

No. 25-112

IN THE
Supreme Court of the United States

OKELLO T. 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 *AMICUS CURIAE*
AMERICANS FOR PROSPERITY FOUNDATION
IN SUPPORT OF PETITIONER**

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**BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation (“AFPF”) respectfully submits this *amicus curiae* brief in support of Petitioner.¹

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include constitutionally limited government and enforcing the Fourth Amendment’s protections against unreasonable searches and seizures and the prohibition against general warrants authorizing government fishing expeditions rummaging through Americans’ private information. As part of this mission, AFPF appears as *amicus curiae* before federal and state courts.

Here, AFPF writes to highlight the broader jurisprudential and practical stakes of this case as technology continuously evolves. AFPF believes that technological innovation is key to unleashing economic growth and prosperity. But the increasingly intrusive government surveillance capabilities these innovations enable, if left unchecked, threaten the liberty and privacy of all Americans and potentially

¹ *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

portend the emergence of an Orwellian police state incompatible with our constitutional order.

The Fourth Amendment is a core safeguard against this danger of government overreach. AFPF urges this Court to apply the Amendment's property-focused protections here through a technology-neutral rubric capable of principled application to novel technologies, including those that are now unimaginable. The Amendment's protections against arbitrary government rummaging must remain as robust today as when it was ratified.

More broadly, AFPF urges this Court to repudiate the judicially created fiction that the Fourth Amendment's protections do not apply to "papers" and "effects" possessed by third parties, regardless of how sensitive the information contained therein and who it belongs to under property law and contract principles. The third-party doctrine has no basis in the Fourth Amendment's original public meaning and eviscerates its protections. It should play no role in how this Court resolves this case.

SUMMARY OF ARGUMENT

As Justice Robert Jackson observed long ago, the Fourth Amendment's guardrails on government surveillance protect "indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). He continued: "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Id.*

That possibility, however theoretical and remote, is what is at stake here. And this Court should nip it in the bud to ensure it never materializes.

Pervasive and persistent government monitoring of Americans' movements, communications, and transactions is incompatible with a free society and antithetical to the property-focused protections of privacy and liberty enshrined in the Fourth Amendment. The Amendment neither contemplates nor tolerates the creation of a government surveillance state. And as America nears its 250th birthday, it bears reminding that general warrants granting government agents untrammelled search-and-seizure powers were among the grievances that inspired the Founding generation's desire for independence from the Crown and a core animating principle behind the Fourth Amendment.

There are societal costs to placing limits on how law enforcement may investigate crimes, particularly those that are serious. But in this country, the ends, however laudable, do not justify the means. And government efficiency is not the lodestar of our constitutional order. To the contrary, limiting "the government is the whole point of our Constitution." *United States v. Smith*, 110 F.4th 817, 841 (5th Cir. 2024) (Ho, J., concurring).

The Fourth Amendment promises that Americans have the right "to be secure in their persons, houses, papers, and effects," U.S. Const. amend. IV, thereby safeguarding individual liberty and privacy against arbitrary government intrusion. It unequivocally bars the government from launching fishing expeditions and rummaging around our private "papers" and

“effects,” instead requiring a particularized warrant based on probable cause signed by a neutral judge. That bedrock proposition holds true regardless of the form these constitutional property interests might take—tangible or intangible—and does not turn on who physically possesses the information.

Nor does the scope of the Fourth Amendment’s protections turn on the capabilities of modern technology, contemporary societal mores, or judicial policy judgments on what privacy expectations should be recognized as reasonable. On the contrary, it guarantees the same baseline level of protection today as when it was ratified. And “[t]here is another way” to ascertain and respect its metes and bounds that is “tied to the law.” *Carpenter v. United States*, 585 U.S. 296, 397 (2018) (Gorsuch, J., dissenting).

