing the destruction or loss of evidence. But neither the Court nor the States identify any practical reasons why obtaining a warrant after making an arrest and before conducting a breath test compromises the quality of the evidence obtained. To the contrary, the delays inherent in administering reliable breath tests generally provide ample time to obtain a warrant.

There is a common misconception that breath tests are conducted roadside, immediately after a driver is arrested. While some preliminary testing is conducted roadside, reliability concerns with roadside tests confine their use in most circumstances to establishing probable cause for an

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Contrary to the Court's suggestion that "no authority" supports this proposition, our cases have often deployed this commonsense comparative check. See *Riley* v. *California*, (rejecting the application of the search-incident-to-arrest exception because the exigency exception is a "more targeted wa[y] to address [the government's] concerns").

arrest. The standard evidentiary breath test is conducted after a motorist is arrested and transported to a police station, governmental building, or mobile testing facility where officers can access reliable, evidence-grade breath testing machinery. Transporting the motorist to the equipment site is not the only potential delay in the process, however. Officers must also observe the subject for 15 to 20 minutes to ensure that "residual mouth alcohol," which can inflate results and expose the test to an evidentiary challenge at trial, has dissipated and that the subject has not inserted any food or drink into his mouth. In many States, including Minnesota, officers must then give the motorist a window of time within which to contact an attorney before administering a test. Finally, if a breath test machine is not already active, the police officer must set it up. North Dakota's Intoxilyzer 8000 machine can take as long as 30 minutes to "warm-up."

Because of these necessary steps, the standard breath test is conducted well after an arrest is effectuated. The Minnesota Court of Appeals has explained that nearly all breath tests "involve a time lag of 45 minutes to two hours."

During this built-in window, police can seek warrants. That is particularly true in light of "advances" in technology that now permit "the more expeditious processing of warrant applications." Moreover, counsel for North Dakota explained at oral argument that the State uses a typical "on-call" system in which some judges are available even during off-duty times.[9]

Where "an officer can . . . secure a warrant while" the motorist is being transported and the test is being prepared, this Court has said that "there would be no plausible justification for an exception to the warrant requirement." Neither the Court nor the States provide any evidence to suggest that, in the normal course of affairs, obtaining a warrant and conducting a breath test will exceed the allotted 2-hour window.

Third, the Court and the States cite a governmental interest in minimizing the costs of gathering evidence of drunk driving. But neither has demonstrated that requiring police to obtain warrants for breath tests would impose a sufficiently significant burden on state resources to justify the elimination of the Fourth Amendment's warrant requirement. The Court notes that North Dakota has 82 judges and magistrate judges who are authorized to issue warrants. Because North Dakota has roughly 7,000 drunk-driving arrests annually, the Court concludes that if police were required to obtain warrants "for every search incident to arrest that does not involve exigent circumstances, the courts would be swamped." That conclusion relies on inflated numbers and unsupported inferences.

Assuming that North Dakota police officers do not obtain warrants for any drunk-driving arrests today, and assuming that they would need to obtain a warrant for every drunk-driving arrest tomorrow, each of the State's 82 judges and magistrate judges would need to issue fewer than

[9] Counsel for North Dakota represented at oral argument that in "larger jurisdictions" it "takes about a half an hour" to obtain a warrant. Counsel said that it is sometimes "harder to get somebody on the phone" in rural jurisdictions, but even if it took twice as long, the process of obtaining a warrant would be unlikely to take longer than the inherent delays in preparing a motorist for testing and would be particularly unlikely to reach beyond the 2-hour window within which officers can conduct the test.

two extra warrants per week. Minnesota has nearly the same ratio of judges to drunk-driving arrests, and so would face roughly the same burden. These back-of-the-envelope numbers suggest that the burden of obtaining a warrant before conducting a breath test would be small in both States.

But even these numbers overstate the burden by a significant degree. States only need to obtain warrants for drivers who refuse testing and a significant majority of drivers voluntarily consent to breath tests, even in States without criminal penalties for refusal. In North Dakota, only 21% of people refuse breath tests and in Minnesota, only 12% refuse. Including States that impose only civil penalties for refusal, the average refusal rate is slightly higher at 24%. Say that North Dakota's and Minnesota's refusal rates rise to double the mean, or 48%. Each of their judges and magistrate judges would need to issue fewer than one extra warrant a week. That bears repeating: The Court finds a categorical exception to the warrant requirement because each of a State's judges and magistrate judges would need to issue less than one extra warrant a week.

Fourth, the Court alludes to the need to collect evidence conveniently. But mere convenience in investigating drunk driving cannot itself justify an exception to the warrant requirement. All of this Court's postarrest exceptions to the warrant requirement require a law enforcement interest separate from criminal investigation. The Court's justification for the search incident to arrest rule is "the officer's safety" and the prevention of evidence "concealment or destruction." The Court's justification for the booking exception, which allows police to obtain fingerprints and DNA without a warrant while booking an arrestee at the police station, is the administrative need for identification. The Court's justification for the inventory search exception, which allows police to inventory the items in the arrestee's personal possession and car, is the need to "protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger."

This Court has never said that mere convenience in gathering evidence justifies an exception to the warrant requirement. If the simple collection of evidence justifies an exception to the warrant requirement even where a warrant could be easily obtained, exceptions would become the rule.

Finally, as a general matter, the States have ample tools to force compliance with lawfully obtained warrants. This Court has never cast doubt on the States' ability to impose criminal penalties for obstructing a search authorized by a lawfully obtained warrant. No resort to violent compliance would be necessary to compel a test. If a police officer obtains a warrant to conduct a breath test, citizens can be subjected to serious penalties for obstruction of justice if they decline to cooperate with the test.

This Court has already taken the weighty step of characterizing breath tests as "searches" for Fourth Amendment purposes. That is because the typical breath test requires the subject to actively blow alveolar (or "deep lung") air into the machine. Although the process of physically blowing into the machine can be completed in as little as a few minutes, the end-to-end process

can be significantly longer. The person administering the test must calibrate the machine, collect at least two separate samples from the arrestee, change the mouthpiece and reset the machine between each, and conduct any additional testing indicated by disparities between the two tests. Although some searches are certainly more invasive than breath tests, this Court cannot do justice to their status as Fourth Amendment "searches" if exaggerated time pressures, mere convenience in collecting evidence, and the "burden" of asking judges to issue an extra couple of warrants per month are costs so high as to render reasonable a search without a warrant. The Fourth Amendment becomes an empty promise of protecting citizens from unreasonable searches.

B

After evaluating the governmental and privacy interests at stake here, the final step is to determine whether any situations in which warrants would interfere with the States' legitimate governmental interests should be accommodated through a case-by-case or categorical exception to the warrant requirement.

As shown, because there are so many circumstances in which obtaining a warrant will not delay the administration of a breath test or otherwise compromise any governmental interest cited by the States, it should be clear that allowing a categorical exception to the warrant requirement is a "considerable overgeneralization" here. As this Court concluded in Riley and McNeely, any unusual issues that do arise can "better [be] addressed through consideration of case-specific exceptions to the warrant requirement."

[T]he search-incident-to-arrest exception is particularly ill suited to breath tests. To the extent the Court discusses any fit between breath tests and the rationales underlying the search-incident-to-arrest exception, it says that evidence preservation is one of the core values served by the exception and worries that "evidence may be lost" if breath tests are not conducted. But, of course, the search-incident-to-arrest exception is concerned with evidence destruction only insofar as that destruction would occur before a warrant could be sought. And breath tests are not, except in rare circumstances, conducted at the time of arrest, before a warrant can be obtained, but at a separate location 40 to 120 minutes after an arrest is effectuated. That alone should be reason to reject an exception forged to address the immediate needs of arrests.

The exception's categorical reach makes it even less suitable here. The search-incident-to-arrest exception is applied categorically precisely because the needs it addresses could arise in every arrest. Robinson. But the government's need to conduct a breath test is present only in arrests for drunk driving. And the asserted need to conduct a breath test without a warrant arises only when a warrant cannot be obtained during the significant built-in delay between arrest and testing. The conditions that require warrantless breath searches, in short, are highly situational and defy the logical underpinnings of the search-incident-to-arrest exception and its categorical application.

Here, the Court lacks even the pretense of attempting to situate breath searches within the narrow and weighty law enforcement needs that have historically justified the limited use of warrantless searches. I fear that if the Court continues down this road, the Fourth Amendment's warrant requirement will become nothing more than a suggestion.

JUSTICE THOMAS, concurring in judgment in part and dissenting in part.

The compromise the Court reaches today is not a good one. By deciding that some (but not all) warrantless tests revealing the blood alcohol concentration (BAC) of an arrested driver are constitutional, the Court contorts the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. The far simpler answer to the question presented is the one rejected in Missouri v. McNeely. Here, the tests revealing the BAC of a driver suspected of driving drunk are constitutional under the exigent-circumstances exception to the warrant requirement. (THOMAS, J., dissenting).

I

Today's decision chips away at a well-established exception to the warrant requirement. Until recently, we have admonished that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." Under our precedents, a search incident to lawful arrest "require[d] no additional justification." Not until the recent decision in Riley v. California, did the Court begin to retreat from this categorical approach because it feared that the search at issue, the "search of the information on a cell phone," bore "little resemblance to the type of brief physical search" contemplated by this Court's past search-incident-to-arrest decisions. I joined Riley, however, because the Court resisted the temptation to permit searches of some kinds of cell-phone data and not others, and instead asked more generally whether that entire "category of effects" was searchable without a warrant.

Today's decision begins where Riley left off. The Court purports to apply Robinson but further departs from its categorical approach by holding that warrantless breath tests to prevent the destruction of BAC evidence are constitutional searches incident to arrest, but warrantless blood tests are not. That hairsplitting makes little sense. Either the search-incident-to-arrest exception permits bodily searches to prevent the destruction of BAC evidence, or it does not.

The Court justifies its result—an arbitrary line in the sand between blood and breath tests—by balancing the invasiveness of the particular type of search against the government's reasons for the search. Such case-by-case balancing is bad for the People, who "through ratification, have already weighed the policy tradeoffs that constitutional rights entail. It is also bad for law enforcement officers, who depend on predictable rules to do their job, as Members of this Court

have exhorted in the past. See Arizona v. Gant (ALITO, J., dissenting); (faulting the Court for "leav[ing] the law relating to searches incident to arrest in a confused and unstable state").

Today's application of the search-incident-to-arrest exception is bound to cause confusion in the lower courts. The Court's choice to allow some (but not all) BAC searches is undeniably appealing, for it both reins in the pernicious problem of drunk driving and also purports to preserve some Fourth Amendment protections. But that compromise has little support under this Court's existing precedents.

II

The better (and far simpler) way to resolve these cases is by applying the per se rule that I proposed in McNeely. Under that approach, both warrantless breath and blood tests are constitutional because "the natural metabolization of [BAC] creates an exigency once police have probable cause to believe the driver is drunk. It naturally follows that police may conduct a search in these circumstances."

The Court in McNeely rejected that bright-line rule and instead adopted a totality-of-the-circumstances test examining whether the facts of a particular case presented exigent circumstances justifying a warrantless search.

The Court ruled that "the natural dissipation of alcohol in the blood" could not "categorically" create an "exigency" in every case. The destruction of "BAC evidence from a drunk-driving suspect" that "naturally dissipates over time in a gradual and relatively predictable manner," according to the Court, was qualitatively different from the destruction of evidence in "circumstances in which the suspect has control over easily disposable evidence."

Today's decision rejects McNeely's arbitrary distinction between the destruction of evidence generally and the destruction of BAC evidence. But only for searches incident to arrest. The Court declares that such a distinction "between an arrestee's active destruction of evidence and the loss of evidence due to a natural process makes little sense." I agree. But it also "makes little sense" for the Court to reject McNeely's arbitrary distinction only for searches incident to arrest and not also for exigent-circumstances searches when both are justified by identical concerns about the destruction of the same evidence. McNeely's distinction is no less arbitrary for searches justified by exigent circumstances than those justified by search incident to arrest.

