No. 16-7314

IN THE
SUPREME COURT OF THE UNITED STATES

ANTONIO RIOS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case involves questions of privacy and the issue of whether police may track 95% of Americans—the 95% who own and carry cellular telephones—without a warrant. It does not turn on artificial distinctions about the duration of tracking, the technology used to conduct tracking, or whether police collect historical or real-time data. Police tracked the location of Antonio Rios's cellular phone in order to monitor his activities and ultimately follow his travel path in order to arrest him. Police acted without probable cause and the Sixth Circuit Court of Appeals refused to review his challenge to what occurred based on its own precedent. The underlying constitutional issue relating to the expectation of privacy in a cellular phone signal is no different than the issue that this Court is considering in *Carpenter v. United States*, cert. granted, No. 15-402 (June 5, 2017). Certiorari is appropriate here in order to allow the Court to consider the aspects of real-time tracking presented in this case, and not presented in *Carpenter*.

Research suggests that 95% of Americans have a cellular phone and most of these people carry their phones wherever they go. Pew Research Center, *Mobile Fact Sheet* (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/mobile/. And 77% of these people carry smartphones. *Id.* Statistics suggest *every* American between the ages of 18 and 29 has a cellular phone. *Id.* What each of these young people also has is a government-mandated tracking device. The Federal Communications Commission regulates cellular service and tracking and location data. For example,

47 C.F.R. § 20.18 mandates certain service providers accommodate cellular 911 services. 47 C.F.R. § 20.18(b).

Under these provisions, certain licensees, with network-based technologies, must have had, by 2012, the ability to pinpoint a caller's location within 100 yards for 67% of calls for 70% of the carrier's covered population. 47 C.F.R. § 20.18(h)(1)(i)(A). The standards tightened over the years, increasing to 100% of counties covered by the carrier by 2016. 47 C.F.R. § 20.18(h)(1)(i)(C). The technology must be able to provide the location to the set accuracy within 30 seconds of a caller placing a 911 call. 47 C.F.R. § 20.18(h)(3). The FCC specifically regulates indoor location accuracy, with mandates on "horizontal" and "vertical" precision. 47 C.F.R. § 20.18(h)(3)(i)(2). Obligations related to location identification—to 911 calling capabilities—extend beyond licensees to resellers. *See* 47 C.F.R. § 20.18(p).

These and other regulations mean the government mandates cellular phones be capable of virtually pinpointing the location of phone carriers, even within a building. Combined with the statistics on phone use, these regulations show the government has mandated that devices that *every* young person, and almost every person in general, in America carries be capable of providing precision tracking data. This tracking capability exists whether or not a person is using the phone. *See, e.g.*, Apple, *About Location Services and Privacy*, https://support.apple.com/en-us/HT207056 (last accessed October 2, 2017) ("For safety purposes, however, your iPhone's location information may be used when you place an emergency call to aid response efforts regardless of whether you enable Location Services."). Congress has

made this information available to law-enforcement personnel seeking to respond to emergency situations when the cell-phone user has called for emergency services. *See* 47 U.S.C. § 222(d)(4)(A). It has also made data available for other emergency services—exigent circumstances. *See* 47 U.S.C. § 222(d)(4); *cf. Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (exigent circumstances constitute an exception to the warrant requirement and include a need to provide emergency services to a home's occupant). Whether such access is constitutionally permissible is beyond the scope of this petition, but access other than in an exigency is exactly the question here and should be answered in the negative.

The government regulates the broadcast and communication airwaves. *See ABC, Inc. v. Aereo Inc.*, 134 S. Ct. 2498, 2511 (2014). One cannot communicate over these airwaves without submitting to and complying with government regulations. *See id.* at 2503. To participate in modern life, however, one virtually *must* use a cell phone. *See Riley v. California*, 134 S. Ct. 2473, 2484 (2014) ("These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."). The question is should the government, which created and regulated this tracking system, be able to track, without a warrant, anyone carrying a cellular phone.

A. Certiorari is Appropriate Here So That This Court Will Have The Chance To Consider The Constitutional Implications Of Real-Time Tracking.

The Respondent suggests this Court could choose to hold this case pending a decision in *Carpenter v. United States*, cert. granted, No. 15-402 (June 5, 2017). Br. in Opp. 11, 20, 27. However, this case presents an important issue not found in *Carpenter*: the impact of real-time tracking. In deciding *Carpenter*, this Court may not be required to reach that issue, making its consideration crucial in this case. In the alternative, it may be appropriate for this Court to hold this case pending a decision in *Carpenter*.

B. For Purposes Of Deciding The Critical Legal Issues Here, The Technology Authorities Used To Track Mr. Rios Is Inconsequential.

