No. 25-112

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 THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the execution of the geofence warrant violated the Fourth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Constitutional Provisions

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty. A central pillar of IJ's mission is the protection of private property rights, both because the ability to control one's property is an essential component of individual liberty and because property rights are bound up with all other civil rights. See *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights.").

To that end, IJ challenges unconstitutional government surveillance of people and their property, and advocates for Fourth Amendment protections that are faithful to the Amendment's text and history. IJ's Fourth Amendment practice reflects a particular concern for the rights of innocent people whose lives and property are subject to unconstitutional searches or seizures. See, *e.g.*, *Snitko* v. *United States*, 90 F.4th 1250 (9th Cir. 2024); *Mendenhall* v. *City & County of Denver*, No. 25-1081, 2026 WL 125748 (10th Cir. Jan. 16, 2026); *Thomas* v. *Schaeffer*, No. 3:24-cv-01603, 2025 WL 2581840 (M.D. Pa. Sept. 5, 2025); *Rosales* v. *Lewis*, No. 22-5838, 2025 WL 3256753 (W.D. La. Oct.

[1] No party or its counsel authored any of this brief, and no person other than the Institute for Justice (IJ), its members, or its counsel contributed monetarily to this brief.

6, 2025). IJ regularly files amicus briefs in Fourth Amendment cases before this Court. See, *e.g.*, *Moore* v. *United States*, 143 S. Ct. 2494 (2022); *Tuggle* v. *United States*, 142 S. Ct. 1107 (2022); *Carpenter* v. *United States*, 585 U.S. 296 (2018); *Riley* v. *California*, 573 U.S. 373 (2014).

SUMMARY OF ARGUMENT

The en banc Fourth Circuit divided 7-7 on whether the government's execution of the geofence warrant constituted a "search" under the Fourth Amendment, producing nine separate opinions that variously applied *Katz*, *Jones*, the third-party doctrine, and combinations thereof. That deadlock is a symptom of a deeper problem. The Court's treatment of "search" as a term of art has transformed an ordinary word into a proxy for analytically distinct constitutional judgments, producing confusion that obscures a straightforward resolution of this case.

The word "searches" in the Fourth Amendment is not a term of art. It carried the same ordinary meaning when it entered the Constitution that it carries today: an act aimed at obtaining information. Every relevant category of historical evidence—general and legal dictionaries, treatises, case reports, newspapers, the Amendment's text and drafting history—affirms that conclusion. The Amendment's text presupposes that broad, ordinary meaning and assigns the constitutional work of line-drawing to

distinct concepts: "[t]he right of the people to be secure in their persons, houses, papers, and effects," reasonableness, and the requirements for a valid warrant. U.S. CONST. amend. IV.

The Court gradually displaced that ordinary meaning by collapsing judgments about constitutionally protected interests into the definition of "search." When the Court concluded that an investigative act did not implicate a constitutionally protected interest, it thus held that "no search" occurred—a shorthand that gradually chiseled the word down to something far narrower than its original, ordinary meaning. *Katz* responded to that problem by replacing the narrow, nominally property-based limitations with the untethered "reasonable expectation of privacy" standard, but left the underlying distortion intact. "Search" remained a term of art carrying the weight of analytically distinct constitutional questions. *Jones* later reimposed a property-based floor, but the result is two parallel tests for a word that should not be a test at all.

Restoring the ordinary meaning of "search" provides a framework that is rooted in the Amendment's text, easier to apply, and more analytically sound. Under that framework, the threshold question is whether the government conducted an act aimed at obtaining information—a search. With that question disposed of, the inquiry

can proceed through a sequence of textually grounded questions: Did the search implicate a constitutionally protected interest? Was it unreasonable in the absence of a warrant or some other constraint? Where the government obtained a warrant, does that warrant satisfy the Warrant Clause's requirements of probable cause, particularity, and oath or affirmation?

Here, the government executed a geofence warrant that authorized three distinct searches in the ordinary sense. It obviously conducted acts aimed at obtaining information at each step. The constitutionally relevant question is whether that warrant satisfies the standards the Amendment imposes. At least at Steps 2 and 3, it does not.