The Court was wrong in McNeely, and today's compromise is perhaps an inevitable consequence of that error. Both searches contemplated by the state laws at issue in these cases would be constitutional under the exigent-circumstances exception to the warrant requirement. I respectfully concur in the judgment in part and dissent in part.

Questions and Notes

1. What is the difference between a search incident to an arrest and an exigent circumstance? Which was Schmerber? Which was Birchfield? Which was Bernard? Which was McNeely?
2. Is the Court saying that a breath test is not a search at all or that it is a minimally intrusive one? Do you think it is a search? If so is it more intrusive than the searches typically allowed incident to arrest?
3. Why are blood tests different? How is a blood test more intrusive than a breathalyzer? Don't they both measure the same thing?
4. The Court seems opposed to arbitrariness, of which they believe the dissent is guilty, for arbitrarily eliminating BAC tests from search incident to arrest. Is the court any less arbitrary in distinguishing between blood and breath tests? Where do you suppose urine tests will fall?
5. The Court seems to question the value of a warrant in this kind of case. If it is correct, does that lead to the conclusion that Justice Thomas is also correct and that McNeely was wrong?
6. Given that probable cause is pretty obvious in these cases, should we require probable cause to search as opposed to merely a search incident to a valid arrest? Or is it enough to say that if the arrest is without probable cause, the search wouldn't be valid anyway?

Insert p. 583 after question 6

CARPENTER v. UNITED STATES

585 U.S. _, 138 S. Ct. 2206 (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. 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. Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion.

At trial, seven of Carpenter's confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's phone near four of the charged robberies. In the Government's view, the location records clinched the case: They confirmed that Carpenter was "right where the . . . robbery was at the exact time of the robbery." 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. 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. Citing *Smith v. Maryland*.

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." 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 rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*. 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.

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." 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.

Although no single rubric definitively resolves which expectations of privacy are entitled to protection,[3] the analysis is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." 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." 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. Because any other conclusion would leave homeowners "at the mercy of advancing technology," we determined

[3] JUSTICE KENNEDY believes that there is such a rubric—the "property-based concepts" that *Katz* purported to move beyond. 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. JUSTICE THOMAS (and to a large extent JUSTICE GORSUCH) would have us abandon *Katz* and return to an exclusively property-based approach. *Katz* of course "discredited" the "premise that property interests control," and we have repeatedly emphasized that privacy interests do not rise or fall with property rights, see, e.g., *United States v. Jones*. Neither party has asked the Court to reconsider *Katz* in this case.

that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore what was happening within the home.

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. 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.

B

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

The first set of cases addresses a person's expectation of privacy in his physical location and movements. In *United States v. Knotts*, 460 U. S. 276, 103 (1983), we considered the Government's use of a "beeper" to aid in tracking a vehicle through traffic. . .. 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.

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." 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."

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. 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. 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.[4]

[4] 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." 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

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*. 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." For another, the nature of those records confirmed Miller's limited expectation of privacy, because the checks were "not confidential communications but negotiable instruments to be used in commercial transactions," and the bank statements contained information "exposed to [bank] employees in the ordinary course of business." 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."

Three years later, Smith applied the same principles in the context of information conveyed to a telephone company. . .. And at any rate, the Court explained, such an expectation "is not one that society is prepared to recognize as reasonable." 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." (internal quotation marks omitted). Once again, we held that the defendant "assumed the risk" that the company's records "would be divulged to police."

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.

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.

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.[5]

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*. A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Jones* (ALITO, J., concurring in judgment); (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." 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."

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." (opinion of SOTOMAYOR, J.). These location records "hold for many Americans the 'privacies of life.'" *Riley*. 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,"—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. Accordingly, when the Government tracks the location of a cell

[5] The parties suggest as an alternative to their primary submissions that the acquisition of CSLI becomes a search only if it extends beyond a limited period. As part of its argument, the Government treats the seven days of CSLI requested from Sprint as the pertinent period, even though Sprint produced only two days of records. Brief for United States 56. Contrary to JUSTICE KENNEDY's assertion, 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.

phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

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

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

The Government and JUSTICE KENNEDY contend, however, that the collection of CSLI should be permitted because the data is less precise than GPS information. Not to worry, they maintain, because the location records did "not on their own suffice to place [Carpenter] at the crime scene"; they placed him within a wedge-shaped sector ranging from one-eighth to four square miles . Yet the Court has already rejected the proposition that "inference insulates a search." *Kyllo*. 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.

At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development." 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.

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.

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*. *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." *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." *Miller* likewise noted that checks were "not confidential communications but negotiable instruments to be used in commercial transactions." 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." 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. JUSTICE GORSUCH wonders why "someone's location when using a phone" is sensitive, and JUSTICE KENNEDY assumes that a person's discrete movements "are not particularly private[.]" 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*. 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.

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).[6]

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.".

The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 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. 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. Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site

[6] 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. Like JUSTICE GORSUCH, we "do not begin to claim all the answers today," and therefore decide no more than the case before us.

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. 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.

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, contemplated requests for evidence implicating diminished privacy interests or for a corporation's own books.[7] 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* ("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 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

[7] 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 Ass'n v. Shultz*, 416 U.S. 21, 67 (1974) (Bank Secrecy Act reporting requirements); *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).

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.'" 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.

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*. 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.

Dissent by: KENNEDY; THOMAS; ALITO; GORSUCH

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. 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.

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 . . .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."

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.

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. And in Smith state police obtained records of the phone numbers dialed from the defendant's home phone. 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. 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." Rather, the defendants "assumed the risk that the information would be divulged to police."

Miller and *Smith* have been criticized as being based on too narrow a view of reasonable expectations of privacy. 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." 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*, 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. Yet "property concepts" are, nonetheless, fundamental "in determining the presence or absence of the privacy interests protected by that Amendment." 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. So when the defendant "shu[t] the door behind him" and "pa[id] the toll," 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, or an overnight guest has in a host's home, *Minnesota v. Olson*. The Government intruded on that space when it attached a listening device to the phone booth. *Katz*. (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.)

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. 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. 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.

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. 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.'" 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.

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. 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. 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.

. . .

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.

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. The statute in general prohibits providers from disclosing personally identifiable cell-site records to private third parties. And it allows customers to request cell-site records from the provider.

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. 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. 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, and holds that the acquisition of more than six days of cell-site records constitutes a search.

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 *Knotts*, 460 U. S. 276 (1983), and *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."

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." True, the Court in Knotts also suggested that "different constitutional principles may be applicable" to "dragnet-type law enforcement practices." But by dragnet practices the Court was referring to "'twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision.'"

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." 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." So in *Jones* it was "not necessary to inquire about the target's expectation of privacy in his vehicle's movements."

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. 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." But *Jones* involved direct governmental surveillance of a defendant's automobile without judicial authorization—specifically, GPS surveillance accurate within 50 to 100 feet. 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*—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." 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." These records could not reveal where Carpenter lives and works, much less his "'familial, political, professional, religious, and sexual associations.'"

By contrast, financial records and telephone records do "'revea[l] . . . personal affairs, opinions, habits and associations.'" 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. 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." 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.'" 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." 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. . . 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. 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." 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. . .. 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.

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

* * *

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 to opinion of KENNEDY, J. omitted]

JUSTICE THOMAS, dissenting.

This case should not turn on "whether" a search occurred. 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* (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. 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* (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*, where federal officers had intercepted the defendants' conversations by tapping telephone lines near their homes. 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. 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. In the ensuing decades, this Court adhered to Olmstead and rejected Fourth Amendment challenges to various methods of electronic surveillance.

In the 1960s, however, the Court began to retreat from *Olmstead*. In *Silverman v. United States*, for example, federal officers had eavesdropped on the defendants by driving a "spike mike" several inches into the house they were occupying. This was a "search," the Court held, because the "unauthorized physical penetration into the premises" was an "actual intrusion into a constitutionally protected area." 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.'"

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. 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." 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." 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."

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.'"

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. The lawyer, a recent law-school graduate, apparently had an "[e]piphany" while preparing for oral argument. 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." After some questioning from the Justices, the lawyer conceded that his test should also require individuals to subjectively expect privacy. 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. And by 1979, the Court was describing Justice Harlan's test as the "lodestar" for determining whether a "search" had occurred. *Smith v. Maryland*. Over time, the Court minimized the subjective prong of Justice Harlan's test. That left the objective prong—the "reasonable expectation of privacy" test that the Court still applies today.

II

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

A

The *Katz* test distorts the original meaning of "searc[h]"—the word in the Fourth Amendment that it purports to define. 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 [**76] inspection; as, to search the house for a book; to search the wood for a thief.'" 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, early congressional documents and debates, collections of early American English texts, or early American newspapers.

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. ("[E]very man's house is looked upon by the law to be his castle").

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,"—Lord Camden explained that "[t]he great end, for which men entered into society, was to secure their property." The American colonists echoed this reasoning in their "widespread hostility" to the Crown's writs of assistance[8]—a practice that inspired the Revolution and became "[t]he driving force behind the adoption of the [Fourth] Amendment."

Of course, the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well. 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"). 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." 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.'" 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.[9] Yet "persons, houses, papers, and effects" cannot mean "anywhere" or "anything."

[8] Writs of assistance were "general warrants" that gave "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v. Texas*, 379 U. S. 476, 481 (1965).

[9] 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

Katz's catchphrase that "the Fourth Amendment protects people, not places," is not a serious attempt to reconcile the constitutional text. The Fourth Amendment obviously protects people; "[t]he question . . . is what protection it affords to those people." *Katz* (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." (emphasis added). In one of the few changes made to Madison's draft, the House Committee of Eleven changed "other property" to "effects." Or the change might have broadened the Fourth Amendment by clarifying that it protects commercial goods, not just personal possessions. 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. The *Katz* test, however, displaces and renders that phrase entirely "superfluous." *Jones*.

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." Stated differently, the word "their" means, at the very least, that individuals do not have Fourth Amendment rights in someone else's property. Yet, under the *Katz* test, individuals can have a reasonable expectation of privacy in another person's property. See, e.g., Carter ("[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. 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." Carpenter stipulated below that the cell-site records are the business records of Sprint and MetroPCS. 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.

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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").

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. 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."

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). Although §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." 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."

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." 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. . .." 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.

Although the Court today maintains that its decision is based on "Founding-era understandings," 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." The common law required warrants for some types of searches and seizures, but not for many others. The relevant rule depended on context. 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. 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." Even 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*.

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").

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.'" 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. While this Court is supposed to base its decisions on society's expectations of privacy, society's expectations [*553] 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." 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.

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

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." Yet, "[t]hough we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election."

* * *

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. 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." 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.

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?

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, 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. 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. . ..

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."

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. . .

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

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. 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.'"

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." 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. Of course, such work depended entirely on grand juries' ability to access any relevant documents.

…

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." '" 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.'" 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."

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).

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* (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 British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*.

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." 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. If anything sufficiently incriminating comes into view, officers seize it. Horton v. California. Physical destruction always lurks as an underlying possibility; "officers executing search warrants on occasion must damage property in order to perform their duty."

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. 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 But it nevertheless asserted that the Fourth Amendment ought to "be liberally construed," and further reasoned that compulsory process "effects the sole object and purpose of search and seizure" by "forcing from a party evidence against himself[.] In this regard," the Court concluded, "the Fourth and Fifth Amendments run almost into each other." 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.

In a concurrence joined by Chief Justice Waite, Justice Miller agreed that the order violated the Fifth Amendment, 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[.] 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."

Although *Boyd* was replete with stirring rhetoric, its reasoning was confused from start to finish in a way that ultimately made the decision unworkable. 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." Without that writ, the Court recognized, "it would be 'utterly impossible to carry on the administration of justice.'"

