

Carpenter v. United States:  
A Reevaluation of First Principles, One Year On

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In *Carpenter v. United States*, the United States Supreme Court confronted an issue at the crossroads of technology, societal notions of privacy, and the meaning of the Fourth Amendment.<sup>1</sup> Its resolution of that issue brought into stark relief profound disagreements among the Justices concerning constitutional construction, the nature of judicial precedent, and indeed the meaning of judging itself. Since the Supreme Court decided *Carpenter* in 2018, a number of reviewing courts—state and federal—have considered its myriad potential implications. They have not yet scratched the surface, and *Carpenter* stands today both as a conceptual challenge for practitioners and judges, and quite possibly a landmark of Fourth Amendment jurisprudence. And it all starts, mundanely enough, with a string of electronics store robberies.

I. THE *CARPENTER* DECISION

In 2011, four men were arrested in Detroit for robbing several Radio Shack and T-Mobile stores in the area.<sup>2</sup> Investigators soon learned that the robberies were not limited to Detroit.<sup>3</sup> Indeed, a “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.”<sup>4</sup>

Prosecutors sought court orders for the cell phone records of Timothy Carpenter and others pursuant to the Stored Communications Act.<sup>5</sup> The Act allows the government access via compulsory process to particular telecommunications records maintained by private entities, so long as the government can show, to the satisfaction of a federal magistrate, “specific and articulable facts showing that there are reasonable grounds to believe that . . . the records . . . are relevant and material to an ongoing investigation.”<sup>6</sup> Specifically, prosecutors sought to compel disclosure of cell-site data from MetroPCS and Sprint:

Those data themselves took the form of business records created and maintained by the defendants’ wireless carriers: when the defendants made or received calls with their cellphones, the phones sent a signal to the nearest cell-tower for the duration of the call; the providers then made records, for billing and other business purposes, showing

1 138 S. Ct. 2206 (2018).

2 *Id.* at 2212.

3 *Id.*

4 *Id.*

5 *Id.*

6 18 U.S.C. § 2703(d).

which towers each defendant's phone had signaled during each call.<sup>7</sup>

The orders were applied for and allowed, and thus “the government obtained 12,898 location points cataloging Carpenter’s movements—an average of 101 data points per day.”<sup>8</sup>

Carpenter was subsequently charged with six counts of robbery and an assortment of firearm offenses.<sup>9</sup> Carpenter moved before trial to suppress the data provided by the carriers, arguing that their seizure violated the Fourth Amendment where it was obtained without a warrant, and the district court denied the motion.<sup>10</sup> Carpenter was convicted on all counts save one firearm count, and the Sixth Circuit affirmed his conviction in a published opinion, holding, among other things, that Carpenter, according to well-established United States Supreme Court precedent, had no expectation of privacy in cell phone records created, stored, and maintained by a third party.<sup>11</sup> The Supreme Court granted Carpenter’s petition for certiorari.<sup>12</sup>

In an opinion authored by Chief Justice John Roberts, the Supreme Court reversed the Sixth Circuit.<sup>13</sup> The Court began by noting that, contrary to earlier precedent, modern Fourth Amendment jurisprudence is not mechanically tethered to pure questions of property law and the common law doctrine of trespass, that is, actual physical intrusions by the government onto the property of another.<sup>14</sup> Instead, the Court has:

established that the Fourth Amendment protects people, not places, and expanded [its] 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, [the Court] has held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.<sup>15</sup>

Indeed, the majority analyzed the case with head-on reference to this well-settled but (as we shall see) much-criticized “reasonable expectation of privacy” test.<sup>16</sup> The Court proceeded to observe that the kind of data at issue—historical cell-site location information, or CSLI, 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.”<sup>17</sup>

