

No. 25-112

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IN THE  
**Supreme Court of the United States**

OKELLO CHATRIE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

*On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit*

**BRIEF OF CONSTITUTIONAL ACCOUNTABILITY  
CENTER AS *AMICUS CURIAE* IN  
SUPPORT OF PETITIONER**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution’s text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

**INTRODUCTION AND  
SUMMARY OF ARGUMENT**

The GPS data recorded by Google and other companies is generated by your phone—one of your effects. It tirelessly logs the movements of your person. Its precision can reveal your position even inside your own home. And everyone with a phone has such a record of their every movement generated by this essential tool of modern life. Allowing the government to rummage at will through those records, without judicial oversight, would deprive the people of their right to be secure in their persons, houses, and effects.

That is precisely what the Fourth Amendment forbids. The Amendment does not just ban unreasonable searches and seizures: “the *text* of the Fourth Amendment expressly guarantees the right of the people to be *secure*” against those intrusions. *Torres v. Madrid*, 592 U.S. 306, 324 (2021) (emphasis in original) (quotation marks omitted). By granting the collective

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel, party, or person other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

“people” an affirmative right “to be secure” in their persons and property, U.S. Const. amend. IV, the text reflects the Framers’ chief complaint about discretionary search authority: it upsets the balance of power between the people and the state by enabling officers to invade the privacies of life arbitrarily or abusively. As the Framers emphasized, the mere existence of such unbounded authority denies security to *everyone*, not just those whom the government ends up singling out for scrutiny.

With the rise of powerful new surveillance technologies like GPS tracking that could erode the “degree of privacy against government” enjoyed at the Founding, *Kyllo v. United States*, 533 U.S. 27, 34 (2001), the Fourth Amendment requires this Court to consider whether permitting the government to use those tools without judicial restraint would undermine the security of “the people.” Otherwise, innovations that enable the government to efficiently spy on the entire population could facilitate the “arbitrary power” that accompanies a “too permeating police surveillance.” *Carpenter v. United States*, 585 U.S. 296, 305 (2018) (quotation marks omitted).

This Court followed that approach in *Carpenter*, demanding judicial oversight of a new tracking technology in part because it enabled “tireless and absolute surveillance” of the entire population. *Id.* at 312. “Critically,” the Court stressed, “this newfound tracking capacity *runs against everyone*.” *Id.* (emphasis added). *Carpenter* took account of “the seismic shifts in digital technology that made possible the tracking of *not only Carpenter’s location but also everyone else’s*.” *Id.* at 313 (emphasis added). To maintain the balance of power between the people and the state, the police could not be given unrestricted access to records

that would allow “near perfect surveillance” of everyone with a phone. *Id.* at 312.

As *Carpenter* recognized, therefore, a critical Fourth Amendment consideration is whether a novel investigative tool enables the government to surveil the entire population. That principle is firmly rooted in the Amendment’s text and history.

The Fourth Amendment’s text explicitly confers a “right to be secure” against unreasonable searches and seizures—that is, a right to be “[f]ree from fear; exempt from terror; easy; assured.” Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792). “If there is any term in the text that might be described as the core or essence of the provision, ‘right to be secure’ is the leading candidate.” Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 741 (1999). And the text ascribes this right to “the people,” i.e., to “those who compose a community” or “a nation.” Johnson, *supra*; see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (“the people” was “a term of art employed in select parts of the Constitution” that “refers to a class of persons who are part of a national community”).

The Framers’ decision to safeguard a “right to be secure” held by “the people” was a considered choice. Those terms, borrowed from state precursors, helped advance “the purpose of the Fourth Amendment,” which was “to protect the people of the United States against arbitrary action by their own Government.” *Id.* at 266; accord *Carpenter*, 585 U.S. at 305.

The Fourth Amendment’s history explains why its text safeguards the security of the people. At every stage in that history—the birth of a common law prohibition on general searches, the landmark English general warrant cases, the American writs of

assistance controversy, and the Constitution’s ratification—a predominant concern was that the mere existence of unrestrained search authority compromised the security of everyone who was vulnerable to it, magnifying the state’s power over the people. General warrants and the like were condemned not just for specific abuses but “simply because they furnished an infinite power of surveillance to searchers that exposed every Englishman’s dwelling to perpetual, capricious intrusion.” William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791*, at 122 (2009).

This theme—the collective insecurity of the people wherever arbitrary search power exists—runs throughout the Amendment’s history. Unrestrained search authority, “if it be lawful,” would mean that “any subject, be he never so great,” could be searched “upon bare surmises.” 4 Edward Coke, *Institutes of the Laws of England 177-78* (1797 ed.). Like *Carpenter*, landmark English decisions stressed that “no subject whatsoever is privileged from this search,” jeopardizing “the secret cabinets and bureaus of every subject in this kingdom.” *Entick v. Carrington*, 19 How. St. Tr. 1029, 1065, 1063 (C.P. 1765). Such power would “affect the person and property of every man” and be “totally subversive of the liberty of the subject.” *Wilkes v. Wood*, 19 How. St. Tr. 1153, 1167 (C.P. 1763).