The warrant's probable cause deficiency is structural. The magistrate evaluated probable cause once, based on the evidence available when the warrant was issued. The warrant then ensured that all subsequent probable cause determinations—whether the fruits of one search justified the next—would be made by the investigating officer, not a neutral and detached magistrate. That delegation is constitutionally impermissible. Left to make those judgments himself, the officer improperly treated mere propinquity as justification to progressively expand the Step 2 and Step 3 searches.

The warrant also lacked particularity. It included no particularized description of the target or scope of the Step 2 and Step 3 searches, delegating those determinations to the officer and to Google to be worked out during execution. This was, in structure and function, a general warrant—the very evil the Fourth Amendment was adopted to prevent.

ARGUMENT

I. The Original, Ordinary Meaning of "Search" Clarifies the Issues Here.

A. Search entered the text of the Fourth Amendment with its ordinary meaning.

This Court has been concerned about its search doctrine for some time—and rightly so. "Search" has become a load-bearing word in Fourth Amendment analysis. Whether a "search" occurred determines whether any substantive protections apply. See, *e.g.*, *Carpenter* v. *United States*, 585 U.S. 296, 313 (2018) (holding warrant was required to obtain cell-site location information only because it was a "search"); *Illinois* v. *Caballes*, 543 U.S. 405, 408–409 (2005) (holding no warrant was required for drug-dog sniff only because it was "not a search"). Yet as this Court has recognized, deciding "whether or not a Fourth Amendment 'search' has occurred is not so simple under our precedent." *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001); *id.* at 32 (noting the Court has

developed doctrines for "assessing when a search is not a search").

That is because, under *Katz* and *Jones*, "search" is treated not as an ordinary word, but as a term of art—a proxy for judgments about privacy, property, and reasonableness. Those distinct concepts are compressed into the search analysis, blurring the underlying legal issues. Look at the Fourth Circuit's fractured decision below: seven judges believed that the execution of the geofence warrant involved a "search," while seven believed it was "not a search"—across nine separate opinions.

That confusion stems not from the meaning of "search," but from its treatment as a term of art. Recent scholarship confirms that that treatment is unwarranted, as the Founding-era public would have understood "search" to carry its ordinary meaning when it entered the text of the Fourth Amendment. See John G. Wrench, *The Original Meaning of "Searches"* 7–18 (Feb. 25, 2026) (unpublished manuscript), papers.ssrn.com/sol3/papers.cfm?abstract_id=6303338. That meaning is straightforward: an act aimed at obtaining information. *Id.* at 12.

All relevant historical evidence points that way. Eighteenth-century dictionaries—published across several decades by lexicographers with markedly different methodologies—defined "search" using a

consistent cluster of synonyms: "to *examine*," "to *try*," "to *look through*," "to *seek*," "to *explore*," and "to *inquire*." *Id.* at 9–12 (discussing six dictionaries first published between 1721 and 1780). These definitions and the illustrative examples confirm that the word's meaning did not depend on what was being searched or how: one could "search" a house for a book, a wood for a thief, or one's heart for truth. *Id.* at 12–13. Search was an ordinary word that was both object- and method-neutral. *Id.*

Notably, no eighteenth-century general or legal dictionary offered a technical definition of "search." That absence is telling. When compilers of general dictionaries encountered words with both ordinary and legal meanings, like "action" or "challenge," they flagged the distinct legal usage explicitly. *Id.* at 10–11. They never did so for "search." *Id.* Similarly, the most influential legal dictionaries of the Founding-era, including Jacob's *A New Law Dictionary*, Cunningham's *A New and Complete Law Dictionary*, and Burn's *New Law Dictionary*, omitted the term entirely. *Id.* at 10–11.

Treatise writers and judicial reports also used "search" as an ordinary word. Lord Coke described "general privie search[es]" for persons located in towns and villages, and a "search" for information contained in a manuscript. *Id.* at 13. Hale wrote of "strict search" conducted in ditches and pools of

water, and going "in *search* of the person." *Id.* at 14. Blackstone spoke of searching "for justice," for "mines of metal," and a constable's authority to "search his own town." *Id*. Reports of *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), and *Wilkes* v. *Wood*, 19 How. St. Tr. 1153 (C.P. 1763)—the paradigmatic cases that animated the Fourth Amendment's adoption—used search as an ordinary word without added technical meaning: to search for papers, to search for the plaintiff, to search wherever suspicions may fall. Wrench, *supra*, at 14–15.