The first line of cases, the Court noted, concerns a person’s expectation of privacy in his physical location and movements. In *United States v. Knotts*, for example, the Court held in 1983 that police use of a “beeper” tracking device secretly placed by them in a container and later acquired by Knotts and unknowingly placed by him in his own vehicle violated no reasonable expectation of privacy.<sup>18</sup> The Court in *Knotts* made the commonsense observation that someone “traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another” and that, because those movements had been “voluntarily conveyed to anyone who wanted to look,” there simply was no “search” in the constitutional sense.<sup>19</sup> *Knotts* was distinguished and refined in 2012, after decades of technological progress and the advent of more sophisticated law enforcement tools and techniques. In *United States v. Jones*, the Supreme Court held that Fourth Amendment protections applied where federal law enforcement secretly installed a GPS tracking device on Jones’ Jeep Grand Cherokee and monitored its location and movements for 28 days.<sup>20</sup> The Court in *Jones* straightforwardly held that the unconsented-to surreptitious attachment of the GPS device to Jones’ personal property—his Jeep—was an actual physical occupation of private property by the government in an effort to acquire information and was thus a search within the meaning of the Fourth Amendment, the only issue before the Court.<sup>21</sup> Nonetheless, five Justices went on to argue in dicta that, setting aside the actual physical trespass by the government, the GPS tracking of Jones implicated his constitutional privacy interests as contemplated by *Katz*.<sup>22</sup> Furthermore, “[s]ince 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 of whether those movements were disclosed to the public at large.”<sup>23</sup>

The second line of cases, the *Carpenter* Court observed, deals with what has become known as the “third-party doctrine.”<sup>24</sup> That doctrine stands for the proposition that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”<sup>25</sup> Thus, information such as records of phone numbers dialed from a person’s home<sup>26</sup> or a person’s banking

7 *United States v. Carpenter*, 819 F.3d 880, 885-886 (2016), *reh’g en banc denied*, June 29, 2016.

8 *Carpenter*, 138 S. Ct. at 2212.

9 *Id.*

10 *Id.*

11 *Carpenter*, 819 F.3d at 887-888.

12 137 S. Ct. 2211, 198 L.Ed.2d 657 (2017).

13 *Carpenter*, 138 S. Ct. at 2223.

14 *Id.* at 2213.

15 *Id.* (internal quotations and citations omitted).

16 That test was originally articulated by the Court in *Katz v. United States*, 389 U.S. 347, 351 (1967), and it has been applied by courts construing the Fourth Amendment ever since.

17 *Carpenter*, 138 S. Ct. at 2214-15.

18 *United States v. Knotts*, 460 U.S. 276, 281-82 (1983).

19 *Id.* at 281.

20 *United States v. Jones*, 565 U.S. 400, 402-03 (2012).

21 *Id.* at 404-05.

22 *Carpenter*, 138 S. Ct. at 2215 (citing *Jones*, 565 U.S. at 426, 428).

23 *Id.* (quoting *Jones*, 565 U.S. at 430 (internal quotations and citations omitted)).

24 *Id.* at 2216.

25 *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979).

26 *Id.*

records<sup>27</sup>—the subjects of *Smith* and *Miller*, respectively—have traditionally received no Fourth Amendment protection whatsoever. This was a bright line rule that, to many practitioners and courts, had the oft-sought virtue of being relatively simple to apply, even if its faithful application sometimes led to counterintuitive results. This was sometimes the case because, so long as the information was voluntarily disclosed to a third party, the Constitution was not implicated, “even if the information [wa]s revealed on the assumption that it [would] be used only for a limited purpose.”<sup>28</sup>

In *Carpenter*, then, the Court was faced with the question of how to treat CSLI in the light of both strands of cases. The second strand presented what could be considered a threshold question: Where law enforcement can track an individual’s past movements by scrutinizing a record of his cell phone signals created and maintained by his wireless carrier, does a straightforward application of the third-party doctrine necessitate an equally straightforward result of no Fourth Amendment protection? The Court said no:

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.<sup>29</sup>

The Court went on to explain—tying in the first strand of cases—that a person’s expectations of privacy are not surrendered simply because she conducts her affairs and moves about in public. Citing *Katz* and its reasonable expectation of privacy standard, the Court observed that “what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>30</sup> Recalling the GPS tracking in *Jones* and the concerns expressed by that case’s concurrence, the Court reiterated that tracking a person’s public movements for an extended period of time intrudes on a reasonable expectation of privacy, even if that tracking takes the form of business records created and maintained by a third-party commercial entity, such as a wireless provider:

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.<sup>31</sup>

The Court proceeded to expound on the fact that new technology allows for more sweeping surveillance than was considered in its prior cases. As law enforcement capabilities grow, the sphere of protection provided to a person’s reasonable expectations of privacy must grow commensurately.<sup>32</sup> The more the government can do, the more the Constitution must do to keep pace. “With access to CSLI,” the Court argued:

the Government can now travel back in time to retrace a person’s whereabouts subject only to the retention policies 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 [wireless] 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.<sup>33</sup>

Moreover, the Court noted that it is inaccurate in this context to say that a person voluntarily and knowingly discloses his location information to his third-party provider simply by carrying a cell phone. The Court observed that cell phones are ubiquitous in modern life, and that an active cell phone generates its own location information without the need for any affirmative action by its holder. Indeed:

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.<sup>34</sup>

The Court then held that it would not “extend” the third-party doctrine as set forth in *Smith* and *Miller* to the collection of CSLI, finding that CSLI is sui generis and its gathering by the government, a search.<sup>35</sup> Moreover, where the acquisition of CSLI is a search, that search must be authorized by a warrant supported by probable cause.<sup>36</sup> The Court made sure to declare that its holding was a “narrow one,” and that it was expressing no views on issues not expressly before it in *Carpenter*.<sup>37</sup> The Court also made clear

27 *United States v. Miller*, 425 U.S. 435, 443-44 (1976).

28 *Id.* at 443.

29 *Carpenter*, 138 S. Ct. at 2217.

30 *Id.* (quoting *Katz*, 389 U.S. at 351-352).

31 *Id.* (internal citation and quotations omitted).

32 *Id.* at 2219 (“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.”). See also Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011) (setting out a theory of how the Supreme Court continually modifies and refines the scope of Fourth Amendment protections in response to social and technological developments), available at <https://harvardlawreview.org/2011/12/an-equilibrium-adjustment-theory-of-the-fourth-amendment/>.

33 *Carpenter*, 138 S. Ct. at 2218.

34 *Id.* at 2220.

35 *Id.*

36 *Id.* at 2221.

37 *Id.* at 2220.

that its holding did “not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, . . .”<sup>38</sup> Nonetheless, the majority opinion found itself faced with a panoply of dissents from four Justices, raising issues of the most fundamental and contentious sort.

## II. THE *CARPENTER* DISSENTS

Justice Anthony Kennedy initiated the gauntlet of dissents with an opinion joined by Justices Clarence Thomas and Samuel Alito. Kennedy’s opinion emphasized that, properly understood, *Carpenter* was simply about the government’s use of congressionally authorized compulsory process to obtain relevant business records in the usual course of a criminal investigation.<sup>39</sup> Process was allowed, pursuant to the Stored Communications Act, by a neutral and detached magistrate, after the government demonstrated that the records were reasonably necessary to an ongoing investigation.<sup>40</sup> Yet the majority had determined that this was not a simple demand for records from a third party, but a search in the constitutional sense affecting the rights of a person who was plainly *not* the holder of the documents subject to compelled disclosure. This, to Kennedy and the Justices who joined him, was unprecedented:

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.<sup>41</sup>

According to Kennedy, there is no way to make a distinction, in any constitutionally cognizable way, between someone’s credit card records and their CSLI. Both open to investigators a window into a person’s life that he has already revealed to the record keeper. And under *Smith* and *Miller*, that revelation should be dispositive in *Carpenter*. Carpenter’s CSLI records are pure business records, and Carpenter “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.”<sup>42</sup> Carpenter had no property interest in the company’s records, and to say that he nonetheless maintained a privacy interest in them makes no sense and departs from well-settled Fourth Amendment jurisprudence. The bright line has been muddied, if not erased, and what had been a straightforward analytical framework was demolished by the wrecking ball of the allegedly “entirely different species of business record” that is CSLI.

Justice Alito wrote his own dissent, joined by Justice Thomas, and was even more critical. Justice Alito noted that the majority’s decision elided the important distinction between actual

physical searches—where government agents enter and search, say, someone’s home or office—supported by probable cause, and an order to produce records:

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?<sup>43</sup>

Certainly such a proposition would work a sea change for law enforcement, but in his rigorously argued dissent, Justice Alito leaves the reader wondering how such an outcome does not follow ineluctably from the majority’s reasoning and premises.