Americans agreed that the existence of discretionary search authority harmed everyone who *could* be subject to it. As James Otis put it, search authority that was “universal” and “perpetual” undermined “the liberty of every man,” and if it “should be declared legal,” it would “totally annihilate” the security of the people. John Adams, “Abstract of the Argument for and against the Writs of Assistance,” *Founders Online* (1761). Other Founders agreed. *E.g.*, 3 *The Debates in*

*the Several State Conventions on the Adoption of the Federal Constitution* 588 (Jonathan Elliot ed., 1836) (Patrick Henry) (“*any* man may be seized, *any* property may be taken, in the most arbitrary manner” (emphasis added)).

Upholding the “right to be secure” held by “the people” does not mean expanding who can invoke the Fourth Amendment’s protections in a given case. See *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978). It simply means following cases like *Entick, Wilkes*, and *Carpenter*: When someone has personally been subjected to an allegedly unlawful intrusion, resolving that claim requires considering the impact of the government’s asserted power on the public at large. Here, at least three implications follow.

*First*, the Fourth Amendment demands judicial oversight of any “newfound tracking capacity [that] runs against everyone.” *Carpenter*, 585 U.S. at 312. Because ubiquitous cell phones now create a perpetual digital trail of their users’ movements, unrestricted police access to GPS phone data would enable “twenty-four hour surveillance of any citizen of this country.” *United States v. Knotts*, 460 U.S. 276, 283 (1983). This data reaches back in time to reveal a wealth of private details that the government, for practical reasons, could never previously uncover for every person. On that basis alone, acquisition of this data from private companies like Google must be regarded as a Fourth Amendment search.

*Second*, the people cannot be secure in their persons and possessions without clear rules that let them know which digital records the government can access without a warrant. That clarity is not provided by rulings that hinge on case-specific variations in the length of surveillance, the amount of data collected in a particular case, the terms of a company’s fine-print

customer agreements, or the vagaries of how users interact with a specific app’s interface. A better approach—which also gives the police the clarity *they* need to avoid violating the Constitution—is to draw bright-line distinctions based on the type of technology involved, taking into account its inherent potential for violating the privacy and security of the people. Applied here, the invasiveness of GPS phone tracking and its potential to facilitate mass surveillance means that collection of that data, for any period, is a search.

*Third*, preserving the people’s right to be secure calls for a strict approach to the requirements of particularity and probable cause in the Warrant Clause. The primary objection to general warrants at the Founding was the excessive discretion they conferred, which left the public exposed to arbitrary and abusive enforcement. In response, the Framers restricted legitimate warrants to a single “place” to be searched, requiring probable cause to be shown separately for each such place. History therefore weighs against treating massive digital entities like Google’s database—which hold millions of records involving an untold number of people—as a single “place” that is searchable merely because pertinent records are *some-where* within. And nothing justifies the additional searches conducted here at the second and third stages of the officers’ inquiry without any judicial oversight. No judge approved those searches, and only the officers know why they singled out the people they did. That is the definition of unguided discretion—precisely the type of government power that denies the people their right to be secure against unreasonable intrusions. This Court should reverse the decision below.

## ARGUMENT

**I. The Fourth Amendment Requires this Court to Consider How Revolutionary Surveillance Capacities Like GPS Tracking Threaten the Security of “The People” Against Arbitrary Power.**

**A. Text.**

The Fourth Amendment’s text does more than ban unreasonable searches and seizures—it guarantees “the people” an affirmative right “to be secure” against them. And it commands that *this* right may not be violated. This Court has stressed, therefore, that “the *text* of the Fourth Amendment expressly guarantees the ‘right of the people to be *secure* in their *persons*’” and possessions. *Torres v. Madrid*, 592 U.S. 306, 324 (2021) (emphasis in original); see U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”).

By protecting a “right to be secure” held by “the people,” the Amendment serves “both to protect the rights of individuals and to prevent the government from functioning as in a police state.” Donald L. Doernberg, “*The Right of the People*”: *Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. Rev. 259, 260 (1983). Acknowledging those functions, this Court has identified two “central” aims of the Amendment: “to secure ‘the privacies of life’ against ‘arbitrary power’” and “to place obstacles in the way of a too permeating police surveillance.” *Carpenter v. United States*, 585 U.S. 296, 305 (2018) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886), and *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

The Amendment’s text thus reflects the Framers’ core concern about overbroad search authority: its capacity to upend the balance of power between the state and the people by enabling officers to invade the privacies of life arbitrarily or abusively. *See infra* Part I.B. The text requires courts to ask, as this Court did in *Carpenter*, whether allowing a novel government intrusion to evade judicial oversight would undermine the security of the people, writ large, in their persons and possessions. *See* 585 U.S. at 312 (“Critically, . . . this newfound tracking capacity runs against everyone. . . . Only the few without cell phones could escape this tireless and absolute surveillance.”).