No matter how this Court resolves Petitioner’s challenge to the “geofence” warrant in this case, it should make clear that a person can have a constitutionally protected *property interest* in his data and digital information even when it is possessed by third parties. There will be line-drawing challenges and edge cases. But possession must not be a condition precedent to Fourth Amendment protection. And this Court should begin the incremental process of elucidating what types of property interest in digital information and data are protected and by which sources of law. It is not without principled guideposts, including analogical reasoning to Founding-era law, contemporary positive and common law, and contract principles.

For the foregoing reasons, this Court should analyze this case through a property-focused rubric

grounded in the Fourth Amendment’s original public meaning. At a minimum, it should hold that the government’s acquisition of Petitioner’s Location History (“LH”) data constituted a “search” within the meaning of the Fourth Amendment.²

ARGUMENT

I. The Fourth Amendment Protects Privacy and Liberty by Securing Property.

The Fourth Amendment “safeguard[s] the privacy and security of individuals against arbitrary invasions by governmental officials,” *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 528 (1967), protecting the “indefeasible right of personal security, personal liberty and private property,” *Boyd v. United States*, 116 U.S. 616, 630 (1886). It “was the founding generation’s response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.” *Riley v. California*, 573 U.S. 373, 403 (2014). And the Amendment, as Justice Story wrote, is “indispensable to the full enjoyment of the rights of personal security, personal liberty, and private

² As Judge Wynn observed below, “geofence” warrants appear “uncomfortably akin to the sort of ‘reviled’ general warrants . . . the Framers intended the Fourth Amendment to forbid.” Pet. App. 217a (dissenting). At least one court has so held. *See Smith*, 110 F.4th at 838 (holding “geofence warrants are general warrants”). Although *amicus* shares those concerns, that issue is beyond the scope of this brief.

property.” 3 Joseph Story, Commentaries on the Constitution § 1895 (1833).

The Fourth Amendment expressly guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,” also promising that “no Warrants shall issue, but upon probable cause, . . . particularly describing the place to be searched, and the persons or things to be seized.”³ U.S. Const. amend. IV. As a textual matter, a “violation occurs when three things are true: (1) the government engages in a search, (2) of a person, house, paper, or effect, (3) that unreasonably violates a person’s right to be secure in that object.” *Morgan v. Fairfield Cty.*, 903 F.3d 553, 567–68 (6th Cir. 2018) (Thapar, J., concurring in part, dissenting in part). As an original matter, these are distinct inquiries.

A. The Concept of a “Search” Does Not Shrink Due to Evolving Societal Expectations.

First, a “search.” Under one strand of this Court’s jurisprudence, tracing its genesis to *Katz v. United States*, 389 U.S. 347 (1967), whether a “search” occurs turns on whether “government officers violate a

³ Each clause serves a distinct function. The Search-and-Seizure Clause “tells the executive what it must do when it conducts a search,” whereas the Warrant Clause “tells the judiciary what it must do when it issues a search warrant.” *City of L.A. v. Patel*, 576 U.S. 409, 430–31 (2015) (Scalia, J., dissenting). *Amicus* focuses here on original public meaning of the former clause.

person’s ‘reasonable expectation of privacy[.]’⁴ *United States v. Jones*, 565 U.S. 400, 406 (2012) (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring)). That approach breaks the tie between the Amendment’s traditional ambit and replaces it with evolving societal mores and value-laden normative judgments. It thereby “invites courts to make judgments about policy, not law,” *Carpenter*, 585 U.S. at 343 (Thomas, J., dissenting), as “[d]eciding what privacy interests should be recognized often calls for a pure policy choice[.]” *Id.* at 393 (Gorsuch, J., dissenting).

This approach, when decoupled from traditional protections, “distorts the original meaning of ‘searc[h],’” *id.* at 346 (Thomas, J., dissenting), and “has no plausible foundation in the text of the Fourth Amendment,”⁵ *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring). The *Katz* framework artificially narrows the Amendment’s sweep, “push[ing] too much police conduct outside of Fourth Amendment scrutiny.” *Morgan*, 903 F.3d at 571 (Thapar, J., concurring in part, dissenting in part). This approach has “yielded an often unpredictable—

⁴ “The word ‘search’ was not associated with ‘reasonable expectation of privacy’ until Justice Harlan coined that phrase in 1967.” *Carpenter*, 585 U.S. at 347 (Thomas, J., dissenting).