Alito proceeded with a comprehensive historical tour of the role of compulsory process in American law from the time of the founding. He demonstrated that its use was never considered a search, and that probable cause was never required for its issuance. Simply put, compulsory process did not historically fall within the ambit of the Fourth Amendment. That amendment instead—and according to its own words—simply prohibits unreasonable searches of an individual’s “person, house, papers, and effects.” Thus, Fourth Amendment law traditionally incorporated a property-based component consistent with common law notions of trespass.<sup>44</sup> “So by its terms,” Alito concluded:

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.”<sup>45</sup>

The showing necessary for a compelled production of documents, as Justice Kennedy observed, is a straightforward one of relevance and reasonableness, not the probable cause required for search warrants.<sup>46</sup> There is no question here, according to Alito, that the order for Carpenter’s CSLI, authorized by the Stored Communications Act, fell comfortably within the constitutional strictures for compulsory process.<sup>47</sup>

Finally, Alito delivered a devastating and apparently unanswerable critique of the majority:

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

38 *Id.*

39 *Id.* at 2224.

40 *Id.*

41 *Id.*

42 *Id.* at 2230.

43 *Id.* at 2247.

44 *See Jones*, 565 U.S. at 405.

45 *Carpenter*, 138 S. Ct. at 2251 (quoting *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (dissenting opinion)).

46 *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 202-04 (1946).

47 *Carpenter*, 138 S. Ct. at 2255.

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.<sup>48</sup>

Thus the circular logic of the majority on this crucial analytical point comes into clear and, as Justice Alito aptly puts it, damning, relief. Moreover, Alito went on to explain how the majority misapprehends *Miller* and *Smith* and what has become known as the third-party doctrine. He noted that the third-party doctrine was never a new doctrine at all, but was merely a consistent and logical application of Fourth Amendment first principles. The idea that one can object to a governmental intrusion upon the property of another flies in the face of the Fourth Amendment’s history and language, where persons are protected in their persons, houses, papers, and effects.

Justice Thomas penned a remarkable solo dissent, in which he questioned why the Court uses *Katz* at all: “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.”<sup>49</sup> Justice Thomas began by recounting the *Katz* test’s unlikely evolution from almost an impromptu afterthought at oral argument in 1967, through Justice Harlan’s concurrence where the phrase “expectation of privacy” first appears in American jurisprudence, to its full-throated adoption by the Court as the “lodestar” for determining whether a constitutional search occurred in *Smith*.<sup>50</sup> He proceeded to explain why *Katz*’s holding that a search occurs whenever the government violates someone’s reasonable expectation of privacy cannot be squared with the text and original meaning of the Fourth Amendment. A search at the time of the founding had a particular meaning: an actual, physical search of a home or office or other location by agents of the government. Moreover, the text of the Fourth Amendment specifically protects people in their persons, houses, papers, and effects, not simply any place a person may have a reasonable expectation of privacy. And individuals have a right to be secure in *their* persons, houses, papers, and effects, not those of others. Finally, to leave it to a court to decide whether someone’s expectation of privacy is reasonable is simply asking for trouble in terms of clarity, predictability, and other legal values. As Justice Scalia famously observed, “In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those actual (subjective) expectations of privacy that society is prepared to recognize as reasonable bear an uncanny resemblance to those expectations of privacy that this

Court considers reasonable.”<sup>51</sup> Finally, Justice Thomas urged the Court to abandon the *Katz* test wholesale.<sup>52</sup> The majority opinion noted, however, that no party in *Carpenter* asked the Court to revisit *Katz*.<sup>53</sup>

Justice Gorsuch, in his own erudite dissent, criticized both *Katz* and the third-party doctrine, advocating for a more traditional, property law-based approach to the Fourth Amendment. In his view, courts deciding cases like this should look not to their own opinions or preferences, but to accepted positive-law sources such as statutes.<sup>54</sup>

### III. APPLYING *CARPENTER*

Since *Carpenter* was released in the summer of 2018, several reviewing courts and various trial courts have grappled with its implications, though none have yet crossed the minefields telegraphed by the dissents. In *United States v. Hood*, the defendant, charged with the transportation and receipt of child pornography, argued that the Internet Protocol (IP) address information that the government obtained from the smartphone messaging company Kik without a warrant should be suppressed under *Carpenter*.<sup>55</sup> The First Circuit disagreed and held that, unlike the CSLI in *Carpenter*, IP address information by itself conveys no information about a person’s location:

The IP address data is merely a string of numbers associated with a device that had, at one time, accessed a wireless network. By contrast, CSLI itself reveals—without any independent investigation—the (at least approximate) location of the cell phone user who generates that data simply by possessing the phone a cell phone.