***The right to be secure.*** More than just a prohibition, the Amendment overtly safeguards an affirmative right. “The text of the Fourth Amendment clearly anticipated that there would be a ‘right to be secure’ in one’s person, house, papers, and effects.” Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 741 (1999). “If there is any term in the text that might be described as the core or essence of the provision, ‘right to be secure’ is the leading candidate.” *Id.*

At the Founding, “secure” meant “[f]ree from fear; exempt from terror; easy; assured.” Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792) (first definition of “secure”). Thus, to be “secure” against a harm meant more than simply being spared from that harm. It meant being “[f]ree from fear or apprehension of danger; not alarmed; not disturbed by fear; confident of safety.” Noah Webster, *An American Dictionary of the English Language* (1828).

A Massachusetts polemicist (possibly James Otis) captured this broad understanding while denouncing colonial writs of assistance: “every hous[e]holder in this province, will necessarily become *less secure* than

he was before this writ had any existence among us.” *Boston Gazette* (Jan. 4, 1762), reprinted in Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772*, at 489 (1865). “The very issuance of a general warrant,” in short, was “understood to necessarily make persons less ‘protected’ against, and more ‘fearful’ of, unreasonable searches and seizures.” Luke M. Milligan, *The Forgotten Right To Be Secure*, 65 *Hastings L.J.* 713, 745 (2014).

If the Fourth Amendment simply banned unreasonable searches and seizures, it could have been phrased accordingly—protecting a “right against unreasonable searches and seizures.” Instead, the Amendment safeguards the right to be “secure” against them—“free from fear,” Johnson, *supra*, and “confident of safety,” Webster, *supra*. Failing to give meaning to the “right to be secure” would impermissibly presume that this “clause in the constitution is intended to be without effect.” *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

The Framers’ protection of a “right to be secure” was a considered choice. This right emerged from post-Independence state constitutions as the preferred means of guarding against search-and-seizure abuse. From a variety of formulations, the states—and then the Framers—deliberately moved toward the broadest model, declaring and preserving an affirmative right to be secure.<sup>2</sup>

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<sup>2</sup> Several early state constitutions referred only to general warrants. See Va. Decl. of Rights, art. X (1776); Del. Decl. of Rights, § 17 (1776); Md. Const., § 23 (1776); N.C. Const., art. XI (1776). But Pennsylvania introduced a broader affirmative proposition:

The language of security “anchored” this safeguard “in the larger set of common-law protections of person and houses.” Davies, *supra*, at 685. And it gave voice to a concern animating the Fourth Amendment—that the government’s mere possession of promiscuous search authority compromised the security of everyone.

***The right of “the people.”*** The Fourth Amendment assigns its right to be secure to “the people,” thus indicating that the “people *as a group* have a right to be confident that the government will not make unreasonable intrusions into their ‘persons, houses, papers and effects.’” Richard H. McAdams, *Tying Privacy in Knotts: Beeper Monitoring and Collective Fourth Amendment Rights*, 71 Va. L. Rev. 297, 318 (1985).

By protecting the security of “the people,” the Fourth Amendment used “a term of art employed in select parts of the Constitution” that “refers to a class

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“the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure.” Penn. Const., art. X (1776). That language became the model for Massachusetts’s influential search-and-seizure clause, drafted by John Adams. See Davies, *supra*, at 678; Mass. Const., pt. 1, art. XIV (1780) (“Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.”). Later, when battleground states like Virginia and New York demanded amendments when ratifying the federal Constitution, they adopted the “right to be secure” concept pioneered by Massachusetts and Pennsylvania. See Ratification of the Constitution by the State of Virginia (June 26, 1788) (“every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and his property”); Ratification of the Constitution by the State of New York (July 26, 1788) (similar). When Congressman James Madison took up the task of composing amendments, borrowing selectively from the state models, his draft safeguarded “[t]he rights of the people to be secured” from unreasonable searches and seizures. 1 Annals of Cong. 452 (1789) (Gales & Seaton’s History ed., 1834).

of persons who are part of a national community.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *see id.* at 265-66 (contrasting “the people” with “the words ‘person’ and ‘accused’ used in the Fifth and Sixth Amendments”). Whereas “person” meant an “individual or particular man or woman,” Johnson, *supra*, “people” meant “those who compose a community” or “a nation,” *id.* Thus, where “the people” is used in the Constitution, it “refers to all members” of that community. *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

The choice to guarantee a “right of the people” was equally considered.<sup>3</sup> That formulation spoke directly to “the purpose of the Fourth Amendment,” which was “to protect the people of the United States against arbitrary action by their own Government.” *Verdugo-Urquidez*, 494 U.S. at 266; *accord Carpenter*, 585 U.S. at 305. As the Founding generation recognized, “[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of [an] arbitrary government.” *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

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<sup>3</sup> This phrase originated in Pennsylvania’s 1776 constitution, which declared that “the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure.” Penn. Const. art. X (1776). In contrast, the influential Massachusetts constitution referred to the rights of “[e]very subject” against unreasonable searches and seizures, Mass. Const. pt. 1, art. XIV (1780), and other models similarly described search-and-seizure protection in individual terms, *see* Ratification of the Constitution by the State of Virginia (June 26, 1788) (referring to “every freeman”). Although the Massachusetts provision was in most respects the primary model for the Fourth Amendment, *see* Davies, *supra*, at 678, James Madison notably departed from its approach by protecting the search-and-seizure rights “of the people,” 1 Annals of Cong. 452 (1789).