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." 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[.] 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." 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.

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." 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."

Since *Oklahoma Press*, we have consistently hewed to that standard. By applying *Oklahoma Press* and thereby respecting "the traditional distinction between a search warrant and a subpoena[. . .]" 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."

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. 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.'" 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." 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." 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. 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." 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. 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.'" 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).[10]

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. (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. Grand juries, for 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* (emphasis added). Almost by definition, then, grand juries will be unable at first to demonstrate "the probable cause required for a warrant." 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." For over a hundred years, we have understood that holding subpoenas to the same standard as actual searches and seizures "would

[10] All that the Court can say in response is that we have "been careful not to uncritically extend existing precedents" when confronting new technologies. 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.

stop much if not all of investigation in the public interest at the threshold of inquiry." 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 guarantees "[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," and as a result, this Court has long insisted that they "may not be asserted vicariously[]". 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."

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. 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. 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.

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. It would be very strange if the owner of records were required to pay in order to inspect his own 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.

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." So not only does Carpenter lack "'the most essential and beneficial'" of the "'constituent elements'" of property, 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.[11]

For all these reasons, there is no plausible ground for maintaining that the information at issue here represents Carpenter's "papers" or "effects."[12]

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.

When the Court held in Katz that "property rights are not the sole measure of Fourth Amendment violations," 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

[11] 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.

[12] 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. (GORSUCH, J., dissenting).

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, 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. Turning to Katz, he then argued that he had a reasonable expectation of privacy in the banks' records regarding his accounts.

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, the Court ruled that he lost any protected Fourth Amendment interest in that information. Later, in *Smith v. Maryland,* 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.'"

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. 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,'" 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."

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.

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* (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*; *United States v. Miller*, 425 U. S. 435, 443. 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. *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." 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*. 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). The reasons are obvious. "As an empirical statement about subjective expectations of privacy," the doctrine is "quite dubious." 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.

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 reasonable expectation of privacy in it. 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." 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.

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." 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. 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 understanding of the Fourth Amendment, as JUSTICE THOMAS thoughtfully explains today. 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." 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). 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. No doubt the colonial outrage engendered 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."

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. 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. 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. 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. 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* (inferring a license to enter on private property from the "'habits of the country[.]'" That is particularly true when the judge looks to positive law rather than intuition for guidance on social norms. Byrd v. United States ("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.

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, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (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." 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. 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." 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." 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." 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." 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)." 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." 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. 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. 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."

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." 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. 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? 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." A bailee normally owes a legal duty to keep the item safe, according to the [*579] terms of the parties' contract if they have one, and according to the "implication[s] from their conduct" if they don't. 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. 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." 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." 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."

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.

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* (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.

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." 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.

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. 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. 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. 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." 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.

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, but instead as an act of compelled self-incrimination implicating the Fifth Amendment. . .. 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." 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*. *Boyd* invoked the Fourth Amendment to restrict the use of subpoenas even for ordinary business records and, as Justice Alito notes, eventually proved unworkable. 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 incriminating evidence.

* * *

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" 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. It also requires the carrier to disclose CPNI "upon affirmative written request by the customer, to any person designated by the customer." 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. Litigants have had fair notice since at least *United States v. Jones* 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.

QUESTIONS AND NOTES

1. Is the phrase "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" any different from probable cause? If it is different, how I it different?
2. If the Court had seen this as simply a restatement of probable cause would the result have been different?
3. Is the number of hits (12, 898) relevant to the decision? Should it be?
4. How, if at all, is this case different from Knotts?
5. Are you persuaded that this case is different from Miller or Smith? If someone told you that the government could get your bank records from the bank, your phone records from the phone company or your location from your cell provider which would you, as an innocent person object to the most?
6. Would it have been better if the Court simply overruled Miller and Smith rather than artificially distinguishing them?
7. Is this fact pattern really an extension of Miller and Smith if most innocent people are less concerned if someone knows their location as opposed to their bank records and who they telephone?
8. How relevant is the omnipresence of store video cameras to this question?

Insert p. 658 (after closing note)

RODRIGUEZ v. UNITED STATES
135 S. Ct. 1609

Opinion

Justice GINSBURG delivered the opinion of the Court.

In *Illinois v. Caballes*, this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation. The Court so recognized in *Caballes*, and we adhere to the line drawn in that decision.

I

Just after midnight on March 27, 2012, police officer Morgan Struble observed a Mercury Mountaineer veer slowly onto the shoulder of Nebraska State Highway 275 for one or two seconds and then jerk back onto the road. Nebraska law prohibits driving on highway shoulders, and on that basis, Struble pulled the Mountaineer over at 12:06 a.m. Struble is a K–9 officer with the Valley Police Department in Nebraska, and his dog Floyd was in his patrol car that night. Two men were in the Mountaineer: the driver, Dennys Rodriguez, and a front-seat passenger, Scott Pollman.

Struble approached the Mountaineer on the passenger's side. After Rodriguez identified himself, Struble asked him why he had driven onto the shoulder. Rodriguez replied that he had swerved to avoid a pothole. Struble then gathered Rodriguez's license, registration, and proof of insurance, and asked Rodriguez to accompany him to the patrol car. Rodriguez asked if he was required to do so, and Struble answered that he was not. Rodriguez decided to wait in his own vehicle.

After running a records check on Rodriguez, Struble returned to the Mountaineer. Struble asked passenger Pollman for his driver's license and began to question him about where the two men were coming from and where they were going. Pollman replied that they had traveled to Omaha, Nebraska, to look at a Ford Mustang that was for sale and that they were returning to Norfolk, Nebraska. Struble returned again to his patrol car, where he completed a records check on Pollman, and called for a second officer. Struble then began writing a warning ticket for Rodriguez for driving on the shoulder of the road.

Struble returned to Rodriguez's vehicle a third time to issue the written warning. By 12:27 or 12:28 a.m., Struble had finished explaining the warning to Rodriguez, and had given back to Rodriguez and Pollman the documents obtained from them. As Struble later testified, at that point, Rodriguez

and Pollman "had all their documents back and a copy of the written warning. I got all the reason[s] for the stop out of the way[,] ... took care of all the business."

Nevertheless, Struble did not consider Rodriguez "free to leave." Although justification for the traffic stop was "out of the way," Struble asked for permission to walk his dog around Rodriguez's vehicle. Rodriguez said no. Struble then instructed Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the patrol car to wait for the second officer. Rodriguez complied. At 12:33 a.m., a deputy sheriff arrived. Struble retrieved his dog and led him twice around the Mountaineer. The dog alerted to the presence of drugs halfway through Struble's second pass. All told, seven or eight minutes had elapsed from the time Struble issued the written warning until the dog indicated the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine.

Rodriguez moved to suppress the evidence seized from his car on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff.

After receiving evidence, a Magistrate Judge recommended that the motion be denied. The Magistrate Judge found no probable cause to search the vehicle independent of the dog alert. He further found that no reasonable suspicion supported the detention once Struble issued the written warning. He concluded, however, that under Eighth Circuit precedent, extension of the stop by "seven to eight minutes" for the dog sniff was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was therefore permissible.

The District Court adopted the Magistrate Judge's factual findings and legal conclusions and denied Rodriguez's motion to suppress. The court noted that, in the Eighth Circuit, "dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only de minimis intrusions." Impelled by that decision, Rodriguez entered a conditional guilty plea and was sentenced to five years in prison.

The Eighth Circuit affirmed.

We granted certiorari to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff.

II

A seizure for a traffic violation justifies a police investigation of that violation. "[A] relatively brief encounter," a routine traffic stop is "more analogous to a so-called '*Terry* stop' ... than to a formal arrest." *Knowles v. Iowa.* See also *Arizona v. Johnson,* 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009). Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, *Caballes,* and attend to related safety concerns. See also *United States v. Sharpe*; *Florida v. Royer,* (plurality opinion) ("The scope of the detention must be carefully

tailored to its underlying justification."). Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. See *Sharpe*, (in determining the reasonable duration of a stop, "it [is] appropriate to examine whether the police diligently pursued [the] investigation").

Our decisions in *Caballes* and *Johnson* heed these constraints. In both cases, we concluded that the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention. *Johnson*, (questioning); *Caballes*, (dog sniff). In *Caballes*, however, we cautioned that a traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a warning ticket. 543 U.S., at 407, 125 S.Ct. 834. And we repeated that admonition in *Johnson* : The seizure remains lawful only "so long as [unrelated] inquiries do not measurably extend the duration of the stop." See also *Muehler v. Mena*, (because unrelated inquiries did not "exten[d] the time [petitioner] was detained[,] ... no additional Fourth Amendment justification ... was required"). An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But contrary to Justice ALITO's suggestion, he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual. But see, ALITO, J., dissenting (premising opinion on the dissent's own finding of "reasonable suspicion," although the District Court reached the opposite conclusion, and the Court of Appeals declined to consider the issue).

Beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See *Prouse*, (A "warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.").

A dog sniff, by contrast, is a measure aimed at "detect[ing] evidence of ordinary criminal wrongdoing." *Indianapolis v. Edmond*. See also *Florida v. Jardines*. Candidly, the Government acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

In advancing its *de minimis* rule, the Eighth Circuit relied heavily on our decision in *Pennsylvania v. Mimms*. In *Mimms*, we reasoned that the government's "legitimate and weighty" interest in officer safety outweighs the "*de minimis* " additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. See also *Maryland v. Wilson*, (passengers may be required to exit vehicle stopped for traffic violation). The Eighth Circuit, echoed in Justice THOMAS's dissent, believed that the imposition here similarly could be offset by the Government's "strong interest in interdicting the flow of illegal drugs along the nation's highways."

Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are "especially fraught with danger to police officers," so an officer may need to take certain negligibly burdensome precautions in

order to complete his mission safely. Cf. *United States v. Holt*, 264 F.3d 1215, 1221–1222 (C.A.10 2001) (en banc) (recognizing officer safety justification for criminal record and outstanding warrant checks). On-scene investigation into other crimes, however, detours from that mission. So too do safety precautions taken in order to facilitate such detours. Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms,* the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular.

The Government argues that an officer may "incremental[ly]" prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. The Government's argument, in effect, is that by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation. The reasonableness of a seizure, however, depends on what the police in fact do. In this regard, the Government acknowledges that "an officer always has to be reasonably diligent." How could diligence be gauged other than by noting what the officer actually did and how he did it? If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." As we said in *Caballes* and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, as Justice ALITO supposes, but whether conducting the sniff "prolongs"—*i.e.*, adds time to—"the stop."

III

The Magistrate Judge found that detention for the dog sniff in this case was not independently supported by individualized suspicion, and the District Court adopted the Magistrate Judge's findings. The Court of Appeals, however, did not review that determination. But see THOMAS, J., dissenting, (resolving the issue, nevermind that the Court of Appeals left it unaddressed); ALITO, J., dissenting, (upbraiding the Court for addressing the sole issue decided by the Court of Appeals and characterizing the Court's answer as "unnecessary" because the Court, instead, should have decided an issue the Court of Appeals did not decide). The question whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation, therefore, remains open for Eighth Circuit consideration on remand.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

Justice KENNEDY, dissenting.

My join in Justice THOMAS' dissenting opinion does not extend to Part III. Although the issue discussed in that Part was argued here, the Court of Appeals has not addressed that aspect of the case in any detail. In my view the better course would be to allow that court to do so in the first instance.

Justice THOMAS, with whom Justice ALITO joins, and with whom Justice KENNEDY joins as to all but Part III, dissenting.

Ten years ago, we explained that "conducting a dog sniff [does] not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." The only question here is whether an officer executed a stop in a reasonable manner when he waited to conduct a dog sniff until after he had given the driver a written warning and a backup unit had arrived, bringing the overall duration of the stop to 29 minutes. Because the stop was reasonably executed, no Fourth Amendment violation occurred. The Court's holding to the contrary cannot be reconciled with our decision in *Caballes* or a number of common police practices. It was also unnecessary, as the officer possessed reasonable suspicion to continue to hold the driver to conduct the dog sniff. I respectfully dissent.