The Amendment's text presupposes that broad, ordinary meaning. By the time Congress drafted the Fourth Amendment, state constitutions had already used "searches" as an ordinary description of investigative conduct while relying on *distinct* principles to sort between lawful and unlawful searches. *Id.* at 17–18. Massachusetts's 1780 Constitution, which Madison's draft tracked, described "searches" and then imposed limits through the right to be "secure," the ban on "unreasonable" searches, and the features of a valid warrant. See Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1299 (2016).

The Fourth Amendment inherited that structure. Its text describes the universe of government conduct it regulates—"searches"—and then assigns the work of constitutional line-drawing to separate concepts:

"[t]he right of the people to be secure in their persons, houses, papers, and effects," "unreasonable," and the Warrant Clause's requirements of "probable cause," "Oath or affirmation," and particularity. U.S. CONST. amend. IV. Recognizing an act as a "search" brought it within the Amendment's framework, but its ultimate constitutionality turned on those separate considerations.

The word "searches" was never modified, clarified, or debated during the drafting process—even as Congress painstakingly revised other terms in the provision. Wrench, *supra*, at 17–18. Had "searches" been understood as a term of art with the significance ascribed to it under current doctrine, one would expect at least some commentary on its meaning or scope. The absence of any such evidence—in dictionaries, treatises, judicial reports, drafting history, or the Amendment's text—point to an ordinary word rather than a term of art.

Indeed, this overwhelming evidence vindicates an increasing concern that "search" has been conscripted into a role that neither the Amendment's text nor history can support. See *Carpenter*, 585 U.S. at 347 (Thomas, J., dissenting) (stating that "search" was "probably not a term of art" at the Founding); *Kyllo*, 533 U.S. at 32 n.1 (noting that "search" had the same meaning "[w]hen the Fourth Amendment was adopted" as it does today); *Morgan* v. *Fairfield*

County, 903 F.3d 553, 568 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part) (asserting that both the *Katz* and *Jones* tests conflict with the original, ordinary meaning of "search"); *State* v. *Bauler*, 8 N.W.3d 892, 909 (Iowa 2024) (McDonald, J., concurring specially) (concluding that "search" should be "given its ordinary meaning" because "[t]here is no evidence" that it was a term of art at the Founding); Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910, 914, 975–980 (2023) (proposing a "broader and more commonsense" understanding of "search"); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 768–769 (1994) (asserting that "[a] search is a search, whether with Raybans or x-rays").

B. The Court gradually displaced that ordinary meaning by collapsing distinct questions into "search."

Although *Katz* certainly exacerbated confusion over the meaning of "search," see, *e.g.*, *Carpenter* v. *United States*, 585 U.S. 296, 347 (2018) (Thomas, J., dissenting) (noting that "search" was "not associated with 'reasonable expectation of privacy' until Justice Harlan coined that phrase in 1967"), it was not the source of that confusion. Beginning in the early twentieth century, the Court collapsed judgments about the existence and scope of constitutionally protected interests into the word's definition. That

innovation appears to have been unintentional—the result of shorthand descriptions of the Amendment's scope rather than deliberate redefinition. The results, however, have been dramatic. Once "search" became a proxy for judgments about protected interests, those judgments reshaped the definition of "search" itself.

As shown below, during this time, the Court did not articulate a positive definition or test for the meaning of "search." Instead, when it concluded that a plainly investigative act did not implicate a protected interest, it held that "no search" had occurred. That shorthand formed a kind of analytical path dependency, such that "search" vs. "no search" became the doctrinal battleground for whether the Amendment applied at all.