By guarding a “right of the people” to “be secure” against arbitrary government invasions, the Fourth Amendment’s text “gives concrete expression to a right of the people which ‘is basic to a free society.’” *Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523, 528 (1967) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)).

### **B. History.**

The Fourth Amendment’s history explains why its text safeguards the security of the people. At each key juncture, a predominant concern was “the harms incurred by every individual due to *the potential* for unreasonable searches and seizures.” Milligan, *supra*, at 747 (emphasis added). Accordingly, the Framers “did not merely create a right of individuals to be free from unreasonable searches or seizures, but a societal right to be free from the fear such practices create.” McAdams, *supra*, at 318-19.

**English common law.** The Fourth Amendment descends from English common law that American colonists “inherited and cherished as their own.” Leonard W. Levy, *Origins of the Fourth Amendment*, 114 Pol. Sci. Quarterly 79, 79 (1999). The common law developed antipathy to unrestricted search authority because it injured every person’s security and led to arbitrary power.

General warrants were pioneered by the Tudors and Stuarts as a tool of oppression, used to stifle political and religious dissent. See William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791*, at 7-9 (2009). As abuses proliferated, these warrants were increasingly condemned because their mere existence caused widespread insecurity. See *id.* at 7 (quoting complaint that an “infinite” number of Catholics’ houses had been rifled and ransacked at night without good reason).

Echoing this theme of insecurity, Edward Coke—later regarded by Americans as the foremost authority on English law, Levy, *supra*, at 80—said the harms of too-lenient warrants “could be felt throughout society,” Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1215 (2016). As he put it, “though commonly the houses or cottages of poor and base people be by such warrants searched etc. yet *if it be lawful*, the houses of *any subject . . . may be searched, etc. by such warrant* upon bare surmises,” 4 Edward Coke, *Institutes of the Laws of England* 177-78 (1797 ed.) (emphasis added).<sup>4</sup> Regardless of who was likely to be searched, “any subject” could find themselves in that position and thus lacked security.

By the mid-1600s, general searches were increasingly condemned not because of the abuses of specific cases, but “simply because they furnished an infinite power of surveillance to searchers that exposed every Englishman’s dwelling to perpetual, capricious intrusion.” Cuddihy, *supra*, at 122; *e.g.*, *id.* (quoting complaint that “my house, which used to be my castle” was now “the knave excise man’s pleasure to search . . . when he pleaseth”). After the Glorious Revolution, Parliament repealed legislation authorizing home entry by tax collectors, denoting it “a badge of slavery upon the whole people” because it “*exposed every man’s house* to be entered into and searched.” *Id.* at 126 (quoting 1 W. & M., c. 10, §§ 1, 2 (1688)).

***Writs of assistance.*** In America, opponents of unchecked search authority also highlighted the harm its mere existence inflicted on the entire population.

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<sup>4</sup> Quotations from historical sources have been updated to modern American spelling and capitalization throughout this brief.

James Otis's landmark condemnation of writs of assistance repeatedly emphasized this theme. Lambasting this "monster of oppression" as "the worst instrument of arbitrary power," Otis stressed that writs of assistance were "universal" and "perpetual," commanding "every subject in the king's dominions" and making the officers wielding them "accountable to no person." John Adams, "Abstract of the Argument for and against the Writs of Assistance," *Founders Online* (1761) [hereinafter "James Otis"].

While the government insisted that a need for effective customs enforcement outweighed "the liberty of any individual," Quincy, *supra*, at 481 (counsel's argument), Otis countered that the writ was "a power that places the liberty of every man in the hands of every petty officer," James Otis, *supra* (emphasis added). "[I]f it should be declared legal," the writ would "totally annihilate" security in the home. *Id.* The mere issuance of the writs, in sum, inflicted harm on everyone who *could* be subject to them.

Amplifying that sentiment, press commentators warned that "every hous[e]holder in this province" would "necessarily become less secure than he was before this writ had any existence." *Boston Gazette* (Jan. 4, 1762) (emphasis added), reprinted in Quincy, *supra*, at 489; see *id.* ("Will any man put so great a value on his freehold, after such a power commences as he did before?"). An influential Boston committee similarly condemned the violation of "domestic security" by "absolute and arbitrary" search authority, under which "even our bed chambers are exposed to be ransacked." Cuddihy, *supra*, at 541 (quoting *A List of Infringements and Violations of Rights* (Nov. 20, 1774)).

***The Wilkes cases.*** As Americans battled writs of assistance, English dissidents brought suit over politically motivated searches and seizures. These land-

mark cases, which “filled the columns of American newspapers from Boston to Charleston,” Levy, *supra*, at 87, challenged “the promulgation of our most private concerns, affairs of the most secret personal nature,” *Wilkes v. Wood*, 19 How. St. Tr. 1153, 1154 (C.P. 1763), under loose warrants that authorized home entry and seizure of papers. In each case, judges and counsel alike emphasized that indefinite search authority undermined the security of the entire nation against arbitrary power.