The Respondent argues that the record in this case fails to identify the exact technology used or the exact information provided by the cellular-service provider, and that this failure makes the case inappropriate for review. Br. in Opp. 12 n.1. The crux of the issue here lies not with the technology but with the invasion of privacy. It is undisputed that the police tracked signal from Mr. Rios's cell phone. Congress recognizes that cell-phone location data should receive protection from disclosure. Under 47 U.S.C. § 222, "call location information" receives protection from disclosure without a customer's consent. 47 U.S.C. § 222(f). Congress regulates law-enforcement access to cell-phone data. *See, e.g.*, 47 U.S.C. §§ 229 & 1004 (requiring court order or "other lawful authorization" to access data). Congress has not distinguished these protections based on the technology involved.

Likewise, in 18 U.S.C. § 1039, Congress has criminalized attempting "to obtain, confidential phone records information" through fraud. 18 U.S.C. § 1039(a). Such conduct constitutes an offense regardless of the technology involved. *See id.* Congress defined "confidential phone records information" as information that relates to the quantity, technical configuration, type, destination, *location*, or amount of use of a service" (which is "offered by a covered entity") and to which a customer of the covered entity subscribed, and which is kept by the covered entity solely by virtue of the relationship between the covered entity and the customer. 18 U.S.C. § 1039(h)(1)(A).

Even if Congress has not gone far enough to comply with the Constitution's requirements, it has recognized that location data should not be available freely—and it makes no distinction based only on the involved technology. Government involvement generally, discussed here and in the opening of this brief, in cell-phone and location-tracking technology also vitiates any distinction jurists may attempt based on technology and government placement of a tracking device versus gathering third-party cell-phone-service data. *See, e.g.*, *Tracey v. State*, 152 So. 3d 504, 529 (Fla. 2014) (Canady, J., dissenting).

C. The Respondent Errors In Trying To Distinguish This Case Based On The Duration Of Monitoring.

In arguing that tracking data does not infringe on Fourth Amendment rights, the Respondent attempts to distinguish "short-term" and "long-term" monitoring. Br. in Opp. 13. The Respondent points to the two-day duration of authorized monitoring,

and the actual monitoring of fewer than twenty-four hours. Br. in Opp. 14. The Respondent argues that the record does not reveal that authorities actually collected intimate information, and that the record does not show the frequency, format, or volume of the information the officers obtained. Br. in Opp. 14. These arguments miss the mark.

The Fourth Amendment does not limit the warrant requirement to lengthy searches. *See, e.g.*, *Bond v. United States*, 529 U.S. 337, 339 (2000) (finding that an agent's physical manipulation of a bag on a bus constituted a Fourth Amendment violation). Even minor intrusions into private spheres may run afoul of the Fourth Amendment. *See id.* The Respondent's framing of the search here as "targeted" and "specific" over two days does not make the search constitutional. *See* Br. in Opp. 15. A warrantless search, unsupported by any exceptions to the warrant requirement, of "only" a bag within a house is not constitutional simply because authorities did not ransack the entire house.

The Florida Supreme Court in *Tracey v. State*, 152 So. 3d 504 (Fla. 2014), rejected just this argument. That court concluded "that basing the determination as to whether warrantless real-time cell site location tracking violates the Fourth Amendment on the length of the time the cell phone is monitored is not a workable analysis." *Tracey*, 152 So. 2d at 520. Such an approach would require "case-by-case, after-the-fact, ad hoc determinations whether the length of the monitoring crossed the threshold of the Fourth Amendment in each case challenged." *Id.* This approach presents the danger of arbitrary and inequitable enforcement. *Id.* at

521. Consideration of the duration of monitoring also fails to address the fact that cellular phones are intimate personal effects, and people have a right to be secure in them. *See* U.S. Const. amend. IV; *see also Tracey*, 152 So. 3d at 524-25.

The duration of monitoring fails to account for the fact that cell-phone location data allows tracking *and* location: police can use data to *locate* a person they otherwise cannot find. *See Jones v. United States*, No. 15-CF-322, slip op. at 15-17, 18 (D.C. Ct. App. Sept. 21, 2017) (for publication). The D.C. Court of Appeals cited this distinction, among other points, in recently concluding that use of a cell-site simulator constituted a search. While *Jones* did not involve a challenge to police obtaining real-time location data, the case highlights the power of such data: other technology—like cell-site simulators—can take that data and do unprecedented things with it, like locate otherwise "vanished" people. *See id.* at 16 n.20, 29; *see also United States v. Ellis*, No. 4:13-CR-818 (N.D. Cal. Aug. 24, 2017) (at record entry 337, PageID 12, in considering a cell-site-simulator situation, the court also found "that cell phone users have an even stronger privacy interest in real time location information associated with their cell phones"). It bears noting the Department of Justice has recognized the search issues here and now requires a warrant for use of a cell-site simulator. *Jones*, No. 15-CF-322, slip op. at 34.