This development originated in a handful of early nineteenth-century cases that conflated whether a "search" occurred with whether the search burdened a constitutionally protected interest. For example, in *Hester* v. *United States*, 265 U.S. 57 (1924), an officer trespassed onto the defendant's land, stood in a field, and watched individuals near the house. Despite the warrantless entry, surveillance, and pursuit, the Court found no "illegal search" because "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,'

is not extended to the open fields."[2] *Id.* at 59. The reasoning was about the nature and scope of those protected interests, not whether the agent's conduct was a "search" in the ordinary sense. Three years later, in *United States* v. *Lee*, 274 U.S. 559, 563 (1927), the Court held that despite officers' use of a searchlight and binoculars to examine a vessel's deck from public waters, "no search * * * is shown." Again, that holding reflected a judgment about protected interests rather than whether a "search" had occurred.

The same pattern appeared a year later in *Olmstead* v. *United States*, 277 U.S. 438 (1928), where officers wiretapped phone lines from public property, intercepting conversations over several months. The Court held "[t]here was no searching" because the officers had not physically intruded into a constitutionally protected space. *Id.* at 464. And in cases involving informants and the public exposure of documents, the Court held that investigative acts targeting information shared with others were "not a search" on the ground that the defendant was deemed to have relinquished any interest in it. See, *e.g.*, *On Lee* v. *United States*, 343 U.S. 747, 753–754 (1952)

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[2] But see Laura K. Donohue, Hester's *Dubious Roots and Legacy: Open Fields Doctrine Under Scrutiny*, forthcoming 13 TEX. A&M L. REV. (2026) (critiquing *Hester*); see also Joshua Windham, *The Open Fields Doctrine is Wrong*, 32 GEO. MASON. L. REV. F. 1 (2024) (critiquing *Hester* and the open fields doctrine more broadly).

(finding no "unlawful search" where defendant "confidentially and indiscreetly" made incriminating statements to a wired informant); *Perlman* v. *United States*, 247 U.S. 7, 13 (1918) (holding government's successful motion to obtain sealed exhibits in another case was not "an actual search").

Each line of cases introduced distinct rationales—public visibility, absence of physical trespass, third-party disclosure—for why plainly investigative acts were "not a search." Critically, each was framed as an application of the term "search," yet none of them ever assessed the term's original meaning. Instead, they applied judgments about whether the investigative act implicated a protected interest, using "search" as a proxy for that question.

Because those judgments were channeled through a dubiously narrow view of "persons, houses, papers, and effects," the meaning of "search" shrank. By the time the Court decided *Katz*, what remained of the word's meaning had been chiseled down to something effectively limited to physical invasions of persons, houses, papers, and effects—each of which were themselves narrowly construed. Fourth Amendment scholars have puzzled over whether the pre-*Katz* decisions articulated a "search" test. Compare Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 96–97 (challenging *Jones*'s historical pedigree as a definition of "search"),

with Orin S. Kerr, *The Two Tests of Search Law: What is the* Jones *Test, and What Does That Say About* Katz*?*, 103 WASH. U. L. REV. 309, 313 (2025) (asserting *Jones* was the revival of a "historically correct" physical intrusion-based test). The confusion is understandable. Before *Katz*, the Court never attempted to define "search," nor did it acknowledge that the word had become a proxy for the protected interests question. But the word's meaning had been gradually whittled down by negation such that it *appeared* as if the Court was applying something like a physical invasion test.

In *Katz* v. *United States*, 389 U.S. 347 (1967), the Court responded to that problem. In rejecting *Olmstead*'s premise that the absence of a physical trespass meant "no search" had occurred, *id.* at 353, the Court liberated Fourth Amendment analysis from an overly narrow understanding of property rights that had been used to shrink the word's meaning—and thus the Amendment's reach—for decades. The Court reasoned that if the Fourth Amendment "protects people, not places," *id.* at 351, then the scope of constitutionally protected interests could not be limited to physical invasions of persons, houses, papers, and effects. That was an important doctrinal shift.