John Wilkes’s counsel, for example, stressed “that the case extended far beyond Mr. Wilkes personally, that it touched the liberty of every subject of this country.” *Id.* at 1153. No one’s home was safe, he said, “if it is *capable* of being entered” without justification, so upholding the search would “fling our liberties into a very unequal balance.” *Id.* at 1153-54 (emphasis added). The solicitor general scoffed: “This was the first time he ever knew a private action represented as the cause of all the good people of England.” *Id.* at 1159. But the court agreed that if the government had the power it claimed, “it certainly may affect the person and property of *every man in this kingdom.*” *Id.* at 1167 (emphasis added). Such power was “totally subversive of the liberty of the subject.” *Id.*

John Entick’s case—which was “in the minds of those who framed the fourth amendment” as “explanatory of what was meant by unreasonable searches,” *Boyd*, 116 U.S. at 626-27—likewise affirmed that the mere existence of promiscuous search authority harmed the nation at large. The warrant for Entick’s papers, which authorized “prying into all his private affairs,” was described by Entick’s counsel as “injurious to a multitude, and prejudicial to the commonwealth.” *Entick v. Carrington*, 19 How. St. Tr. 1029, 1041, 1039 (C.P. 1765). “[I]f it were lawful, no man

could endure to live in this country.” *Id.* at 1038. The court concurred: “It must not be here forgot, that *no subject whatsoever is privileged from this search.*” *Id.* at 1065 (emphasis added). If the warrant were valid, then “the secret cabinets and bureaus of *every subject in this kingdom* will be thrown open [to] search and inspection,” and “*every house* will fall under the power.” *Id.* at 1063, 1071 (emphasis added).

Striking the same theme, other general-warrant cases foregrounded the injury to the public of arbitrary search authority. In *Leach v. Money*, counsel warned that “[s]uch a power would be extremely mischievous” and “productive of great oppression.” 19 How. St. Tr. 1001, 1024 (K.B. 1765). The court agreed that “such an uncertain warrant” was void because it was “not fit” to confer broad discretion on officers. *Id.* at 1027.

Finally, the decision in *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), declared that the mere establishment of overbroad search power—not just its use in specific instances—harmed everyone. The defendant officer claimed that the damages against him were “outrageous” because “the personal injury done to [the plaintiff] was very small.” *Id.* at 768. Disagreeing, the court explained that “the small injury done to the plaintiff” was clearly less important to the jury than “the great point of law touching the liberty of the subject.” *Id.* at 769. “[T]hey saw a magistrate over all the King’s subjects, exercising arbitrary power” and “attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them.” *Id.*

***Adoption of the Fourth Amendment.*** “Colonial newspapers covered the sagas of Entick and Wilkes with an enthusiasm paralleling that of modern *Down-ton Abbey* fans.” Donohue, *supra*, at 1257. When the Townshend Acts spread the writs-of-assistance debate

“continent-wide,” Levy, *supra*, at 90, Americans denounced unchecked search authority in familiar terms: it was an assault on the entire populace, elevating government power by making “every person’s home vulnerable,” Morgan Cloud, *Searching Through History; Searching for History*, 63 U. Chi. L. Rev. 1707, 1726 (1996).

One critique, “which circulated in every colony,” Levy, *supra*, at 91, called unbounded search authority an “engine of oppression” and “dangerous to freedom,” John Dickinson, *Letters from a Farmer in Pennsylvania No. IX* (1768). Indiscriminate search power was viewed as “utterly destructive to liberty,” *id.*, because it “put every person in jeopardy,” Cloud, *supra*, at 1727. After Independence, state constitutions labelled general warrants “grievous,” “oppressive,” and “dangerous to liberty.” *E.g.*, Va. Decl. of Rights, art. X (1776); N.C. Const., art. XI (1776).

When the federal Constitution was unveiled, critics denounced its lack of protection from search and seizure as robbing the nation of security against arbitrary power. As Mercy Otis Warren put it, the Constitution’s “dangerous encroachments of power” were apparent “in too many instances to be named: but I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence.” *Observations on the New Constitution, by a Columbian Patriot* (1788). Antifederalists repeatedly underscored that *everyone* was left exposed: “The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority,” and “go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear.” 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 448-49 (Jonathan Elliot ed., 1836) (Patrick Henry); *see id.* at 588 (“any man

may be seized, *any* property may be taken, in the most arbitrary manner . . . by the strong hand of power” (emphasis added); Luther Martin, *Genuine Information No. VI*, Balt. Md. Gazette (Jan. 15, 1788) (the Constitution “authorizes officers to go into your houses, your kitchens, your cellars, and to examine into your private concerns”).