⁵ As Justice Gorsuch observed in *Carpenter*, “there may be some occasions where *Katz* is capable of principled application” and “it may also be possible to apply *Katz* by analogizing from precedent when the line between an existing case and a new fact pattern is short and direct.” 585 U.S. at 394 (Gorsuch, J., dissenting). *Amicus* does not address that question here.

and sometimes unbelievable—jurisprudence.”⁶ *Carpenter*, 585 U.S. at 394 (Gorsuch, J., dissenting).

Katz’s cramped conception of “search” is not only atextual and illogical but creates a downward ratchet from the Fourth Amendment’s baseline. As this Court has repeatedly explained, the Fourth Amendment protects the “degree of privacy against government that existed” at the ratification. *Id.* at 305 (majority op.) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). “Whatever new methods of investigation may be devised, [this Court’s] task, at a minimum, is to decide whether the action in question would have constituted a ‘search’ within the original meaning of the Fourth Amendment.” *Jones*, 565 U.S. at 406 n.3.

“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.” *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008); see *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 235 (2022) (“Constitutional analysis must begin with ‘the language of the instrument,’ which offers a ‘fixed standard’ for ascertaining what our founding document means.” (citations omitted)). And

⁶ See, e.g., *Florida v. Riley*, 488 U.S. 445, 451–52 (1989) (person has no reasonable expectation of privacy from police helicopter hovering at 400 feet over their home); *California v. Greenwood*, 486 U.S. 35, 40–44 (1988) (police going through a person’s garbage in front of their home not a “search”); *Smith v. Maryland*, 442 U.S. 735, 743–44, 746 (1979) (person has no expectation of privacy in whom they call); *United States v. Miller*, 425 U.S. 435, 443 (1976) (same for banking records).

the Constitution’s “[w]ords must be given the meaning they had when the text was adopted,” Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012), and “are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary,” *State of Tennessee v. Whitworth*, 117 U.S. 139, 147 (1886); see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) (“[T]he enlightened patriots who framed our constitution . . . must be understood to have employed words in their natural sense[.]”).

Here, there are no sound reasons to depart from the ordinary meaning of the word “search,” which, at the Founding, does not appear to be “a term of art, as it does not appear in legal dictionaries from the era.” *Carpenter*, 585 U.S. at 347 (Thomas, J., dissenting). Instead, it was, and remains, a simple, commonsense concept. “[H]istory shows that a ‘search’ meant then what it means now: a purposeful, investigative act (and nothing more).” *Morgan*, 903 F.3d at 568 (Thapar, J., concurring in part, dissenting in part). At the Founding, “as now, to ‘search’ meant ‘to look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.” *Kyllo*, 533 U.S. at 32 n.1 (quoting N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)); see 1 Samuel Johnson, *A Dictionary of the English Language* (1773) (defining “search” as “Inquiry” or “Examination”).⁷

⁷ https://johnsonsdictionaryonline.com/1773/search_ns.

That is all that is required for an act to constitute a “search” within the meaning of that word as used in the Fourth Amendment; the concept itself has nothing whatsoever to do with a person’s “reasonable expectations” and does not invite judicial balancing. *See Morgan*, 903 F.3d at 570 (Thapar, J., concurring in part, dissenting in part) (“[A] search can plainly occur regardless of whether a person reasonably believes the area the officers rummage through is private.”). When “search” is given its plain, original meaning, it is apparent that “the concept is broader than th[is] Court’s current jurisprudence contemplates”—and more readily administrable by courts, to boot.⁸ *Id.* at 572 (Thapar, J., concurring in part, dissenting in part). And if a “search” is understood in this way without judicial gloss, “many things that are currently considered outside the Amendment’s scope might come back in.” *Id.* at 571–72 (Thapar, J., concurring in part, dissenting in part).

Moreover, the concept is technologically neutral and does not change over time as surveillance capabilities evolve. To the contrary, “[a] search is a search, whether with Raybans or x-rays.” Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv.