I

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." U.S. Const., Amdt. 4. As the text indicates, and as we have repeatedly confirmed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" We have defined reasonableness "in objective terms by examining the totality of the circumstances," *Ohio v. Robinette,* 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996), and by considering "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing," *Atwater v. Lago Vista.* When traditional protections have not provided a definitive answer, our precedents have "analyzed a search or seizure in light of traditional standards of reasonableness 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." *Virginia v. Moore.*

Although a traffic stop "constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]," such a seizure is constitutionally "reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren*. But "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Caballes.*

Because Rodriguez does not dispute that Officer Struble had probable cause to stop him, the only question is whether the stop was otherwise executed in a reasonable manner. I easily conclude that it was. Approximately 29 minutes passed from the time Officer Struble stopped Rodriguez until his narcotics-detection dog alerted to the presence of drugs. That amount of time is hardly out of the ordinary for a traffic stop by a single officer of a vehicle containing multiple occupants even when no dog sniff is involved. During that time, Officer Struble conducted the ordinary activities of a traffic stop—he approached the vehicle, questioned Rodriguez about the observed violation, asked Pollman about their travel plans, ran serial warrant checks on Rodriguez and Pollman, and issued a written warning to Rodriguez. And when he decided to conduct a dog sniff, he took the precaution of calling for backup out of concern for his safety.

As *Caballes* makes clear, the fact that Officer Struble waited until after he gave Rodriguez the warning to conduct the dog sniff does not alter this analysis. Because "the use of a well-trained narcotics-detection dog ... generally does not implicate legitimate privacy interests," "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." The stop here was "lawful at its inception and otherwise executed in a reasonable manner." As in *Caballes*, "conducting a dog sniff [did] not change the character of [the] traffic stop," and thus no Fourth Amendment violation occurred.

II

Rather than adhere to the reasonableness requirement that we have repeatedly characterized as the "touchstone of the Fourth Amendment," the majority constructed a test of its own that is inconsistent with our precedents.

A

The majority's rule requires a traffic stop to "en[d] when tasks tied to the traffic infraction are—or reasonably should have been—completed." "If an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete the stop's mission" and he may hold the individual no longer. The majority's rule thus imposes a one-way ratchet for constitutional protection linked to the characteristics of the individual officer conducting the stop: If a driver is stopped by a particularly efficient officer, then he will be entitled to be released from the traffic stop after a shorter period of time than a driver stopped by a less efficient officer. Similarly, if a driver is stopped by an officer with access to technology that can shorten a records check, then he will be entitled to be released from the stop after a shorter period of time than an individual stopped by an officer without access to such technology.

I "cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." We have repeatedly explained that the reasonableness inquiry must not hinge on the characteristics of the individual officer conducting the seizure. We have held, for example, that an officer's state of mind "does not invalidate [an] action taken as long as the circumstances, viewed objectively, justify that action." We have spurned theories that would make the Fourth Amendment "change with local law enforcement practices." *Moore*. And we have rejected a rule that would require the offense establishing probable cause to be "closely related to" the offense identified by the arresting officer, as such a rule would make "the constitutionality of an arrest ... vary from place to place and from time to time, depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists." *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004). In *Devenpeck*, a unanimous Court explained: "An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection."

The majority's logic would produce similarly arbitrary results. Under its reasoning, a traffic stop made by a rookie could be executed in a reasonable manner, whereas the same traffic stop made by a knowledgeable, veteran officer *in precisely the same circumstances* might not, if in fact his

knowledge and experience made him capable of completing the stop faster. We have long rejected interpretations of the Fourth Amendment that would produce such haphazard results, and I see no reason to depart from our consistent practice today.

B

As if that were not enough, the majority also limits the duration of the stop to the time it takes the officer to complete a narrow category of "traffic-based inquiries." According to the majority, these inquiries include those that "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." Inquiries directed to "detecting evidence of ordinary criminal wrongdoing" are not traffic-related inquiries and thus cannot count toward the overall duration of the stop.

The combination of that definition of traffic-related inquiries with the majority's officer-specific durational limit produces a result demonstrably at odds with our decision in *Caballes*. *Caballes* expressly anticipated that a traffic stop could be *reasonably* prolonged for officers to engage in a dog sniff. We explained that no Fourth Amendment violation had occurred in *Caballes*, where the "duration of the stop ... was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop," but suggested a different result might attend a case "involving a dog sniff that occurred during an *unreasonably* prolonged traffic stop." The dividing line was whether the overall duration of the stop exceeded "the time reasonably required to complete th[e] mission," not, as the majority suggests, whether the duration of the stop "in fact" exceeded the time necessary to complete the traffic-related inquiries.

The majority's approach draws an artificial line between dog sniffs and other common police practices. The lower courts have routinely confirmed that warrant checks are a constitutionally permissible part of a traffic stop, and the majority confirms that it finds no fault in these measures. Yet its reasoning suggests the opposite. Such warrant checks look more like they are directed to "detecting evidence of ordinary criminal wrongdoing" than to "ensuring that vehicles on the road are operated safely and responsibly." Perhaps one could argue that the existence of an outstanding warrant might make a driver less likely to operate his vehicle safely and responsibly on the road, but the same could be said about a driver in possession of contraband. A driver confronted by the police in either case might try to flee or become violent toward the officer. But under the majority's analysis, a dog sniff, which is directed at uncovering that problem, is not treated as a traffic-based inquiry. Warrant checks, arguably, should fare no better. The majority suggests that a warrant check is an ordinary inquiry incident to a traffic stop because it can be used " 'to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.' " But as the very treatise on which the majority relies notes, such checks are a "manifest[ation of] the 'war on drugs' motivation so often underlying [routine traffic] stops," and thus are very much like the dog sniff in this case.

Investigative questioning rests on the same basis as the dog sniff. "Asking questions is an essential part of police investigations." *Hiibel.* And the lower courts have routinely upheld such questioning during routine traffic stops. The majority's reasoning appears to allow officers to engage in *some* questioning aimed at detecting evidence of ordinary criminal wrongdoing. But it is hard to see how such inquiries fall within the "seizure's 'mission' [of] address[ing] the traffic violation that

warranted the stop," or "attend[ing] to related safety concerns." Its reasoning appears to come down to the principle that dogs are different.

C

On a more fundamental level, the majority's inquiry elides the distinction between traffic stops based on probable cause and those based on reasonable suspicion. Probable cause is *the* "traditional justification" for the seizure of a person. This Court created an exception to that rule in *Terry v. Ohio,* permitting "police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause." Reasonable suspicion is the justification for such seizures. *Prado Navarette*.

Traffic stops can be initiated based on probable cause or reasonable suspicion. Although the Court has commented that a routine traffic stop is "more analogous to a so-called '*Terry* stop' than to a formal arrest," it has rejected the notion "that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Berkemer v. McCarty*, 468 U.S. 420, 439, and n. 29, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

Although all traffic stops must be executed reasonably, our precedents make clear that traffic stops justified by reasonable suspicion are subject to additional limitations that those justified by probable cause are not. A traffic stop based on reasonable suspicion, like all *Terry* stops, must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." It also "cannot continue for an excessive period of time or resemble a traditional arrest." By contrast, a stop based on probable cause affords an officer considerably more leeway. In such seizures, an officer may engage in a warrantless arrest of the driver, *Atwater*, a warrantless search incident to arrest of the driver, *Riley v. California*, and a warrantless search incident to arrest of the vehicle if it is reasonable to believe evidence relevant to the crime of arrest might be found there, *Arizona v. Gant*.

The majority casually tosses this distinction aside. It asserts that the traffic stop in this case, which was undisputedly initiated on the basis of probable cause, can last no longer than is in fact necessary to effectuate the mission of the stop. And, it assumes that the mission of the stop was merely to write a traffic ticket, rather than to consider making a custodial arrest. In support of that durational requirement, it relies primarily on cases involving *Terry* stops.

The *only* case involving a traffic stop based on probable cause that the majority cites for its rule is *Caballes*. But, that decision provides no support for today's restructuring of our Fourth Amendment jurisprudence. In *Caballes*, the Court made clear that, in the context of a traffic stop supported by probable cause, "a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." To be sure, *the dissent* in *Caballes* would have "appl[ied] *Terry* 's reasonable-relation test ... to determine whether the canine sniff impermissibly expanded the scope of the initially valid seizure of Caballes." (GINSBURG, J., dissenting). But even it conceded that the *Caballes* majority had "implicitly [rejected] the application of *Terry* to a traffic stop converted, by calling in a dog, to a drug search."

By strictly limiting the tasks that define the durational scope of the traffic stop, the majority accomplishes today what the *Caballes* dissent could not: strictly limiting the scope of an officer's activities during a traffic stop justified by probable cause. In doing so, it renders the difference between probable cause and reasonable suspicion virtually meaningless in this context. That shift is supported neither by the Fourth Amendment nor by our precedents interpreting it. And, it results in a constitutional framework that lacks predictability. Had Officer Struble arrested, handcuffed, and taken Rodriguez to the police station for his traffic violation, he would have complied with the Fourth Amendment. See *Atwater*. But because he made Rodriguez wait for seven or eight extra minutes until a dog arrived, he evidently committed a constitutional violation. Such a view of the Fourth Amendment makes little sense.

III

Today's revision of our Fourth Amendment jurisprudence was also entirely unnecessary. Rodriguez suffered no Fourth Amendment violation here for an entirely independent reason: Officer Struble had reasonable suspicion to continue to hold him for investigative purposes. Our precedents make clear that the Fourth Amendment permits an officer to conduct an investigative traffic stop when that officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Prado Navarette.* Reasonable suspicion is determined by looking at "the whole picture," taking into account "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Officer Struble testified that he first became suspicious that Rodriguez was engaged in criminal activity for a number of reasons. When he approached the vehicle, he smelled an "overwhelming odor of air freshener coming from the vehicle," which is, in his experience, "a common attempt to conceal an odor that [people] don't want ... to be smelled by the police." He also observed, upon approaching the front window on the passenger side of the vehicle, that Rodriguez's passenger, Scott Pollman, appeared nervous. Pollman pulled his hat down low, puffed nervously on a cigarette, and refused to make eye contact with him. The officer thought he was "more nervous than your typical passenger" who "do[esn't] have anything to worry about because [t]hey didn't commit a [traffic] violation."

Officer Struble's interactions with the vehicle's occupants only increased his suspicions. When he asked Rodriguez why he had driven onto the shoulder, Rodriguez claimed that he swerved to avoid a pothole. But that story could not be squared with Officer Struble's observation of the vehicle slowly driving off the road before being jerked back onto it. And when Officer Struble asked Pollman where they were coming from and where they were going, Pollman told him they were traveling from Omaha, Nebraska, back to Norfolk, Nebraska, after looking at a vehicle they were considering purchasing. Pollman told the officer that he had neither seen pictures of the vehicle nor confirmed title before the trip. As Officer Struble explained, it "seemed suspicious" to him "to drive ... approximately two hours ... late at night to see a vehicle sight unseen to possibly buy it," and to go from Norfolk to Omaha to look at it because "[u]sually people leave Omaha to go get vehicles, not the other way around" due to higher Omaha taxes.

These facts, taken together, easily meet our standard for reasonable suspicion. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion," *Illinois v. Wardlow*, and both

vehicle occupants were engaged in such conduct. The officer also recognized heavy use of air freshener, which, in his experience, indicated the presence of contraband in the vehicle. "[C]ommonsense judgments and inferences about human behavior" further support the officer's conclusion that Pollman's story about their trip was likely a cover story for illegal activity. Taking into account all the relevant facts, Officer Struble possessed reasonable suspicion of criminal activity to conduct the dog sniff.