But the costs were severe. The "reasonable expectation of privacy" test, attributed to Justice

Harlan's concurrence,[3] was eventually fashioned to replace a narrow but determinate set of property-based limitations with what would ultimately be applied as a free-floating evaluative standard built (all too often) on subjective, standardless judgments about what privacy people *should* expect. Critically, *Katz* pruned only one outgrowth of the term-of-art approach: the precedents holding that the absence of physical trespass meant "no search" occurred. The other "not a search" doctrines—open fields, plain view, and third-party disclosure—survived, now

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[3] Contrary to the canonical reading of Justice Harlan's *Katz* concurrence, there is strong evidence that he did not intend the "reasonable expectation of privacy" standard to be a definition of "search." Indeed, his opinion used the word only twice in irrelevant contexts. *See Katz*, 389 U.S. at 360–361 (Harlan, J., concurring) (using the phrase "search warrant"); *id.* at 362 (quoting a holding that the interception of private conversations "could constitute a 'search * * * '"). And in the years immediately following *Katz*, the Court appears to have been of two minds about whether the "reasonable expectation of privacy" standard was a definition of "search" or a standard for identifying protected interests beyond "persons, houses, papers, and effects." See, *e.g.*, *Mancusi* v. *DeForte*, 392 U.S. 364 (1968) (taking for granted that a "search" occurred and applying the reasonable expectation of privacy test to determine whether the defendant had a constitutionally protected interest in a shared union office); accord Orin S. Kerr, Katz *as Originalism*, 71 DUKE L.J. 1047, 1056–1057 (2022) (arguing that *Katz* is properly understood as a means of identifying "which kinds of spaces could receive Fourth Amendment protection from searches"). However, by the time this Court decided *Smith* v. *Maryland*, 442 U.S. 735, 739 (1979), the reasonable expectation of privacy test was unambiguously characterized as the "lodestar" for determining whether conduct is "a 'search * * * ' within the meaning of the Fourth Amendment.'"

repackaged within the more abstract vocabulary of "reasonable expectations of privacy." Those surviving doctrines would expand dramatically under that standard, and once again, the meaning of "search" shrank accordingly.

The third-party doctrine illustrates that dynamic perfectly. In its pre-*Katz* decisions, the Court had held that investigative acts targeting documents filed with a court, *Perlman*, 247 U.S. at 13, or statements made to a wired government informant, *On Lee*, 343 U.S. at 751, were not "searches" because the defendant had deliberately surrendered any interest they had in that information. Whatever one's view of those holdings, they were at least fact-bound and nominally appealed to property principles. But after *Katz*, that rationale became broader and categorical: one who conveys information to any third party, including banks and phone companies, "assumes the risk" of disclosure and forfeits any "reasonable expectation of privacy" in it. See *United States* v. *Miller*, 425 U.S. 435, 443 (1976) (holding bank depositor "takes the risk" the bank will convey their records to the government); *Smith* v. *Maryland*, 442 U.S. 735, 744 (1979) (holding petitioner "assumed the risk" phone company "would reveal to police the numbers he dialed").

Treating "search" as a term of art, combined with *Katz*'s amorphous test, made that dramatic expansion possible. A holding about protected interests is

naturally fact-bound. That a defendant lacks a protected interest in statements voluntarily and "indiscreetly" made to a wired informant does not, on its own, say much about one's interest in their phone metadata or bank records, information that "[p]eople often *do* reasonably expect * * * will be kept private." *Carpenter* v. *United States*, 585 U.S. 296, 389 (2018) (Gorsuch, J., dissenting). But once the same judgment is recast as a proposition about what "search" means, it sheds that specificity and becomes a categorical rule that no longer asks whether the original rationale applies to new contexts. See *id.* at 405 (arguing that "the rationale of *Smith* and *Miller* is wrong" but "categorical"). We are thus left with a framework in which the most consequential determination in Fourth Amendment law—whether the Amendment applies at all—is increasingly governed by categorical rules that resist contextual scrutiny.

Those developments are what make the Court's intervention in *United States* v. *Jones*, 565 U.S. 400 (2012) intelligible. In holding that attaching a GPS device to a vehicle constituted a search, the Court did not apply the reasonable expectation of privacy test. Instead, the Court grounded the holding in physical invasion: officers had "physically occupied private property for the purpose of obtaining information." *Id.* at 405–406. The majority emphasized that *Katz* had been "*added to*, not *substituted for*" the earlier property-based approach—in essence, the Court

reimposed a property-based floor to prevent the reasonable expectation of privacy test from dissolving the very protections it was supposed to have expanded beyond.[4] *Id.* at 409 (emphasis in original). But *Jones* did not fix the underlying problem. It is less of a search "test," and more of a limited intervention and safe harbor from *Katz*'s instability.