⁸ This Court’s jurisprudence “conflate[s]” the question whether the government’s actions were “reasonable” with the antecedent question whether a “search” occurred. *See Morgan*, 903 F.3d at 570 (Thapar, J., concurring in part, dissenting in part). These are separate inquiries. *See Carpenter*, 585 U.S. at 326 (Kennedy, J., concurring). “[R]easonableness determines the legality of a search, not ‘whether a search . . . within the meaning of the Constitution has occurred.’” *Id.* at 355 (Thomas, J., dissenting) (quoting *Carter*, 525 U.S. at 97 (opinion of Scalia, J.)).

L. Rev. 757, 769 (1994). And the Fourth Amendment’s “meaning applies equally whether the government seeks to conduct a search [of a home] the old-fashioned way by rummaging through the place or in a more modern way by using a thermal imaging device to see inside.” Neil Gorsuch et al., *A Republic, If You Can Keep It* 111 (2019); see *Kyllo*, 533 U.S. 27. Or by obtaining someone’s cell-site location information. *Cf. Carpenter*, 585 U.S. 296. Or, as in this case, LH data. And the same would hold true for emerging technologies and those beyond current contemplation.

B. The Fourth Amendment Guarantees Individual Property-Focused Rights.

Of course, not all “searches” within the original meaning of the Fourth Amendment implicate its protections; only those that implicate a person’s right to be secure in four categories of things: persons, houses, papers, and effects. The Amendment’s plain language “reflects its close connection to property, since otherwise it would have referred simply to ‘the right of the people to be secure against unreasonable searches and seizures’; the phrase ‘in their persons, houses, papers, and effects’ would have been superfluous.” *Jones*, 565 U.S. at 405. And importantly, it primarily guarantees an individual—as opposed to collective—right closely tethered to a person’s property interests.⁹ Its “text does not refer to a right

⁹ At the Founding, “liberty and privacy rights were understood largely in terms of property rights.” Morgan Cloud, *Property Is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 *Am.*

exercised in relation to the property of others,” focusing instead on “*whose* property was searched,” Laura K. Donohue, *Functional Equivalence and Residual Rights Post-Carpenter: Framing a Test Consistent With Precedent and Original Meaning*, 2018 Sup. Ct. Rev. 347, 390 (2018), tellingly “us[ing] a possessive pronoun—‘their’—to describe” the categories of things it safeguards, Randy Barnett, *Why the NSA Data Seizures Are Unconstitutional*, 38 Harv. J. L. & Pub. Pol. 3, 13 (2015).¹⁰

By the Fourth Amendment’s plain text, it “gives ‘each person . . . the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.’” *Byrd v. United States*, 584 U.S. 395, 412 (2018) (Thomas, J., concurring) (quoting *Carter*, 525 U.S. at 92 (Scalia, J., concurring)). The Amendment thereby “grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.” *Carpenter*, 585 U.S. at 391 (Gorsuch, J., dissenting). All that is “needed to trigger” its

Crim. L. Rev. 37, 42 (2018). The Founding generation was well acquainted with the concept “of security in property,” “a prominent concept in English law[.]” *Carpenter*, 585 U.S. at 348–49 (Thomas, J., dissenting). Indeed, “property” was an “organizing constitutional idea.” *Id.* at 351.

¹⁰ As Professor Barnett has observed, “by availing themselves of the law of property and contract, people create their own zones of privacy. In short, first comes property and contract, then comes privacy.” Barnett, 38 Harv. J. L. & Pub. Pol. at 13.

application is that “a house, paper, or effect was *yours* under law.” *Id.* at 397–98 (Gorsuch, J., dissenting).

II. Sharing Digital Information Does Not Automatically Destroy Constitutionally Protected Property Interests.

As a matter of first principles, “[t]his case should not turn on ‘whether’ a search occurred.” *Id.* at 342 (Thomas, J., dissenting) (citation omitted). Here, it plainly did: the government’s collection of Petitioner’s LH information using a “geofence” warrant was a deliberate investigative act.