In contrast, an internet user like the defendant in *Hood* makes “the affirmative decision to access a website or application.”<sup>56</sup> This distinction was enough for the First Circuit to find *Carpenter* inapplicable, and the court noted its agreement with the only other circuit court to have addressed the issue post-*Carpenter*.<sup>57</sup>

Several federal district court opinions have taken the law and logic of *Carpenter* in directions more amenable to defendant

48 *Id.* (quoting *Carpenter*, 138 S. Ct. at 2221).

49 *Id.* at 2236.

50 *Id.* at 2236-38. See also Peter Winn, *Katz and the Origins of the “Reasonable Expectation of Privacy” Test*, 40 McGEORGE L. REV. 1 (2009), available at <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1204&context=mlr>; Harvey A. Schneider, *Katz v. United States: The Untold Story*, 40 McGEORGE L. REV. 13 (2009), [https://www.mcgeorge.edu/documents/Publications/06\\_Schneider\\_Master1MLR40.pdf](https://www.mcgeorge.edu/documents/Publications/06_Schneider_Master1MLR40.pdf).

51 *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

52 *Carpenter*, 138 S. Ct. at 2246. As evidenced by some recent opinions, Justice Thomas is not shy about urging that the Court reconsider some venerable cases and doctrines that he believes, and attempts to demonstrate, rest on particularly unstable foundations. See, e.g., *McKee v. Cosby*, 139 S. Ct. 675 (Thomas, J., concurring in denial of cert.) (Feb. 19, 2019) (explaining reasons for reconsidering the constitutional requirement that public figures satisfy an actual-malice standard for state-law defamation actions); *Garza v. Idaho*, 139 S. Ct. 738, 756-59 (Thomas, J., dissenting) (questioning the underpinnings of the constitutional right to effective assistance of counsel at taxpayer expense).

53 *Carpenter*, 138 S. Ct. at 2214, n.1.

54 *Id.* at 2267-72.

55 *United States v. Hood*, 920 F.3d 87 (1st Cir. 2019).

56 *Id.* at 92.

57 See *United States v. Contreras*, 905 F.3d 853, 857 (5th Cir. 2018) (“The information at issue here falls comfortably within the scope of the third-party doctrine. [The] records revealed only that the IP address was associated with the Contreras’s Brownwood residence. They had

expectations of privacy than to law enforcement investigative techniques. In *United States v. Diggs*, in a closely reasoned and comprehensive opinion, the Northern District of Illinois held that, although police were voluntarily provided GPS location data by a car dealer from whom a friend of the defendant had bought a car on credit, a warrant was nonetheless required.<sup>58</sup> The court carefully analyzed the case under *Carpenter*'s construal of the third-party doctrine and determined that the defendant did not surrender any reasonable expectation of privacy in his physical movements as detailed in the GPS data even though the owner of the car, freely and via a signed waiver, had released the data to the third-party car dealer which then turned over that data to the police who simply requested it.<sup>59</sup> The court held that there is no doctrinally meaningful difference between GPS data and the historical CSLI at issue in *Carpenter*.<sup>60</sup> Perhaps even more significantly, the district court went on to hold that the good-faith exception to the exclusionary rule did not apply in these circumstances.<sup>61</sup> Indeed, it held that, based on the *Carpenter* majority's own articulation of the precise nature of its holding, *Carpenter* in fact broke no new doctrinal ground, but instead merely declined to extend the third-party doctrine into the new context of historical CSLI.<sup>62</sup> And where historical CSLI and historical GPS are functionally equivalent for purposes of a Fourth Amendment analysis, binding appellate precedent did not authorize the warrantless acquisition of the GPS data at issue.<sup>63</sup> The district court finally concluded that, although the car contract explicitly stated that the dealer was authorized to use an embedded GPS tracking device to track the car's whereabouts, as with *Carpenter*'s cell phone, it could not be said that the users of the car truly "voluntarily turned over" that data to any third party.<sup>64</sup>