The Court's most recent foray into the "search" analysis illustrated just how confusing and unworkable the term-of-art approach has become. In *Carpenter* v. *United States*, 585 U.S. 296 (2018), the Court declined to extend the third-party doctrine to historical cell-site location information, while acknowledging its instability did not otherwise "disturb the application of *Smith* and *Miller*." *Id.* at 316. The fractured opinions revealed fundamental disagreements about every dimension of the search analysis. See *id.* at 310–313 (holding that "[t]he location information obtained from Carpenter's wireless carriers was the product of a search"); *id.* at 333–334 (Kennedy, J., dissenting) (concluding that no search occurred under a "straightforward application" of the third-party doctrine); *id.* at 343–347 (Thomas,

[4] The property-based floor was necessary because *Katz*'s reasonable expectation of privacy test cut in both directions. If the Amendment's protections are indeed "ruled by fluid concepts of 'reasonableness,'" *United States* v. *White*, 401 U.S. 745, 752–753 (1971), then courts can find no reasonable expectation of privacy even where the pre-*Katz* approach would have recognized a search.

J., dissenting) (insisting that whether a "search" occurred is the wrong question because the word "was probably not a term of art" at the Founding); *id.* at 388–391 (Gorsuch, J., dissenting) (critiquing *Katz* and describing the third-party doctrine as a "doubtful" application of it).

The Court now operates with two parallel tests for a word that should not be a test at all, layered on top of doctrines that reflect analytically distinct constitutional judgments. The en banc Fourth Circuit's decision below is a direct product of that confusion. Across nine separate opinions, the court divided 7-7 on whether the government's execution of a geofence warrant was a "search"—with judges variously applying *Katz*, *Jones*, the third-party doctrine, and combinations thereof. That deadlock did not arise from genuine confusion about whether the government conducted acts aimed at obtaining information. Instead, it arose because "search" has been conscripted into carrying the weight of distinct constitutional judgments that the word's original, ordinary meaning simply cannot bear.

C. The ordinary meaning of "search" helps frame the question presented.

Restoring the ordinary meaning of "search" clarifies Fourth Amendment analysis, including the issues here.

Giving "search" its ordinary meaning does not leave a void where the Court's current analysis stands. Instead, it clarifies that analysis by disentangling the distinct constitutional questions that the term-of-art framework has compressed into a single, overloaded on/off switch for the Amendment's protections.

When the Court asks whether a "search" occurred, it is rarely asking whether the government conducted an act aimed at obtaining information. The answer to that question is typically obvious.[5] What the Court is actually doing—what concepts like plain view and the third-party doctrine reflect—is resolving a series of distinct questions about whether and how the Fourth Amendment constrains that search. Even scholars with distinct methodological commitments recognize this. See, *e.g.*, D'Onfro & Epps, 132 YALE L.J. at 965, 975–980 (proposing a sequential analysis that begins with a "commonsense" understanding of "search" and proceeds through protected interests and reasonableness as distinct questions); Orin S. Kerr, Katz *as Originalism*, 71 DUKE L.J. 1047, 1052 (2022)

[5] The circumstances in which "search" are most likely to be debatable involve officers claiming to have coincidentally discovered evidence while conducting a purportedly non-investigative act. See, *e.g.*, *United States* v. *Carloss*, 818 F.3d 988, 1004 (10th Cir. 2016) (Gorsuch, J., dissenting) ("An officer approaching your home to return your lost dog or to solicit for charity may not be conducting a 'search' within the meaning of the Fourth Amendment.").

(breaking the "search inquiry" into four distinct questions).

Under the ordinary meaning of "search," those questions can be addressed in their proper analytic sequence, on their own terms, rather than collapsed into one. First, did the government conduct an act aimed at obtaining information—i.e., a search? If so, did that search implicate a constitutionally protected interest—did it burden the "right of the people to be secure in their persons, houses, papers, and effects"? If so, was the search "unreasonable"? That question may be answered by reference to the circumstances of the search itself, or it may turn on whether the government was required to obtain a warrant and, if so, whether it did. And where the government did obtain a warrant, the Warrant Clause imposes its own independent requirements: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Each question is textually grounded, and each does different constitutional work. The confusion in modern doctrine arises not because those questions are inherently difficult to distinguish, but because the term-of-art approach has required courts to answer all of them at once under the guise of interpreting the word "search."