This Court has also made clear that constitutionally protected property rights may extend to intangible property, such as commercial data.¹¹ *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–04 (1984). *Cf. Olmstead v. United States*, 277 U.S. 438, 487 (1928) (Butler, J., dissenting) (“The communications belong to the parties between whom they pass.”). And at least as a general matter, data and digital information might qualify, by analogy, as modern-day “papers” and “effects” within the meaning of the Fourth Amendment. *See Riley*, 573 U.S. at 399, 401 (suggesting digital records are “private effects”); *United States v. Ackerman*, 831 F.3d 1292, 1304 (10th Cir. 2016) (treating digital files as “paper” or “effect”); *see also* Amar, 107 Harv. L. Rev. at 811 (“a person’s

¹¹ “[I]t is well established that information contained in a computer is ‘property.’” *Van Buren v. United States*, 593 U.S. 374, 400 (2021) (Thomas, J., dissenting). Similarly, “[c]onfidential business information has long been recognized as property.” *Carpenter v. United States*, 484 U.S. 19, 26 (1987).

‘effects’ may be intangible”); Donohue, 2018 Sup. Ct. Rev. at 408 (“Digital documents and records constitute ‘papers[.]’”).

There will be edge cases and hard questions. But an interesting thought experiment is whether at least in some circumstances comprehensive location data might be a modern-day analog of a journal or ship’s log, documenting the paths taken and locations visited over an extended period of time.¹² If so, it may qualify as a modern-day “paper” or “effect” that should be treated no different from that same information if it were compiled in paper form. *Cf. Ackerman*, 831 F.3d at 1308 (applying “analogy from principle to new technology” and treating emails as “papers” under the Fourth Amendment); *United States v. Warshak*, 631 F.3d 266, 285–86 (6th Cir. 2010).

The Fourth Amendment’s protection of “papers” and “effects” does not turn on where they are located or stored. This Court has long made clear that a person’s right “to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.” *Ex parte Jackson*, 96 U.S. 727, 733 (1877). Thus, “the fact that a third party has access to or possession of your papers and effects does not

¹² The LH information at issue here has been described by Google as “a history or journal,” JA-16, the content of which is “capable of being reviewed, edited, and deleted by the user,” JA-29. According to Google, “Google LH information is created, edited, and stored by and for the benefit of Google users[.]” JA-12. Users “control[]” and “can review, edit, or delete” it “from Google’s servers at will.” JA-12.

necessarily eliminate your interest in them.” *Carpenter*, 585 U.S. at 399 (Gorsuch, J., dissenting). Nor is “complete ownership or exclusive control of property” a sine qua non to protection under the Fourth Amendment, *id.* at 401 (Gorsuch, J., dissenting), or Fourth Amendment protection defeated if an additional person has a possessory property interest where the first party objects to the search, *Georgia v. Randolph*, 547 U.S. 103, 115 (2006).

The broader (and thornier) doctrinal question is which property rights are implicated when data is accessible to or stored by a third party and whose rights are they? That is, “what kind of property interest do individuals need before something can be considered ‘their[s] . . . under the original meaning of the Fourth Amendment?” *Byrd*, 584 U.S. at 412 (Thomas, J., dissenting). That inquiry implicates several related threshold questions: “what kind of legal interest is sufficient to make something yours? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times? Both?” *Carpenter*, 585 U.S. at 398–99 (Gorsuch, J., dissenting). *Cf. Byrd*, 584 U.S. at 412 (Thomas, J., dissenting) (highlighting “at least three threshold questions”). The best answer may well be some combination of these and other guideposts.