Rodriguez contends that reasonable suspicion cannot exist because each of the actions giving rise to the officer's suspicions could be entirely innocent, but our cases easily dispose of that argument. Acts that, by themselves, might be innocent can, when taken together, give rise to reasonable suspicion. *Terry* is a classic example, as it involved two individuals repeatedly walking back and forth, looking into a store window, and conferring with one another as well as with a third man. The Court reasoned that this "series of acts, each of them perhaps innocent in itself, ... together warranted further investigation," and it has reiterated that analysis in a number of cases, see, *e.g., Arvizu*, *Sokolow*. This one is no different.

* * *

I would conclude that the police did not violate the Fourth Amendment here. Officer Struble possessed probable cause to stop Rodriguez for driving on the shoulder, and he executed the subsequent stop in a reasonable manner. Our decision in *Caballes* requires no more. The majority's holding to the contrary is irreconcilable with *Caballes* and a number of other routine police practices, distorts the distinction between traffic stops justified by probable cause and those justified by reasonable suspicion, and abandons reasonableness as the touchstone of the Fourth Amendment. I respectfully dissent.

Justice ALITO, dissenting.

This is an unnecessary, impractical, and arbitrary decision. It addresses a purely hypothetical question: whether the traffic stop in this case *would be* unreasonable if the police officer, prior to leading a drug-sniffing dog around the exterior of petitioner's car, did not already have reasonable suspicion that the car contained drugs. In fact, however, the police officer *did have* reasonable suspicion, and, as a result, the officer was justified in detaining the occupants for the short period of time (seven or eight minutes) that is at issue.

The relevant facts are not in dispute. Officer Struble, who made the stop, was the only witness at the suppression hearing, and his testimony about what happened was not challenged. Defense counsel argued that the facts recounted by Officer Struble were insufficient to establish reasonable suspicion, but defense counsel did not dispute those facts or attack the officer's credibility. Similarly, the Magistrate Judge who conducted the hearing did not question the officer's credibility. And as Justice THOMAS's opinion shows, the facts recounted by Officer Struble "easily meet our standard for reasonable suspicion."

Not only does the Court reach out to decide a question not really presented by the facts in this case, but the Court's answer to that question is arbitrary. The Court refuses to address the real Fourth Amendment question: whether the stop was unreasonably prolonged. Instead, the Court latches

onto the fact that Officer Struble delivered the warning prior to the dog sniff and proclaims that the authority to detain based on a traffic stop ends when a citation or warning is handed over to the driver. The Court thus holds that the Fourth Amendment was violated, not because of the length of the stop, but simply because of the sequence in which Officer Struble chose to perform his tasks.

This holding is not only arbitrary; it is perverse since Officer Struble chose that sequence for the purpose of protecting his own safety and possibly the safety of others. Without prolonging the stop, Officer Struble could have conducted the dog sniff while one of the tasks that the Court regards as properly part of the traffic stop was still in progress, but that sequence would have entailed unnecessary risk. At approximately 12:19 a.m., after collecting Pollman's driver's license, Officer Struble did two things. He called in the information needed to do a records check on Pollman (a step that the Court recognizes was properly part of the traffic stop), and he requested that another officer report to the scene. Officer Struble had decided to perform a dog sniff but did not want to do that without another officer present. When occupants of a vehicle who know that their vehicle contains a large amount of illegal drugs see that a drug-sniffing dog has alerted for the presence of drugs, they will almost certainly realize that the police will then proceed to search the vehicle, discover the drugs, and make arrests. Thus, it is reasonable for an officer to believe that an alert will increase the risk that the occupants of the vehicle will attempt to flee or perhaps even attack the officer. See, *e.g.*, *United States v. Dawdy*, 46 F.3d 1427, 1429 (C.A.8 1995) (recounting scuffle between officer and defendant after drugs were discovered).

In this case, Officer Struble was concerned that he was outnumbered at the scene, and he therefore called for backup and waited for the arrival of another officer before conducting the sniff. As a result, the sniff was not completed until seven or eight minutes after he delivered the warning. But Officer Struble could have proceeded with the dog sniff while he was waiting for the results of the records check on Pollman and before the arrival of the second officer. The drug-sniffing dog was present in Officer Struble's car. If he had chosen that riskier sequence of events, the dog sniff would have been completed before the point in time when, according to the Court's analysis, the authority to detain for the traffic stop ended. Thus, an action that would have been lawful had the officer made the *unreasonable* decision to risk his life became unlawful when the officer made the *reasonable* decision to wait a few minutes for backup. Officer Struble's error—apparently—was following prudent procedures motivated by legitimate safety concerns. The Court's holding therefore makes no practical sense. And nothing in the Fourth Amendment, which speaks of *reasonableness*, compels this arbitrary line.

The rule that the Court adopts will do little good going forward.[2] It is unlikely to have any appreciable effect on the length of future traffic stops. Most officers will learn the prescribed sequence of events even if they cannot fathom the reason for that requirement. (I would love to be the proverbial fly on the wall when police instructors teach this rule to officers who make traffic stops.)

For these reasons and those set out in Justice THOMAS's opinion, I respectfully dissent.

[2] It is important to note that the Court's decision does not affect procedures routinely carried out during traffic stops, including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the

automobile's registration and proof of insurance." And the Court reaffirms that police "may conduct certain unrelated checks during an otherwise lawful traffic stop." Thus, it remains true that police may ask questions aimed at uncovering other criminal conduct and may order occupants out of their car during a valid stop.

QUESTIONS AND NOTES

1. Was the additional detention to which Rodriguez was subjected *de minimis*? Why? Why not?
2. If after this case, the police told you (as their attorney) that they wanted to continue dog sniffs, how would you advise them?
3. Do you sense that the Court is backtracking from *Caballes*, especially in light of *Jardines*?
4. Was it wise for the government to concede that a dog sniff is not part of an ordinary traffic stop?
5. Is *Rodriguez* consistent with *Robinette*?
6. Do you think that the lower court will (should) find reasonable suspicion on remand?

Insert p. 823 after question 5

BYRD v. UNITED STATES

584 U.S. _, 138 S. Ct. 1518 (2018)

JUSTICE KENNEDY delivered the opinion of the Court.

In September 2014, Pennsylvania State Troopers pulled over a car driven by petitioner Terrence Byrd. Byrd was the only person in the car. In the course of the traffic stop the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. A search of the trunk uncovered body armor and 49 bricks of heroin.

The evidence was turned over to federal authorities, who charged Byrd with distribution and possession of heroin with the intent to distribute . . . and possession of body armor by a prohibited person. Byrd moved to suppress the evidence as the fruit of an unlawful search. The United States District Court for the Middle District of Pennsylvania denied the motion, and the Court of Appeals for the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car. Based on this conclusion, it appears that both the District Court and Court of Appeals deemed it unnecessary to consider whether the troopers had probable cause to search the car.

This Court granted certiorari to address the question whether a driver has a reasonable expectation of privacy in a rental car when he or she is not listed as an authorized driver on the rental agreement. The Court now holds that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.

The Court concludes a remand is necessary to address in the first instance the Government's argument that this general rule is inapplicable because, in the circumstances here, Byrd had no greater expectation of privacy than a car thief. If that is so, our cases make clear he would lack a legitimate expectation of privacy. It is necessary to remand as well to determine whether, even if Byrd had a right to object to the search, probable cause justified it in any event.

I

On September 17, 2014, petitioner Terrence Byrd and Latasha Reed drove in Byrd's Honda Accord to a Budget car-rental facility in Wayne, New Jersey. Byrd stayed in the parking lot in the Honda while Reed went to the Budget desk and rented a Ford Fusion. The agreement Reed signed required her to certify that she had a valid driver's license and had not committed certain vehicle-related offenses within the previous three years. An addendum to the agreement, which Reed initialed, provides the following restriction on who may drive the rental car:

> "I understand that the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an

> Additional Driver Form. These other drivers must also be at least 25 years old and validly licensed.
> "PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT. THIS MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID AND MY BEING FULLY RESPONSIBLE FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES."

In filling out the paperwork for the rental agreement, Reed did not list an additional driver.

With the rental keys in hand, Reed returned to the parking lot and gave them to Byrd. The two then left the facility in separate cars—she in his Honda, he in the rental car. Byrd returned to his home in Patterson, New Jersey, and put his personal belongings in the trunk of the rental car. Later that afternoon, he departed in the car alone and headed toward Pittsburgh, Pennsylvania.

After driving nearly three hours, or roughly half the distance to Pittsburgh, Byrd passed State Trooper David Long, who was parked in the median of Interstate 81 near Harrisburg, Pennsylvania. Long was suspicious of Byrd because he was driving with his hands at the "10 and 2" position on the steering wheel, sitting far back from the steering wheel, and driving a rental car. Long knew the Ford Fusion was a rental car because one of its windows contained a barcode. Based on these observations, he decided to follow Byrd and, a short time later, stopped him for a possible traffic infraction.

When Long approached the passenger window of Byrd's car to explain the basis for the stop and to ask for identification, Byrd was "visibly nervous" and "was shaking and had a hard time obtaining his driver's license." *Id.*, at. He handed an interim license and the rental agreement to Long, stating that a friend had rented the car. Long returned to his vehicle to verify Byrd's license and noticed Byrd was not listed as an additional driver on the rental agreement. Around this time another trooper, Travis Martin, arrived at the scene. While Long processed Byrd's license, Martin conversed with Byrd, who again stated that a friend had rented the vehicle. After Martin walked back to Long's patrol car, Long commented to Martin that Byrd was "not on the renter agreement," to which Martin replied, "yeah, he has no expectation of privacy."

A computer search based on Byrd's identification returned two different names. Further inquiry suggested the other name might be an alias and also revealed that Byrd had prior convictions for weapons and drug charges as well as an outstanding warrant in New Jersey for a probation violation. After learning that New Jersey did not want Byrd arrested for extradition, the troopers asked Byrd to step out of the vehicle and patted him down.

Long asked Byrd if he had anything illegal in the car. When Byrd said he did not, the troopers asked for his consent to search the car. At that point Byrd said he had a "blunt" in the car and offered to retrieve it for them. The officers understood "blunt" to mean a marijuana cigarette. They declined to let him retrieve it and continued to seek his consent to search the car, though they stated they did not need consent because he was not listed on the rental agreement. The troopers then opened the passenger and driver doors and began a thorough search of the passenger compartment.

Martin proceeded from there to search the car's trunk, including by opening up and taking things out of a large cardboard box, where he found a laundry bag containing body armor. At this point, the troopers decided to detain Byrd. As Martin walked toward Byrd and said he would be placing him in handcuffs, Byrd began to run away. A third trooper who had arrived on the scene joined Long and Martin in pursuit. When the troopers caught up to Byrd, he surrendered and admitted there was heroin in the car. Back at the car, the troopers resumed their search of the laundry bag and found 49 bricks of heroin.

In pretrial proceedings Byrd moved to suppress the evidence found in the trunk of the rental car, arguing that the search violated his *Fourth Amendment* rights. Although Long contended at a suppression hearing that the troopers had probable cause to search the car after Byrd stated it contained marijuana, the District Court denied Byrd's motion on the ground that Byrd lacked "standing" to contest the search as an initial matter. Byrd later entered a conditional guilty plea, reserving the right to appeal the suppression ruling. This Court granted Byrd's petition for a writ of certiorari. . . to address the conflict among the Courts of Appeals over whether an unauthorized driver has a reasonable expectation of privacy in a rental car.

II

Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. The Framers made that right explicit in the *Bill of Rights* following their experience with the indignities and invasions of privacy wrought by "general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence." Ever mindful of the *Fourth Amendment* and its history, the Court has viewed with disfavor practices that permit "police officers unbridled discretion to rummage at will among a person's private effects."