D. The Florida Supreme Court's Decision In *Tracey* Represents A Split In Authority Between A Federal Appellate Court And A State Court Of Last Resort.

The Respondent argues that the Sixth Circuit's decision in this case does not represent a conflict with a state court of last resort because the Florida Supreme

Court's decision in *Tracey v. State*, 152 So. 3d 504 (Fla. 2014), involved consideration of cell-site data rather than precision location data. Br. in Opp. 18. This distinction in technology, however, does not affect the Fourth Amendment analysis. As discussed in sections B above and E below, the distinction between cell-site data and real-time precision location data does not change the analysis.

The facts of *Tracey* actually bear a great resemblance to those at hand. The *Tracey* court considered "real time cell site location information given off by cell phones when calls are placed." *Tracey*, 152 So. 3d at 507. The case did not involve historical cell-site data. It involved data akin to precision real-time tracking and precision-location data—the data in Mr. Rios's case. The *Tracey* court even framed the issue with a statement that the U.S. Supreme Court has yet to rule "on whether probable cause and a warrant are required, either under the statutory scheme or based on the Fourth Amendment, for an order requiring disclosure of *real time* cell site location information to be used by law enforcement to track a subscriber's cell phone." *Id.* at 512 (emphasis added). The *Tracey* opinion acknowledged the split with the Sixth Circuit. *Id.* at 517. The critical issue is the real-time data—or even location data as a whole, real-time and historical. *See id.* at 515-16 (discussing the issues arising with historical data as well). The technology, which continues to evolve at lightning speed, cannot ground the inquiry.

E. A Distinction Between Historical Cell-Site Data And Precision Real-Time Location Information Does Not Save This Case From Fourth Amendment Scrutiny.

The Respondent attempts to distinguish historical cell-site data (as in *Graham v. United States*, No. 16-6308 and *Carpenter*) and real-time cell-phone location information (at issue here). Br. in Opp. 18-19. The Respondent argues that the petitioner in *Carpenter* has "conceded" that government acquisition of historical cell-site data covering a "short period of time" would not raise Fourth Amendment questions. Br. in Opp. 19.

Even Congress has recognized the need to obtain warrants to procure the contents of a wire or electronic communication. *See, e.g.*, 18 U.S.C. § 2703(a). While such communications can be distinguished from location data, § 2703 demonstrates an acknowledgement that electronic data deserves privacy protections (though certain provision of § 2703 do allow the government to obtain records with only a subpoena, as in § 2703(b)(1)(B)(i)). Given the intimate details of a person's life revealed by electronic location tracking and data, no reason exists to distinguish between real-time location data, historical cell-site data, or even electronic communications. Real-time data can reveal extremely personal information about a person, information such as political affiliations (visits to a political rally or party office), sexual habits and proclivities (visits to a strip club or adult-toy store), substance-use (arrival at an Alcoholics Anonymous meeting), health status (a visit to an oncologist's or therapist's office), or personal struggles and conflicts (visits to an

attorney's office, abortion clinic, domestic-violence shelter, or probation office). *See United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring).

While travel in public may mean people expose certain aspects of their lives to public sight, no one expects that someone—a government agent—could collect an aggregate record of their movements. This Court's decision in *Bond v. United States*, provides a helpful analogy: "When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another." *Bond*, 529 U.S. at 338. So, while, "a bus passenger clearly expects that his bag may be handled," such a passenger "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Id.* at 338-39. Fourth Amendment protections attach to real-time location data.

F. The Sixth Circuit's Decision Rested On A Conclusion That Real-Time Tracking Does Not Require A Warrant, So The Warrant In This Case Does Affect The Need For Review.

Pointing to the warrant issued in this case, the Respondent argues that the judgment below could be affirmed on that ground, despite the Sixth Circuit's failure to address the warrant. Br. in Opp. 20. The Sixth Circuit, however, clearly held that no warrant was required—and that is the holding at issue, here and in cases, like *Tracey*, across the country. *See United States v. Rios*, 830 F.3d 403, 428-29 (6th Cir. 2016) (finding that "individuals do not have a reasonable expectation of privacy in the real-time location data that their cellular telephones transmit, making it unnecessary to obtain a warrant to obtain such information"). The Sixth Circuit

never considered the warrant and Mr. Rios was deprived of review of his constitutional claim.

CONCLUSION

For these reasons and those in his principal brief, Mr. Rios asks this Honorable Court to grant his Petition for a Writ of Certiorari and reverse the Judgment of the Sixth Circuit Court of Appeals, or to summarily reverse that judgment.

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Respectfully Submitted,

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