“[S]tatutes and common law of the founding era” may often supply evidence of “the norms that the Fourth Amendment was meant to preserve,” *Virginia v. Moore*, 553 U.S. 164, 168 (2008), and assist courts in ascertaining its application. And “the Framers’ view provides a baseline for our own day: The Amendment must provide *at a minimum* the degree

of protection it afforded when it was adopted.”¹³ *Lange v. California*, 594 U.S. 295, 309 (2021) (cleaned up). Cf. *Tyler v. Hennepin Cty.*, 598 U.S. 631, 638 (2023) (noting “traditional property law principles” and “historical practice” supplement state law as source of property rights protected under Takings Clause). The Fourth Amendment’s Founding-era floor “embraces the protections against unreasonable searches and seizures that existed at common law at the time of its adoption[.]” *United States v. Krueger*, 809 F.3d 1109, 1123 (10th Cir. 2015) (Gorsuch, J., concurring).

At the same time, “property rights change over time.”¹⁴ *United States v. Fellmy*, 165 F.4th 501, 513 (6th Cir. 2026) (Thapar, J., concurring). And as Justice Scalia has explained, “[t]here is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change,” *Randolph*, 547 U.S. at 144 (dissenting), such as state property law, *see id.* Under this Court’s Takings Clause jurisprudence, for example, “[s]tate law is one important source” for determining the existence vel non of a constitutionally protected property interest. *Tyler*, 598 U.S. at 638. The same principle might be applied in the Fourth Amendment context.

¹³ This baseline might “bar efforts to circumvent the Fourth Amendment’s protection through the use of subpoenas.” *Carpenter*, 585 U.S. at 403 (Gorsuch, J., dissenting).

¹⁴ “Property is a dynamic institution that evolves over time in response to changing technologies and changing levels of supply and demand.” Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 945 (2000).

Contractual principles supply another guidepost.¹⁵ There is no reason to think parties cannot agree that data and digital information an individual provides to a third party remains *his* property. *See Carpenter*, 585 U.S. at 353–54 (Thomas, J., dissenting) (noting “such [contractual] provisions could exist in the marketplace”). For example, a contractual right to limit access to data held by third parties might give rise to a property interest protected under the Fourth Amendment. A right to delete might also be sufficient, particularly if conceived as a “right to exclude,” which “is one of the most treasured rights of property ownership.”¹⁶ *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021); *see Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (“One of the main rights attaching to property is the right to exclude others[.]”); *see also Chapman v. United States*, 365 U.S. 610, 616 (1961) (apartment leaseholder). Indeed, “[t]he hallmark of a protected property interest is the right to exclude others.”¹⁷ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673

¹⁵ *See* Chris Machold, Note, *Could Justice Gorsuch’s Libertarian Fourth Amendment Be the Future of Digital Privacy? A “Moderate” Contracts Approach to Protecting Defendants After Carpenter*, 53 U.C. Davis L. Rev. 1643, 1658–80 (2020).

¹⁶ “[P]roperty means something different than mere possession.” Thomas Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 732 (1998). And the right to *use* property is a distinct concept from the right to *exclude*. *See id.* at 741.

¹⁷ This stick in the bundle of property rights “does a good job of identifying those interests that we may loosely call common-law property rights.” Merrill, 86 Va. L. Rev. at 945. “For the Framing Generation, the right to exclude was the quintessential property right.” Michael J. O’Connor, *Digital Bailments*, 22 U. Pa. J. Const. L. 1271, 1286 (2020).

(1999). And transfer of a portion of that right to a third party, for example in the form of an easement, does not throw open the doors to entry by the government or the public. *See, e.g., Schmidt v. Bank of Am., N.A.*, 223 Cal. App. 4th 1489, 1501 (Cal. Ct. App. 2014) (private easement does not create public right of way nor regulation).

So too bailment law. “English common law has long recognized that possession is insufficient to extinguish a property owner’s residual rights. A bailor and bailee both hold rights in the same property.” Donohue, 2018 Sup. Ct. Rev. at 353 (citations omitted). And digital records may well be a modern-day species of bailment for consideration.¹⁸ *See id.* at 396–99; *see also* Haley Amster & Brett Diehl, Note, *Against Geofences*, 74 Stan. L. Rev. 385, 410 (2022) (suggesting people “have a property interest in their SensorVault information, and those individuals who knowingly opt into LH collection affirmatively designate Google as a bailee”). Another possibility is that in some circumstances “stor[ing] data with third parties may amount to a sort of involuntary bailment”

¹⁸ Use of the bailment law in third-party possession cases to ascertain the existence of a property interest for Fourth Amendment purposes would appear to track with how that concept applies elsewhere in this Court’s jurisprudence. *See* O’Connor, 22 U. Pa. J. Const. L. at 1309 (suggesting this “Court has regularly considered bailments as property under the Takings and Due Process clauses”).

as a practical necessity of modern life. *Carpenter*, 585 U.S. at 402 (Gorsuch, J., dissenting).