Addressing these critiques after Ratification, James Madison’s draft amendment protected a “right to be secured” held collectively by “the people.” 1 Annals of Cong. 452 (1789); *see supra* notes 2 & 3 (describing how Madison drew selectively from state precursors to create a broad safeguard). Introducing his proposal to Congress, Madison “repeatedly used variations on the concept of ‘security’ as the underlying concern.” Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 1046 n.402 (2011). And Congress’s most significant edit made the people’s right to be secure even more definitive. Whereas the draft said only that this right could not be violated by general warrants, *see* 1 Annals of Cong. 452, the final version, ratified by the people, declares that this right “shall not be violated”—period.

## **II. Allowing the Government Unsupervised Access to Cell Phone GPS Data Would Violate the People’s Right to Be Secure in their Persons and Property.**

At the Founding, officers could not search or seize anyone’s person, house, papers, or effects without physically intruding upon them. But modern technology enables the government to violate the security of a person and their property without physical interference. *E.g.*, *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001) (inspecting home interior with thermal imager);

*United States v. Warshak*, 631 F.3d 266, 283 (6th Cir. 2010) (acquiring emails from provider).

That is the case here. By using location information generated by an individual’s own phone (one of his or her “effects”), the records generated reveal comprehensive details about the whereabouts of that individual’s “person,” including inside his or her “house.” *See* Pet. App. 54a.

Surreptitiously acquiring GPS information from Google or other companies—unlike relying on the observations of an agent on the street—thus turns a person’s own “effect” into a surveillance device to be used against them, compromising the security of their person and house in the process. The fruits of that surveillance can remain available to law enforcement for years on end. And nearly everyone in the nation is vulnerable to this surveillance. Allowing the government to exploit GPS phone tracking without adequate judicial scrutiny would therefore undermine the people’s right to be secure in their persons and property.

**A. The right to be secure demands judicial oversight of any surveillance technique that perpetually runs against everyone.**

In *Carpenter*, this Court recognized that an essential Fourth Amendment consideration is whether an investigative tool enables the government to surveil the entire population: “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.” 585 U.S. at 312. Without the police even deciding in advance whom to track, the government could easily retrace *any* person’s movements, “every moment of

every day,” for years. *Id.* That was a “[c]ritically” important point. *Id.*

By requiring judicial oversight of a new tracking technology that allowed “tireless and absolute surveillance” of the entire population, *id.*, *Carpenter* acknowledged the Fourth Amendment’s role “as a restriction on government power, not just a protection of privacy.” Paul Ohm, *The Many Revolutions of Carpenter*, 32 *Harv. J.L. & Tech.* 357, 390 (2019). Because cell-site tracking gave “access to a category of information” previously “unknowable,” which could efficiently be mined to achieve “near perfect surveillance” of anyone with a phone, guardrails were needed to preserve the “degree of privacy against government that existed when the Fourth Amendment was adopted.” *Carpenter*, 585 U.S. at 312, 305 (quoting *Kyllo*, 533 U.S. at 34).

This approach prevents technological advances from upending the balance of power between the people and the state—keeping at bay the “arbitrary” power made possible by “a too permeating police surveillance.” *Id.* at 305 (citations omitted); accord *Riley v. California*, 573 U.S. 373 (2014) (refusing to give police the windfall of inspecting the contents of cell phones under traditional arrest rules). Put simply, this approach “tries to avoid dystopia.” Orin Kerr, *The Digital Fourth Amendment* 122 (2025). It recognizes that overbroad search authority “leads to abuse” and “allows the police to pursue personal vendettas, target the politically unpopular, and otherwise use investigative powers in bad faith,” in part by uncovering “embarrassing facts outside any legitimate state interest.” *Id.*

Those concerns are all deeply rooted in Fourth Amendment text and history. Unchecked search authority was decried at the Founding as leading to dystopia, see *Huckle*, 95 Eng. Rep. at 769 (the government

was “attempting to destroy the liberty of the kingdom” and create a regime “under which no Englishman would wish to live an hour”), and was deemed “totally subversive of the liberty of the subject,” *Wilkes*, 19 How. St. Tr. at 1167. Such authority fostered abuse: “any property may be taken, in the most arbitrary manner, without any evidence or reason.” 3 *Elliot’s Debates* 588 (Patrick Henry). And it was a tool for targeting the politically unpopular—“the great engine by which power may destroy those individuals who resist usurpation.” 2 *id.* 551 (Maryland ratifying convention); see Cuddihy, *supra*, at 441-43 (describing how the Wilkes searches were conducted to suppress dissent). Unbounded search power could be exploited for “malice or revenge.” James Otis, *supra* (recounting incident in which officer retaliated against his enemies by ordering their houses searched without cause). It was especially dangerous because it could unearth embarrassing secrets. See *A Son of Liberty*, *N.Y. Journal* (Nov. 8, 1787) (“our bed chambers will be subjected to be searched by brutal tools of power”); *Entick*, 19 How. St. Tr. at 1063 (“the secret cabinets and bureaus of every subject in this kingdom will be thrown open”).