This concern attends the search of an automobile. *See Delaware v. Prouse*. The Court has acknowledged, however, that there is a diminished expectation of privacy in automobiles, which often permits officers to dispense with obtaining a warrant before conducting a lawful search. See, *e.g.*, *California v. Acevedo.*

Whether a warrant is required is a separate question from the one the Court addresses here, which is whether the person claiming a constitutional violation "has had his own *Fourth Amendment* rights infringed by the search and seizure which he seeks to challenge." *Rakas v. Illinois.* Answering that question requires examination of whether the person claiming the constitutional violation had a "legitimate expectation of privacy in the premises" searched. "Expectations of privacy protected by the *Fourth Amendment*, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest." Still, "property concepts" are instructive in "determining the presence or absence of the privacy interests protected by that Amendment."

Indeed, more recent *Fourth Amendment* cases have clarified that the test most often associated with legitimate expectations of privacy, which was derived from the second Justice Harlan's concurrence in *Katz v. United States* supplements, rather than displaces, "the traditional property-based understanding of the *Fourth Amendment*." *Florida v. Jardines*. Perhaps in light of this clarification, Byrd now argues in the alternative that he had a common-law property interest in the rental car as a second bailee that would have provided him with a cognizable *Fourth*

Amendment interest in the vehicle. But he did not raise this argument before the District Court or Court of Appeals, and those courts did not have occasion to address whether Byrd was a second bailee or what consequences might follow from that determination. In those courts he framed the question solely in terms of the *Katz* test noted above. Because this is "a court of review, not of first view," it is generally unwise to consider arguments in the first instance, and the Court declines to reach Byrd's contention that he was a second bailee.
Reference to property concepts, however, aids the Court in assessing the precise question here: Does a driver of a rental car have a reasonable expectation of privacy in the car when he or she is not listed as an authorized driver on the rental agreement?

III

A

One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it. More difficult to define and delineate are the legitimate expectations of privacy of others.

On the one hand, as noted above, it is by now well established that a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it.

On the other hand, it is also clear that legitimate presence on the premises of the place searched, standing alone, is not enough to accord a reasonable expectation of privacy, because it "creates too broad a gauge for measurement of *Fourth Amendment* rights." *Rakas* ("We would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling"); *Minnesota v. Carter*. . .

Although the Court has not set forth a single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy, it has explained that "[l]egitimation of expectations of privacy by law must have a source outside of the *Fourth Amendment*, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*. The two concepts in cases like this one are often linked. "One of the main rights attaching to property is the right to exclude others," and, in the main, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." This general property-based concept guides resolution of this case.

B

Here, the Government contends that drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the rental company's lack of authorization alone. This *per se* rule rests on too restrictive a view of the *Fourth Amendment*'s protections. Byrd, by contrast, contends that the sole occupant of a rental car always has an expectation of privacy in it based on mere possession and control. There is more to recommend Byrd's

proposed rule than the Government's; but, without qualification, it would include within its ambit thieves and others who, not least because of their lack of any property-based justification, would not have a reasonable expectation of privacy.

1

Stripped to its essentials, the Government's position is that only authorized drivers of rental cars have expectations of privacy in those vehicles. This position is based on the following syllogism: Under *Rakas*, passengers do not have an expectation of privacy in an automobile glove compartment or like places; an unauthorized driver like Byrd would have been the passenger had the renter been driving; and the unauthorized driver cannot obtain greater protection when he takes the wheel and leaves the renter behind. The flaw in this syllogism is its major premise, for it is a misreading of *Rakas*.

The Court in *Rakas* did not hold that passengers cannot have an expectation of privacy in automobiles. To the contrary, the Court disclaimed any intent to hold "that a passenger lawfully in an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it." The Court instead rejected the argument that legitimate presence alone was sufficient to assert a *Fourth Amendment* interest, which was fatal to the petitioners' case there because they had "claimed only that they were 'legitimately on [the] premises' and did not claim that they had any legitimate expectation of privacy in the areas of the car which were searched."

What is more, the Government's syllogism is beside the point, because this case does not involve a passenger at all but instead the driver and sole occupant of a rental car. As Justice Powell observed in his concurring opinion in *Rakas*, a "distinction . . . may be made in some circumstances between the *Fourth Amendment* rights of passengers and the rights of an individual who has exclusive control of an automobile or of its locked compartments." This situation would be similar to the defendant in *Jones*. . . who, as *Rakas* notes, had a reasonable expectation of privacy in his friend's apartment because he "had complete dominion and control over the apartment and could exclude others from it," Justice Powell's observation was also consistent with the majority's explanation that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude," an explanation tied to the majority's discussion of *Jones*.

The Court sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it, much as it did not seem to matter whether the friend of the defendant in *Jones* owned or leased the apartment he permitted the defendant to use in his absence. Both would have the expectation of privacy that comes with the right to exclude. Indeed, the Government conceded at oral argument that an unauthorized driver in sole possession of a rental car would be permitted to exclude third parties from it, such as a carjacker.

2

The Government further stresses that Byrd's driving the rental car violated the rental agreement that Reed signed, and it contends this violation meant Byrd could not have had any basis for claiming an expectation of privacy in the rental car at the time of the search. As anyone who has rented a car knows, car rental agreements are filled with long lists of restrictions. Examples include prohibitions on driving the car on unpaved roads or driving while using a handheld cellphone. Few would contend that violating provisions like these has anything to do with a driver's reasonable expectation of privacy in the rental car—as even the Government agrees. Despite this concession, the Government argues that permitting an unauthorized driver to take the wheel of a rental car is a breach different in kind from these others, so serious that the rental company would consider the agreement "void" the moment an unauthorized driver takes the wheel. To begin with, that is not what the contract says. It states: "Permitting an unauthorized driver to operate the vehicle is a violation of the rental agreement. This may result in any and all coverage otherwise provided by the rental agreement being void and my being fully responsible for all loss or damage, including liability to third parties."

Putting the Government's misreading of the contract aside, there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it—perhaps the renter is drowsy or inebriated and the two think it safer for the friend to drive them to their destination. True, this constitutes a breach of the rental agreement, and perhaps a serious one, but the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car. Stated in different terms, for *Fourth Amendment* purposes there is no meaningful difference between the authorized-driver provision and the other provisions the Government agrees do not eliminate an expectation of privacy, all of which concern risk allocation between private parties—violators might pay additional fees, lose insurance coverage, or assume liability for damage resulting from the breach. But that risk allocation has little to do with whether one would have a reasonable expectation of privacy in the rental car if, for example, he or she otherwise has lawful possession of and control over the car.

3

The central inquiry at this point turns on the concept of lawful possession, and this is where an important qualification of Byrd's proposed rule comes into play. *Rakas* makes clear that "'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search. . .. A burglar plying his trade in a summer cabin during the off season," for example, "may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'" Likewise, "a person present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile." No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car.

On this point, in its merits brief, the Government asserts that, on the facts here, Byrd should have no greater expectation of privacy than a car thief because he intentionally used a third party as a strawman in a calculated plan to mislead the rental company from the very outset, all to aid him in committing a crime. This argument is premised on the Government's inference that Byrd knew he would not have been able to rent the car on his own, because he would not have satisfied the rental company's requirements based on his criminal record, and that he used Reed,

who had no intention of using the car for her own purposes, to procure the car for him to transport heroin to Pittsburgh.
It is unclear whether the Government's allegations, if true, would constitute a criminal offense in the acquisition of the rental car under applicable law. And it may be that there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge of the type the Government alleges occurred here and one who steals the car outright.
The Government did not raise this argument in the District Court or the Court of Appeals, however. It relied instead on the sole fact that Byrd lacked authorization to drive the car. And it is unclear from the record whether the Government's inferences paint an accurate picture of what occurred. Because it was not addressed in the District Court or Court of Appeals, the Court declines to reach this question. The proper course is to remand for the argument and potentially further factual development to be considered in the first instance by the Court of Appeals or by the District Court.

IV

The Government argued in its brief in opposition to certiorari that, even if Byrd had a *Fourth Amendment* interest in the rental car, the troopers had probable cause to believe it contained evidence of a crime when they initiated their search. If that were true, the troopers may have been permitted to conduct a warrantless search of the car in line with the Court's cases concerning the automobile exception to the warrant requirement. The Court of Appeals did not reach this question because it concluded, as an initial matter, that Byrd lacked a reasonable expectation of privacy in the rental car.

It is worth noting that most courts analyzing the question presented in this case, including the Court of Appeals here, have described it as one of *Fourth Amendment* "standing," a concept the Court has explained is not distinct from the merits and "is more properly subsumed under substantive *Fourth Amendment* doctrine." *Rakas*.

The concept of standing in *Fourth Amendment* cases can be a useful shorthand for capturing the idea that a person must have a cognizable *Fourth Amendment* interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits. Because *Fourth Amendment* standing is subsumed under substantive *Fourth Amendment* doctrine, it is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a *Fourth Amendment* claim. On remand, then, the Court of Appeals is not required to assess Byrd's reasonable expectation of privacy in the rental car before, in its discretion, first addressing whether there was probable cause for the search, if it finds the latter argument has been preserved.

V

Though new, the fact pattern here continues a well traveled path in this Court's *Fourth Amendment* jurisprudence. Those cases support the proposition, and the Court now holds, that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. The Court leaves for remand two of the Government's arguments: that one who intentionally uses a third

party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event. The Court of Appeals has discretion as to the order in which these questions are best addressed.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

Although I have serious doubts about the "reasonable expectation of privacy" test from *Katz*. I join the Court's opinion because it correctly navigates our precedents, which no party has asked us to reconsider. As the Court notes, Byrd also argued that he should prevail under the original meaning of the *Fourth Amendment* because the police interfered with a property interest that he had in the rental car. I agree with the Court's decision not to review this argument in the first instance. In my view, it would be especially "unwise" to reach that issue because the parties fail to adequately address several threshold questions.

The *Fourth Amendment* guarantees the people's right to be secure from unreasonable searches of "their persons, houses, papers, and effects." With this language, the *Fourth Amendment* gives "*each* person . . . the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects." *Minnesota v. Carter* (Scalia, J., concurring). The issue, then, is whether Byrd can prove that the rental car was *his* effect.

That issue seems to turn on at least three threshold questions. First, what kind of property interest do individuals need before something can be considered "their . . . effec[t]" under the original meaning of the *Fourth Amendment*? Second, what body of law determines whether that property interest is present— modern state law, the common law of 1791, or something else? Third, is the unauthorized use of a rental car illegal or otherwise wrongful under the relevant law, and, if so, does that illegality or wrongfulness affect the *Fourth Amendment* analysis?

The parties largely gloss over these questions, but the answers seem vitally important to assessing whether Byrd can claim that the rental car is his effect. In an appropriate case, I would welcome briefing and argument on these questions.

JUSTICE ALITO, concurring.

The Court holds that an unauthorized driver of a rental car is not always barred from contesting a search of the vehicle. Relevant questions bearing on the driver's ability to raise a *Fourth Amendment* claim may include: the terms of the particular rental agreement; the circumstances surrounding the rental; the reason why the driver took the wheel; any property right that the driver might have; and the legality of his conduct under the law of the State where the conduct occurred. On remand, the Court of Appeals is free to reexamine the question whether petitioner may assert a *Fourth Amendment* claim or to decide the appeal on another appropriate ground. On this understanding, I join the opinion of the Court.