Positive law provides another possible rubric through which to assess the existence of property rights in digital information protected under the Fourth Amendment. A positive-law approach “ask[s] judges to consult what the people’s representatives have to say about their rights.” *Id.* at 398 (Gorsuch, J., dissenting) (citation omitted). It thus “carves out significant room for legislative participation in the Fourth Amendment context,” William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1852 (2016), thereby providing “a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations,” *Carpenter*, 585 U.S. at 402 (Gorsuch, J., dissenting). This approach is technologically neutral and might be well suited to keeping pace with rapidly changing surveillance capabilities. And there is a growing body of positive law courts may draw from. “Both the States and federal government are actively legislating in the area of third party data storage and the rights users enjoy.” *Id.* For example, “[f]ederal and state law routinely define ‘property’ to include computer data.” *Van Buren*, 593 U.S. at 400 (Thomas, J., dissenting); *see, e.g.*, Ind. Code Ann. § 35-31.5-2-253(a)(15) (defining “property” to include “data”).

Finally, tort law provides yet another guidepost for assessing when a person’s data and digital information held by a third party remain *his* property and thus protected under the Fourth Amendment. *Cf. Carpenter*, 585 U.S. at 353 (Thomas, J., dissenting) (“If someone stole these records from Sprint or

MetroPCS, Carpenter does not argue that he could recover in a traditional tort action.”). And “many courts have already applied the common law’s ancient trespass to chattels doctrine to electronic, not just written, communications.”¹⁹ *Ackerman*, 831 F.3d at 1308 (listing examples); *see, e.g., Compuserve Inc. v. Cyber Promotions*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997) (“Electronic signals generated and sent by computer have been held to be sufficiently physically tangible to support a trespass cause of action.”).

In sum, numerous traditional property-based guideposts exist that this Court may draw from in applying the Fourth Amendment’s protections to emerging technologies.

III. The Third-Party Doctrine’s Judicial Gloss Departs Downward From The Constitutional Baseline.

A person’s Fourth Amendment right to be secure in their “papers and effects do[es] not automatically disappear” when they grant a third party access to these materials. *Carpenter*, 585 U.S. at 398 (Gorsuch, J., dissenting). But under the third-party doctrine, “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties,” *Smith*, 442 U.S. at 743–44, “even if the

¹⁹ “[U]nder a common-law trespassory test, any government intrusion on property is trespass no matter that [the trespasser] does no damage at all.” *Verdun v. City of San Diego*, 51 F.4th 1033, 1049 (9th Cir. 2022) (Bumatay, J., dissenting) (quoting *Jones*, 565 U.S. at 405 (quoting *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765))).

information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed,” *Miller*, 425 U.S. at 443.²⁰

The judicially created third-party doctrine is not only at odds with the Fourth Amendment’s original public meaning but departs downward from the baseline protections enshrined in it and this Court’s jurisprudence. See *Ex parte Jackson*, 96 U.S. at 733 (regarding letters: “Whilst in the mail, they can only be opened and examined under like warrant,” despite being voluntarily placed in possession of a government agency.). *Smith* and *Miller* represent a constitutionally dubious gloss on “*Katz* that lets the government search almost whatever it wants whenever it wants.” *Carpenter*, 585 U.S. at 391 (Gorsuch, J., dissenting). However this Court chooses to resolve the question presented, the third-party doctrine should play no role in the analysis. The third-party doctrine should not be kept “on life support” or further judicially glossed “with a new and multilayered inquiry that seems to be only *Katz*-squared.” *Id.* at 405 (Gorsuch, J., dissenting). And this case presents an ideal opportunity to narrow or repudiate it and “reconsider the premise that an