Above all, history shows that unchecked search authority—epitomized by general warrants—was rejected precisely because it “runs against everyone.” *Carpenter*, 585 U.S. at 312. Without proper restraints, “any subject, be he never so great,” could find his privacy invaded without adequate cause. Coke, *supra*, at 177. Because “no subject whatsoever” was “privileged from this search,” *Entick*, 19 How. St. Tr. at 1065, the mere existence of general search authority made “the person and property of every man in [the] kingdom” insecure. *Wilkes*, 19 How. St. Tr. at 1167. Such “universal” and “perpetual” search authority thus compromised “the liberty of every man.” James Otis, *supra*.

These core tenets underscore why *Carpenter* was right to consider the harm inflicted on “the people” at large if a powerful new surveillance tool were to escape judicial oversight. Radical enhancements in tracking technology would otherwise “alter the relationship between citizen and government in a way that is inimical to democratic society.” *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (citation omitted).

While *Carpenter* highlighted the pervasive reach of cell-site surveillance along with other considerations, any “newfound tracking capacity [that] runs against everyone,” 585 U.S. at 312, should be subject to Fourth Amendment limits on that basis alone. The Amendment responded to “the eighteenth-century equivalent of a surveillance state,” David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 Minn. L. Rev. 62, 70 (2013), and aimed to prevent its recurrence by preserving the people’s right to be secure against such all-encompassing surveillance.

Importantly, too, the people’s security against pervasive surveillance should not wither just because a digital-age society comes to have fewer “expectations of privacy,” *Katz v. United States*, 389 U.S. 347, 362 (1967) (Harlan, J., concurring), as it turns over more data to private companies. The critical question is not whether “a reasonable person would . . . have anticipated” the use of an intrusive surveillance technique, *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment), because that would allow “technology to shrink the realm of guaranteed privacy,” *Kyllo*, 533 U.S. at 34, as soon as the public comes to expect its widespread use. The Fourth Amendment was not meant to “saddle society with merely what it has come to expect.” *Ohm*, *supra*, at 388. Rather, it promises a baseline level of security in person and property by denying

the government a blank check to develop “instrument[s] of arbitrary power” that are “destructive of . . . liberty.” James Otis, *supra*.

Fully accounting for the people’s right to be secure also exposes flaws in comparisons between traditional investigative techniques and unfettered police access to GPS data. Law enforcement’s ability to retrieve “markers left at a public crime scene” like “boot prints,” Cert. Opp. 11 (quoting Pet. App. 32a (Niemeyer, J., concurring)), does not put the entire nation under perpetual surveillance, with a record of their movements constantly subject to being scrutinized at will by the government. Unlike traditional crime-scene methods, unrestricted access to GPS records of people’s whereabouts would empower the government to do what the Fourth Amendment forbids: intrude on the privacy and security of large swaths of the public for arbitrary or illegitimate reasons.

**B. The right to be secure calls for clear rules that let the people know when the government can acquire their information without a warrant.**

A challenge after *Carpenter* has been applying its holding to different circumstances. The proliferation of ever more digital technologies increases the factual variations that can distinguish one case from another. But without clear rules, the police “cannot know how to avoid violating the Constitution.” Kerr, *supra*, at 133. And the public cannot know what the police are restrained from doing without a warrant. To help them both, “[t]he lines courts draw on what a ‘search’ is need to be clear.” *Id.*

This concern is not just pragmatic—it implicates the people’s right *to be secure*. Without clear standards about which digital records the government can

exploit outside of Fourth Amendment constraints, the people cannot be secure against unreasonable searches.

Consider, for instance, a person who is thinking of attending a political gathering or demonstration. Can federal, state, or local government officials later check to see whether he or she was at the location of the event by obtaining their cell-site records, without any judicial oversight? While *Carpenter* held that accessing seven days of cell-site data is a Fourth Amendment search, it left open whether shorter periods might be exempt. See Pet. App. 28a (arguing that *Carpenter* “ruled on seven days’ worth of location data, not the snapshot before us now”). People holding disfavored views may have good reason to skip such gatherings if the answer is yes—or even if the answer is unclear.

Although trends have emerged suggesting what kinds of data collection are likely to be recognized as a search, see Matthew Tokson, *The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law, 2018–2021*, 135 Harv. L. Rev. 1790 (2022), variations among cases in the amount of data collected and the voluntariness of the disclosures still leaves things murky. See *id.* That uncertainty deprives people of security in their persons and possessions. To be truly secure against arbitrary, unconstrained surveillance in the digital age, the people need to know which records held by private companies can be accessed by law enforcement without judicial approval.

Some recent decisions instead typify the “mosaic” theory, under which the aggregation of data over time “can turn nonsearches into a search.” Kerr, *supra*, at 131. This framework essentially asks whether “too much” of a person’s information was collected. But critics “have rightly wondered how courts will determine whether investigators have gathered too much

information in any given case and how officers in the midst of ongoing investigations will know whether the aggregate fruits of their efforts are approaching a Fourth Amendment boundary.” Gray & Citron, *supra*, at 71. This approach “offers no clarity” to either the people or the police “about how much surveillance is enough to trigger a search.” Kerr, *supra*, at 135.