QUESTIONS AND NOTES

1. Would it have mattered if Byrd were underaged and the Rent-a-Car Company had a policy against allowing drivers under 25 to drive a car because its insurance wouldn't cover any such driver?
2. Were any of the things Byrd did while driving suspicious? Hand position on steering wheel? Distance from steering wheel? Driving a Rent-a-Car?
3. Assuming that your answer was "no" to all of the question 2 questions, does the traffic infraction sanitize the stop? Explain.
4. Is Byrd's case for standing stronger than Rakas? If not, why would he have standing when Rakas did not?
5. Is the Court beginning to take the Fourth Amendment more seriously?
6. Is this case really like an inebriated driver allowing a friend to drive or should the willful fraudulent conduct of Reed and Byrd have made a difference?
7. The Court describes Byrd's possession as lawful. Does that beg the question? The Government's position is that his possession was unlawful?
8. How do you think this case will be decided on remand? Will the Court fin that there was probable cause?
9. Justice Alito contends that state law might determine whether Byrd had standing. Would that be Pennsylvania law or New Jersey law?

Insert p. 1306 before heading B.

UTAH v. STRIEFF

195 L. Ed. 2d 400 (2016)

Opinion

JUSTICE THOMAS delivered the opinion of the Court.

To enforce the Fourth Amendment's prohibition against "unreasonable searches and seizures," this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

I

This case began with an anonymous tip. In December 2006, someone called the South Salt Lake City police's drug-tip line to report "narcotics activity" at a particular residence. Narcotics detective Douglas Fackrell investigated the tip. Over the course of about a week, Officer Fackrell conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs.

One of those visitors was respondent Edward Strieff. Officer Fackrell observed Strieff exit the house and walk toward a nearby convenience store. In the store's parking lot, Officer Fackrell detained Strieff, identified himself, and asked Strieff what he was doing at the residence.

As part of the stop, Officer Fackrell requested Strieff's identification, and Strieff produced his Utah identification card. Officer Fackrell relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell then arrested Strieff pursuant to that warrant. When Officer Fackrell searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia.

The State charged Strieff with unlawful possession of methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. At the suppression hearing, the prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The trial court agreed with the State and admitted the evidence. The court found that the short time between the illegal stop and the search weighed in favor of suppressing the evidence, but that two countervailing considerations made it admissible. First, the court considered the presence of a valid arrest warrant to be an "'extraordinary intervening circumstance.'" Second, the court stressed the absence of flagrant misconduct by Officer Fackrell, who was conducting a legitimate investigation of a suspected drug house.

Strieff conditionally pleaded guilty to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia, but reserved his right to appeal the trial court's denial of the suppression motion. The Utah Court of Appeals affirmed.

The Utah Supreme Court reversed. It held that the evidence was inadmissible because only "a voluntary act of a defendant's free will (as in a confession or consent to search)" sufficiently breaks the connection between an illegal search and the discovery of evidence. Because Officer Fackrell's discovery of a valid arrest warrant did not fit this description, the court ordered the evidence suppressed.

We granted certiorari to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant. We now reverse.

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." Because officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help. In the 20th century, however, the exclusionary rule—the rule that often requires trial courts to exclude unlawfully seized evidence in a criminal trial—became the principal judicial remedy to deter Fourth Amendment violations.

Under the Court's precedents, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality," the so-called "'fruit of the poisonous tree.'" But the significant costs of this rule have led us to deem it "applicable only . . . where its deterrence benefits outweigh its substantial social costs." *Hudson v. Michigan.* "Suppression of evidence . . . has always been our last resort, not our first impulse."

We have accordingly recognized several exceptions to the rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. [A]t issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."

B

Turning to the application of the attenuation doctrine to this case, we first address a threshold question: whether this doctrine applies at all to a case like this, where the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant. The Utah Supreme Court declined to apply the attenuation doctrine because it read our precedents as applying the doctrine only "to circumstances involving an independent act of a defendant's 'free will' in confessing to a crime or consenting to a search." In this Court, Strieff has not defended this argument, and we disagree with it, as well. The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions. And the logic of our prior attenuation cases is not limited to independent acts by the defendant.

It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person. The three factors articulated in *Brown v. Illinois* guide our analysis. First, we look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider "the presence of intervening circumstances." Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct." In evaluating these factors, we assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff. And, because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant's existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence.

1

The first factor, temporal proximity between the initially unlawful stop and the search, favors suppressing the evidence. Our precedents have declined to find that this factor favors attenuation unless "substantial time" elapses between an unlawful act and when the evidence is obtained. Here, however, Officer Fackrell discovered drug contraband on Strieff's person only minutes after the illegal stop. As the Court explained in Brown, such a short time interval counsels in favor of suppression; there, we found that the confession should be suppressed, relying in part on the "less than two hours" that separated the unconstitutional arrest and the confession.

In contrast, the second factor, the presence of intervening circumstances, strongly favors the State. In Segura, the Court addressed similar facts to those here and found sufficient intervening circumstances to allow the admission of evidence. There, agents had probable cause to believe that apartment occupants were dealing cocaine. They sought a warrant. In the meantime, they entered the apartment, arrested an occupant, and discovered evidence of drug activity during a limited search for security reasons. The next evening, the Magistrate Judge issued the search warrant. This Court deemed the evidence admissible notwithstanding the illegal search because the information supporting the warrant was "wholly unconnected with the [arguably illegal] entry and was known to the agents well before the initial entry."

Segura, of course, applied the independent source doctrine because the unlawful entry "did not contribute in any way to discovery of the evidence seized under the warrant." But the Segura Court suggested that the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is "sufficiently attenuated to dissipate the taint." That principle applies here.

In this case, the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." Officer Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety.

Finally, the third factor, "the purpose and flagrancy of the official misconduct" also strongly favors the State. The exclusionary rule exists to deter police misconduct. The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.

Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell's stated purpose was to "find out what was going on [in] the house." Nothing prevented him from approaching Strieff simply to ask. See *Florida v. Bostick*. ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions"). But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights.

While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a "negligibly burdensome precautio[n]" for officer safety. *Rodriguez v. United States*. And Officer Fackrell's actual search of Strieff was a lawful search incident to arrest.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that

warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct.

2

We find Strieff's counterarguments unpersuasive.

First, he argues that the attenuation doctrine should not apply because the officer's stop was purposeful and flagrant. He asserts that Officer Fackrell stopped him solely to fish for evidence of suspected wrongdoing. But Officer Fackrell sought information from Strieff to find out what was happening inside a house whose occupants were legitimately suspected of dealing drugs. This was not a suspicionless fishing expedition "in the hope that something would turn up." *Taylor v. Alabama*.

Strieff argues, moreover, that Officer Fackrell's conduct was flagrant because he detained Strieff without the necessary level of cause (here, reasonable suspicion). But that conflates the standard for an illegal stop with the standard for flagrancy. For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure. See, e.g., *Kaupp*, 538 U. S., at 628, 633, (finding flagrant violation where a warrantless arrest was made in the arrestee's home after police were denied a warrant and at least some officers knew they lacked probable cause). Neither the officer's alleged purpose nor the flagrancy of the violation rise to a level of misconduct to warrant suppression.

Second, Strieff argues that, because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied. We think that this outcome is unlikely. Such wanton conduct would expose police to civil liability. And in any event, the Brown factors take account of the purpose and flagrancy of police misconduct. Were evidence of a dragnet search presented here, the application of the Brown factors could be different. But there is no evidence that the concerns that Strieff raises with the criminal justice system are present in South Salt Lake City, Utah.

* * *

We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest. The judgment of the Utah Supreme Court, accordingly, is reversed.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins as to Parts I, II, and III, dissenting.

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing

wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.

I

Minutes after Edward Strieff walked out of a South Salt Lake City home, an officer stopped him, questioned him, and took his identification to run it through a police database. The officer did not suspect that Strieff had done anything wrong. Strieff just happened to be the first person to leave a house that the officer thought might contain "drug activity."

As the State of Utah concedes, this stop was illegal. The Fourth Amendment protects people from "unreasonable searches and seizures." An officer breaches that protection when he detains a pedestrian to check his license without any evidence that the person is engaged in a crime. *Delaware v. Prouse*; *Terry v. Ohio.* The officer deepens the breach when he prolongs the detention just to fish further for evidence of wrongdoing. In his search for lawbreaking, the officer in this case himself broke the law.

The officer learned that Strieff had a "small traffic warrant." Pursuant to that warrant, he arrested Strieff and, conducting a search incident to the arrest, discovered methamphetamine in Strieff's pockets.

Utah charged Strieff with illegal drug possession. Before trial, Strieff argued that admitting the drugs into evidence would condone the officer's misbehavior. The methamphetamine, he reasoned, was the product of the officer's illegal stop. Admitting it would tell officers that unlawfully discovering even a "small traffic warrant" would give them license to search for evidence of unrelated offenses. The Utah Supreme Court unanimously agreed with Strieff. A majority of this Court now reverses.

II

It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right. When "lawless police conduct" uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence. For example, if an officer breaks into a home and finds a forged check lying around, that check may not be used to prosecute the homeowner for bank fraud. We would describe the check as "'fruit of the poisonous tree.'" *Wong Sun v. United States*. Fruit that must be cast aside includes not only evidence directly found by an illegal search but also evidence "come at by exploitation of that illegality." Ibid.

This "exclusionary rule" removes an incentive for officers to search us without proper justification. It also keeps courts from being "made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." When courts admit only lawfully obtained evidence, they encourage "those who formulate law enforcement polices, and the officers who implement them, to incorporate Fourth

Amendment ideals into their value system." But when courts admit illegally obtained evidence as well, they reward "manifest neglect if not an open defiance of the prohibitions of the Constitution."

Applying the exclusionary rule, the Utah Supreme Court correctly decided that Strieff's drugs must be excluded because the officer exploited his illegal stop to discover them. The officer found the drugs only after learning of Strieff's traffic violation; and he learned of Strieff's traffic violation only because he unlawfully stopped Strieff to check his driver's license.

The court also correctly rejected the State's argument that the officer's discovery of a traffic warrant unspoiled the poisonous fruit. The State analogizes finding the warrant to one of our earlier decisions, Wong Sun v. United States. There, an officer illegally arrested a person who, days later, voluntarily returned to the station to confess to committing a crime.. Even though the person would not have confessed "but for the illegal actions of the police," we noted that the police did not exploit their illegal arrest to obtain the confession. Because the confession was obtained by "means sufficiently distinguishable" from the constitutional violation, we held that it could be admitted into evidence. The State contends that the search incident to the warrant-arrest here is similarly distinguishable from the illegal stop.

But *Wong Sun* explains why Strieff's drugs must be excluded. We reasoned that a Fourth Amendment violation may not color every investigation that follows but it certainly stains the actions of officers who exploit the infraction. We distinguished evidence obtained by innocuous means from evidence obtained by exploiting misconduct after considering a variety of factors: whether a long time passed, whether there were "intervening circumstances," and whether the purpose or flagrancy of the misconduct was "calculated" to procure the evidence. *Brown v. Illinois*.

These factors confirm that the officer in this case discovered Strieff's drugs by exploiting his own illegal conduct. The officer did not ask Strieff to volunteer his name only to find out, days later, that Strieff had a warrant against him. The officer illegally stopped Strieff and immediately ran a warrant check. The officer's discovery of a warrant was not some intervening surprise that he could not have anticipated. Utah lists over 180,000 misdemeanor warrants in its database, and at the time of the arrest, Salt Lake County had a "backlog of outstanding warrants" so large that it faced the "potential for civil liability." The officer's violation was also calculated to procure evidence. His sole reason for stopping Strieff, he acknowledged, was investigative—he wanted to discover whether drug activity was going on in the house Strieff had just exited.

The warrant check, in other words, was not an "intervening circumstance" separating the stop from the search for drugs. It was part and parcel of the officer's illegal "expedition for evidence in the hope that something might turn up." Under our precedents, because the officer found Strieff's drugs by exploiting his own constitutional violation, the drugs should be excluded.

III

A

The Court sees things differently. To the Court, the fact that a warrant gives an officer cause to arrest a person severs the connection between illegal policing and the resulting discovery of

evidence. This is a remarkable proposition: The mere existence of a warrant not only gives an officer legal cause to arrest and search a person, it also forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch.