²⁰ At minimum, *Smith* and *Miller* should only apply as exceptions to *Katz*, not to the property-based approach. See *Carpenter*, 585 U.S. at 398 (Gorsuch, J., dissenting). And as Justice Kennedy noted in *Carpenter*, “*Miller* and *Smith* may not apply when the Government obtains the modern-day equivalents of an individual’s own ‘papers’ or ‘effects,’ even when those papers or effects are held by a third party,” including as “a bailment[.]” *Id.* at 332–33 (concurring).

individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.” *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring) (citations omitted).

Smith and *Miller*, taken too far, bless the creation of an Orwellian surveillance state with tracking and monitoring technologies. Under the logic of *Smith* and *Miller*, “the Constitution does nothing to limit investigators from searching records you’ve entrusted to your bank, accountant, and maybe even your doctor.” *Carpenter*, 585 U.S. at 387 (Gorsuch, J., dissenting). “The third party doctrine presents one of the most serious threats to privacy in the digital age.” Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 Fordham L. Rev. 747, 753 (2005).

“This approach is ill suited to the digital age[.]” *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring). And “wooden application” of this doctrine leads down a “slippery slope[.]” *United States v. Davis*, 785 F.3d 498, 537 (11th Cir. 2015) (en banc) (Martin, J., dissenting). As Judge Tymkovich has observed in applying the doctrine to reject a pre-*Carpenter* challenge to collection of CSLI, there is reason to “fear the Orwellian-style surveillance state that could emerge from unfettered government collection of personal data.” *United States v. Thompson*, 866 F.3d 1149, 1159 (10th Cir. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2706 (2018). This concern is only

amplified by the advent of geofence warrants and other surveillance technologies on the horizon.²¹

This case illustrates the dangers the third-party doctrine poses. Yet, in the en banc decision below, seven (of fifteen) judges concluded that no *search* within the meaning of the Fourth Amendment occurred, *see* Pet. App. 72a (Richardson, J., concurring), finding that “[t]he third-party doctrine . . . squarely governs this case,” Pet. App. 95a (Richardson, J., concurring). The panel similarly concluded that the third-party doctrine controls, and as a result no Fourth Amendment search occurred. *See* Pet. App. 170a. *Amicus* respectfully believes that was error, showcasing why this Court should revisit and repudiate the third-party doctrine, at least as applied to the property-based inquiry.²²

“[I]t would be a grave misjudgment to conflate an individual’s limited disclosure to Google with an open invitation to the state.” Pet. App. 64a–65a (Wynn, J., concurring). It cannot be the case that the Fourth Amendment has no application whenever someone voluntarily discloses information to a third party or

²¹ “Geofence intrusions are . . . low-value fishing expeditions,” Pet. App. 217a (Wynn, J., dissenting), which “present the exact sort of ‘general, exploratory rummaging’ that the Fourth Amendment was designed to prevent.” *Smith*, 110 F.4th at 837.

²² The sky would not fall. Nor would doing so prevent law enforcement from using and relying on confidential informants—the *raison d’être* of the doctrine prior to *Katz*. *See generally* Amy L. Peikoff, *Of Third-Party Bathwater: How to Throw Out the Third-Party Doctrine While Preserving Government’s Ability to Use Secret Agents*, 88 St. John’s L. Rev. 349 (2014).

that property rights magically disappear—especially when the third party may *also* have a property interest in the data. “The Constitution deals with substance, not shadows.” *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867). So too here. The mere fact that a person has provided the modern-day equivalent of “papers” and “effects” to a third party does not transmute the meaning of the word “search” in the Fourth Amendment. Nor does it matter that the property of two parties has been searched. This *may* affect whether the “search” was “unreasonable” or the related question whether it implicates a person’s Fourth Amendment rights as a threshold matter. But a search is a search, regardless of who is in physical possession of the property that is searched.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

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