A better solution would be to draw categorical distinctions based only on the technology the government uses—a “simple rule” that hinges on how the information was obtained. *Id.* at 140. Instead of assessing the privacy intrusions in each individual case by considering the scale, duration, or voluntariness of the records disclosure in that particular case, a “technology-centered approach” focuses on the tracking potential “*inherent* in a given surveillance technology.” Gray & Citron, *supra*, at 126. So “once the Fourth Amendment status of a technology has been established, the threshold question of whether use of that technology constitutes a Fourth Amendment search does not need to be litigated in every case.” *Id.* at 130. This “ensures that the difficult line-drawing exercises needed to implement *Carpenter* only require decisions for a type of record generally rather than for each information transfer individually.” Kerr, *supra*, at 140.

This approach arguably is the only feasible one as a practical matter. *See id.* at 133-37. And it avoids disrupting precedent involving traditional investigative methods because it pegs the “search” question to the technology used. *See* Gray & Citron, *supra*, at 124; *cf. Jones*, 565 U.S. at 412 (noting that while continuous human surveillance is not a search, “achieving the same result through electronic means” might be). Most importantly, this approach may best ensure that activists, journalists, politicians, and all of “the people”

can have the security in their persons and possessions that the Fourth Amendment expressly protects.

Applied here, this Court should hold that regardless of the time periods involved, the terms of particular customer agreements, or the vagaries of a user's experience with a software interface, the government's collection of GPS cell phone data is a search—full stop.

**C. The right to be secure requires a strict approach to the Warrant Clause's particularity and probable cause requirements.**

Evaluating the warrant in this case requires drawing analogies between digital space and the tangible items this Court's precedents address; it also requires deciding how particularized a warrant must be in this novel context and how specific its probable-cause showing. The people's "right to be secure" weighs in favor of a strict approach to these questions.

The Framers' main objection to general warrants was the excessive discretion they conferred on officers. That discretion was what opened the door to arbitrary enforcement and abuse, leaving the people insecure in their persons and property. Here, the multistep data-gathering process carried out under the geofence warrant gave law enforcement officers far too much unguided discretion in choosing whose accounts to target.

The "primary abuse thought to characterize the general warrants and the writs of assistance was their indiscriminate quality, the license that they gave to search Everyman without particularized cause." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 366 (1974); see *supra* Part I.B. In *Leach v. Money*, for instance, the plaintiff objected to "mischievous" warrants that described only an offense and not the person to be seized.

19 How. St. Tr. at 1024. The court agreed that it was “not fit” to confer this discretion on officers through “such an uncertain warrant.” *Id.* at 1027. In *Entick v. Carrington*, the warrant named John Entick specifically and authorized seizing him and his papers, but that was not good enough. Even when singling out one person, a warrant that permitted indiscriminate seizure of all his books and papers was overbroad. 19 How. St. Tr. at 1031, 1065-66.

“Hostility to conferring discretionary search authority on common officers is also the theme of American complaints about the general writ of assistance.” Davies, *supra*, at 580. Emphasizing “the uncontrolled authority to search that customs officials had as a result of the writs,” Clancy, *supra*, at 994, James Otis argued that it “places the liberty of every man in the hands of every petty officer” and that “every one with this writ may be a tyrant,” James Otis, *supra*. In response, “the Amendment’s ban on too-loose warrants served to reaffirm the common law’s general resistance to conferring discretionary authority.” Davies, *supra*, at 724.

The Amendment’s drafting history confirms this understanding. Madison’s initial proposal referenced warrants that failed to describe “the places” to be searched or the persons or things to be seized. 1 Annals of Cong. 452 (1789). Notably, Congress changed “place” to the singular, while leaving “persons or things” plural. U.S. Const. amend. IV. By requiring that warrants “particularly” describe “the place” to be searched, *id.*, the text reflects the common law principle that warrants to search multiple locations—even if obtained under oath with probable cause—were invalid. See Cuddihy, *supra*, at 739-41.

That principle is hard to square with the notion that a warrant can declare “Google” the place to be

searched or find probable cause to search every user's account because evidence of a crime will be found *somewhere*. On that logic, why not authorize searching every Gmail account if there is probable cause that some users somewhere communicated information about a crime? *See* Pet. Br. 40.

The Framers' insistence on single-place warrants also supports the analogy between individual Google accounts and individual homes. Just as separate warrants, supported by probable cause, would be needed to search nineteen houses or apartments, separate warrants supported by probable cause should be needed to search the nineteen Google accounts—all held by different people—that law enforcement pried into here.

Likewise, the Fourth Amendment's hostility to officer discretion confirms the unreasonableness of the totally unsupervised searches conducted at the second and third stages of the officers' inquiry. At those stages, the officers obtained new and geographically unrestricted location history for nine people whom they unilaterally selected, and then obtained additional information exposing the identities of three people whom they also unilaterally selected. No neutral magistrate found probable cause to conduct any of those add-on searches. No one except the officers knows why they singled out the people they did.

That is the definition of unguided discretion—just the type of power that the government could employ arbitrarily or abusively. The very existence of such power deprives the people of security in their persons and possessions. The Fourth Amendment prohibits precisely that.

**CONCLUSION**

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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