To explain its reasoning, the Court relies on *Segura v. United States*. There, federal agents applied for a warrant to search an apartment but illegally entered the apartment to secure it before the judge issued the warrant. After receiving the warrant, the agents then searched the apartment for drugs. The question before us was what to do with the evidence the agents then discovered. We declined to suppress it because "[t]he illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant."

According to the majority, Segura involves facts "similar" to this case and "suggest[s]" that a valid warrant will clean up whatever illegal conduct uncovered it. It is difficult to understand this interpretation. In Segura, the agents' illegal conduct in entering the apartment had nothing to do with their procurement of a search warrant. Here, the officer's illegal conduct in stopping Strieff was essential to his discovery of an arrest warrant. Segura would be similar only if the agents used information they illegally obtained from the apartment to procure a search warrant or discover an arrest warrant. Precisely because that was not the case, the Court admitted the untainted evidence.

The majority likewise misses the point when it calls the warrant check here a "'negligibly burdensome precautio[n]'" taken for the officer's "safety." Remember, the officer stopped Strieff without suspecting him of committing any crime. By his own account, the officer did not fear Strieff. Moreover, the safety rationale we discussed in Rodriguez, an opinion about highway patrols, is conspicuously absent here. A warrant check on a highway "ensur[es] that vehicles on the road are operated safely and responsibly." We allow such checks during legal traffic stops because the legitimacy of a person's driver's license has a "close connection to roadway safety." A warrant check of a pedestrian on a sidewalk, "by contrast, is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'" Surely we would not allow officers to warrant-check random joggers, dog walkers, and lemonade vendors just to ensure they pose no threat to anyone else.

The majority also posits that the officer could not have exploited his illegal conduct because he did not violate the Fourth Amendment on purpose. Rather, he made "good-faith mistakes." Never mind that the officer's sole purpose was to fish for evidence. The majority casts his unconstitutional actions as "negligent" and therefore incapable of being deterred by the exclusionary rule.

But the Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better. Even officers prone to negligence can learn from courts that exclude illegally obtained evidence. Indeed, they are perhaps the most in need of the education, whether by the judge's opinion, the prosecutor's future guidance, or an updated manual on criminal procedure. If the officers are in doubt about what the law requires, exclusion gives them an "incentive to err on the side of constitutional behavior."

B

Most striking about the Court's opinion is its insistence that the event here was "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." Respectfully, nothing about this case is isolated.

Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses.

Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. In a single year in New Orleans, officers "made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets." In the St. Louis metropolitan area, officers "routinely" stop people—on the street, at bus stops, or even in court—for no reason other than "an officer's desire to check whether the subject had a municipal arrest warrant pending." Ferguson Report, at 49, 57. In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them.

I do not doubt that most officers act in "good faith" and do not set out to break the law. That does not mean these stops are "isolated instance[s] of negligence," however. Many are the product of institutionalized training procedures. The New York City Police Department long trained officers to, in the words of a District Judge, "stop and question first, develop reasonable suspicion later." The Utah Supreme Court described as "'routine procedure' or 'common practice'" the decision of Salt Lake City police officers to run warrant checks on pedestrians they detained without reasonable suspicion. *State v. Topanotes*, 2003 UT 30, ¶2, 76 P. 3d 1159, 1160. In the related context of traffic stops, one widely followed police manual instructs officers looking for drugs to "run at least a warrants check on all drivers you stop. Statistically, narcotics offenders are . . . more likely to fail to appear on simple citations, such as traffic or trespass violations, leading to the issuance of bench warrants. Discovery of an outstanding warrant gives you cause for an immediate custodial arrest and search of the suspect."

The majority does not suggest what makes this case "isolated" from these and countless other examples. Nor does it offer guidance for how a defendant can prove that his arrest was the result of "widespread" misconduct. Surely it should not take a federal investigation of Salt Lake County before the Court would protect someone in Strieff's position.

IV

Writing only for myself, and drawing on my professional experiences, I would add that unlawful "stops" have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. *Whren v. United States*. That justification must provide specific reasons why the officer suspected you were breaking the law, but it may factor in your ethnicity, where you live, what you were wearing, and how you behaved, *Illinois v. Wardlow*. The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous.

The indignity of the stop is not limited to an officer telling you that you look like a criminal. The officer may next ask for your "consent" to inspect your bag or purse without telling you that you can decline. Regardless of your answer, he may order you to stand "helpless, perhaps facing a wall with [your] hands raised." If the officer thinks you might be dangerous, he may then "frisk" you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may "'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.'"

The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or "driving [your] pickup truck . . . with [your] 3-year-old son and 5-year-old daughter . . . without [your] seatbelt fastened." *Atwater v. Lago Vista*. At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to "shower with a delousing agent" while you "lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals." *Florence v. Board of Chosen Freeholders of County of Burlington*. Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the "civil death" of discrimination by employers, landlords, and whoever else conducts a background check. And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you "arrestable on sight" in the future.

This case involves a suspicionless stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops

corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

***

I dissent.

JUSTICE KAGAN, with whom JUSTICE GINSBURG joins, dissenting.

If a police officer stops a person on the street without reasonable suspicion, that seizure violates the Fourth Amendment. And if the officer pats down the unlawfully detained individual and finds drugs in his pocket, the State may not use the contraband as evidence in a criminal prosecution. That much is beyond dispute. The question here is whether the prohibition on admitting evidence dissolves if the officer discovers, after making the stop but before finding the drugs, that the person has an outstanding arrest warrant. Because that added wrinkle makes no difference under the Constitution, I respectfully dissent.

This Court has established a simple framework for determining whether to exclude evidence obtained through a Fourth Amendment violation: Suppression is necessary when, but only when, its societal benefits outweigh its costs. *See Davis v. United States*, U. S. 229, 237 (2011). The exclusionary rule serves a crucial function—to deter unconstitutional police conduct. By barring the use of illegally obtained evidence, courts reduce the temptation for police officers to skirt the Fourth Amendment's requirements. But suppression of evidence also "exacts a heavy toll": Its consequence in many cases is to release a criminal without just punishment. Our decisions have thus endeavored to strike a sound balance between those two competing considerations—rejecting the "reflexive" impulse to exclude evidence every time an officer runs afoul of the Fourth Amendment, but insisting on suppression when it will lead to "appreciable deterrence" of police misconduct, *Herring v. United States*.

This case thus requires the Court to determine whether excluding the fruits of Officer Douglas Fackrell's unjustified stop of Edward Strieff would significantly deter police from committing similar constitutional violations in the future. And as the Court states, that inquiry turns on application of the "attenuation doctrine," —our effort to "mark the point" at which the discovery of evidence "become[s] so attenuated" from the police misconduct that the deterrent benefit of exclusion drops below its cost. Since *Brown v. Illinois*, three factors have guided that analysis. First, the closer the "temporal proximity" between the unlawful act and the discovery of evidence, the greater the deterrent value of suppression. Second, the more "purpose[ful]" or "flagran[t]" the police illegality, the clearer the necessity, and better the chance, of preventing similar misbehavior. And third, the presence (or absence) of "intervening circumstances" makes a difference: The stronger the causal chain between the misconduct and the evidence, the more exclusion will curb future constitutional violations. Here, as shown below, each of those considerations points toward suppression: Nothing in Fackrell's discovery of an outstanding warrant so attenuated the connection between his wrongful behavior and his detection of drugs as to diminish the exclusionary rule's deterrent benefits.

Start where the majority does: The temporal proximity factor, it forthrightly admits, "favors suppressing the evidence." After all, Fackrell's discovery of drugs came just minutes after the

unconstitutional stop. And in prior decisions, this Court has made clear that only the lapse of "substantial time" between the two could favor admission. So the State, by all accounts, takes strike one.

Move on to the purposefulness of Fackrell's conduct, where the majority is less willing to see a problem for what it is. The majority chalks up Fackrell's Fourth Amendment violation to a couple of innocent "mistakes." But far from a Barney Fife-type mishap, Fackrell's seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality. At the suppression hearing, Fackrell acknowledged that the stop was designed for investigatory purposes—i.e., to "find out what was going on [in] the house" he had been watching, and to figure out "what [Strieff] was doing there." And Fackrell frankly admitted that he had no basis for his action except that Strieff "was coming out of the house." Plug in Fackrell's and Strieff's names, substitute "stop" for "arrest" and "reasonable suspicion" for "probable cause," and this Court's decision in Brown perfectly describes this case:

> "[I]t is not disputed that [Fackrell stopped Strieff] without [reasonable suspicion]. [He] later testified that [he] made the [stop] for the purpose of questioning [Strieff] as part of [his] investigation . . . . The illegality here . . . had a quality of purposefulness. The impropriety of the [stop] was obvious. [A]wareness of that fact was virtually conceded by [Fackrell] when [he] repeatedly acknowledged, in [his] testimony, that the purpose of [his] action was 'for investigation': [Fackrell] embarked upon this expedition for evidence in the hope that something might turn up."

In Brown, the Court held those facts to support suppression—and they do here as well. Swing and a miss for strike two.

Finally, consider whether any intervening circumstance "br[oke] the causal chain" between the stop and the evidence. The notion of such a disrupting event comes from the tort law doctrine of proximate causation. And as in the tort context, a circumstance counts as intervening only when it is unforeseeable—not when it can be seen coming from miles away. For rather than breaking the causal chain, predictable effects (e.g., X leads naturally to Y leads naturally to Z) are its very links.

And Fackrell's discovery of an arrest warrant—the only event the majority thinks intervened—was an eminently foreseeable consequence of stopping Strieff. As Fackrell testified, checking for outstanding warrants during a stop is the "normal" practice of South Salt Lake City police. In other words, the department's standard detention procedures—stop, ask for identification, run a check—are partly designed to find outstanding warrants. And find them they will, given the staggering number of such warrants on the books. To take just a few examples: The State of California has 2.5 million outstanding arrest warrants (a number corresponding to about 9% of its adult population); Pennsylvania (with a population of about 12.8 million) contributes 1.4 million more; and New York City (population 8.4 million) adds another 1.2 million. So outstanding warrants do not appear as bolts from the blue. They are the run-of-the-mill results of police stops—what officers look for when they run a routine check of a person's identification and what they know will turn up with fair regularity. In short, they are nothing like what intervening circumstances are supposed to be. Strike three.

The majority's misapplication of Brown's three-part inquiry creates unfortunate incentives for the police—indeed, practically invites them to do what Fackrell did here. Consider an officer who, like Fackrell, wishes to stop someone for investigative reasons, but does not have what a court would view as reasonable suspicion. If the officer believes that any evidence he discovers will be inadmissible, he is likely to think the unlawful stop not worth making—precisely the deterrence the exclusionary rule is meant to achieve. But when he is told of today's decision? Now the officer knows that the stop may well yield admissible evidence: So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer's incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove. Because the majority thus places Fourth Amendment protections at risk, I respectfully dissent.

QUESTIONS AND NOTES

1. Although Strieff was in fact a visitor, Officer Fackrell didn't know that when he stopped him. For all he knew, Strieff could have lived in the house and simply gone out to walk to the neighborhood store. By describing him as a visitor, did the Court understate the severity of the violation?
2. Do you think that Officer Fackrell's behavior was "flagrant"? Why? Why not?
3. Is it even clear that the stat should have conceded the illegality of the initial stop? Explain.
4. Assess the following sentence: "[B]ecause we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant's existence alone would make the initial constitutional even if Officer Fackrell was unaware of its existence." Isn't that possibility directly contrary to the rule that a stop is never justified by what it might subsequently turn up? Is the Court questioning that long-time bedrock of Fourth Amendment law or simply saying that it is not at issue?
5. Is (should) this case (be) controlled by *Brown v. Illinois* and *Taylor v. Alabama*?
6. Would (should) *Strieff* cause concern for an innocent person with no outstanding warrants?