Several district courts have also dealt with stationary surveillance cameras post-*Carpenter*. In *United States v. Kelly*, the Eastern District of Wisconsin held that stationary video surveillance of the exterior of an apartment building and the hallway outside of an apartment for forty-nine days did not require a warrant under *Carpenter*.<sup>65</sup> The court noted:

Unlike a cell phone, the video surveillance did not track the totality of the defendant's movements. It tracked only his arrival to and departure from a residence that wasn't his. The defendant's attempt to equate a process that records only what someone standing in the apartment hallway, or outside

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no bearing on any person's day-to-day movement. Contreras lacked a reasonable expectation of privacy in that information.").

58 385 F. Supp. 3d 648, 655 (2019).

59 *Id.*

60 *Id.* at 653-54.

61 See *Davis v. United States*, 564 U.S. 229, 249-50 (2011) (holding that "when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply").

62 *Diggs*, 385 F. Supp. 3d at 657.

63 *Id.*

64 *Id.* at 660.

65 385 F. Supp. 3d 721, 729 (2019).

the apartment complex, could have seen with a process that follows a person into homes, places of worship, hotels, bedrooms, restaurants and meetings, takes *Carpenter*'s reasoning too far.<sup>66</sup>

In contrast, the District of Massachusetts recently held in *United States v. Moore-Bush*, which involved a stationary surveillance camera attached to an outside utility pole, that a defendant "had an objectively reasonable expectation of privacy in their and their guests' activities around the front of [their] house for a continuous eight-month period."<sup>67</sup> The court said:

It stands to reason that the public at the time of the [Fourth Amendment's] framing would have understood the King's constables to violate their understanding of privacy if they discovered that constables had managed to collect a detailed log of when a home's occupants were inside and when visitors arrived and whom they were.<sup>68</sup>

Although the surveillance in *Moore-Bush* was considerably longer than that in *Kelly*, and although the camera in *Moore-Bush* was trained on the defendant's home as opposed to someone else's or a common hallway, both cases implicate a standard investigative technique whose lawful limits are now called into question by *Carpenter* and its doctrinal ancestors. The various courts of appeals will have to grapple with these issues soon, no doubt in anticipation of further refinement and explication by the Supreme Court.

Finally, the state court whose 2014 opinion presaged *Carpenter* in most material respects<sup>69</sup> confronted an issue the Supreme Court specifically did not address in *Carpenter*: real-time CSLI. In *Commonwealth v. Almonor*, the Supreme Judicial Court of Massachusetts held that the government's causing a defendant's cell phone to reveal its real-time location by "pinging" the phone—that is, having the service provider cause the phone to transmit its GPS coordinates to the provider—is a search under Article 14 of the Massachusetts Declaration of Rights (the state's equivalent of the federal Fourth Amendment).<sup>70</sup> A warrant supported by probable cause was therefore required. Although the court held that exigent circumstances excused the failure to obtain a warrant in *Almonor*, it is now clear that such an investigative technique is a search in Massachusetts.<sup>71</sup> The reasoning of the majority opinion in *Carpenter* provided valuable jurisprudential support for the state court's holding.

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66 *Id.* at 727.

67 *United States v. Moore-Bush*, 381 F. Supp. 3d 139, 146 (2019).

68 *Id.* at 148.

69 See *Commonwealth v. Augustine*, 467 Mass. 230, 251 (2014) (holding that government acquisition of CSLI must be by a search warrant supported by probable cause because defendant had a reasonable expectation of privacy in the CSLI under Article 14 of the Massachusetts Declaration of Rights).

70 482 Mass. 35 (2019).

71 *Id.* at 52-53.

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#### IV. CONCLUSION

Lower courts have barely scratched the surface of *Carpenter* and its implications. The many opinions in the case are a feast of passionate argument, legal philosophy, and American history. One thing is for certain: the rules of *Carpenter* and *Katz* will lend fuel to the fires of legal debate in courtrooms and the academy for a long time to come.