Here, the government executed a geofence warrant that authorized three distinct searches in the ordinary sense of that word. At Step 1, the warrant authorized the government to compel Google to query the Sensorvault database and disclose anonymized location data for every device the fell within the 1-hour, 150-meter parameter. Pet. App. 295a. At Step 2, the warrant authorized the government to obtain expanded location histories, with geographic boundaries removed and the time window doubled, for specific devices selected by the investigating officer. *Id.* at 296a. At Step 3, the warrant authorized the government to unmask the personal identities of users the officer selected from the Step 2 results. *Id.* Each step was a distinct search, and each step must independently satisfy the Warrant Clause.

The government is thus incorrect that no warrant was required because it "did not conduct a 'search' within the meaning of the Fourth Amendment." Br. in Opp. 10. Under the ordinary meaning of "search," the government plainly conducted searches at every step. The key fact here is that the government chose to arm itself with a warrant, Pet. App. 293a, and must now defend that warrant under the standards the Amendment imposes. The issue of this warrant's *validity*—which turns on the Warrant Clause's requirements of probable cause and particularity, is distinct from the question of when a warrant is *required*—which implicates *Katz*, *Jones*, and the

third-party doctrine. Only the former is at issue here, and this Court need not address the latter. Nor does the Court need to resolve whether the warrant was invalid as to Step 1, as it independently fails at Steps 2 and 3 for lack of probable cause and particularity. As Part II demonstrates, this was a general warrant executed in violation of the Fourth Amendment.

II. This Warrant Violated the Fourth Amendment's Probable Cause and Particularity Requirements.

The Fourth Amendment was forged in opposition to general warrants—warrants that lacked probable cause, failed to particularly describe their targets, or left the scope of the search to the officer's discretion, all while giving "the person wielding it the imprimatur of law." Donohue, 83 U. CHI. L. REV. at 1251. The Founding generation considered them so dangerous and abusive that the Constitution would probably not have been ratified absent an explicit guarantee against similar abuses. *Id.* at 1287–1293 (describing how some states conditioned ratification on the inclusion of a "statement outlawing general warrants" in a bill of rights). Accordingly, the Fourth Amendment's text condemns general warrants: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

"These words are precise and clear," *Stanford* v. *Texas*, 379 U.S. 476, 481 (1965), which is why this Court has repeatedly held that warrants lacking probable cause or particularity are invalid, *Groh* v. *Ramirez*, 540 U.S. 551, 557 (2004) (holding a warrant was "plainly invalid" where it failed to particularly describe the "persons or things to be seized"). See also *id.* at 566 (Kennedy, J., dissenting) (disagreeing on the application of qualified immunity while agreeing that the warrant "did not comply with the Fourth Amendment"); *Stanford*, 379 U.S. at 486 (stating that to uphold an invalid warrant "would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history").

As Part I explains, each step of the geofence warrant authorized a distinct search in the ordinary sense of that word, and each must independently satisfy the Warrant Clause's requirements. Critically, because the government chose to arm itself with a warrant, the Court need not resolve the separate question that has divided the lower courts—whether a warrant was *required* under *Katz* or *Jones*—in order to dispose of this case. Nor does the Court need to resolve whether Step 1 of the warrant satisfies the Amendment. Steps 2 and 3 of the warrant *both* lacked probable cause and particularity, *either* of which is sufficient to reverse.

A. The warrant lacked probable cause at Steps 2 and 3.

The probable cause deficiency at Steps 2 and 3 is structural. When the magistrate signed this warrant, the only evidence before him was that the suspect "had a cell phone in his right hand and appeared to be speaking with someone on the device." Pet. App. 296a–297a. The magistrate evaluated probable cause once, at the time the warrant was issued, based on that evidence. Whatever one's view of whether that showing justified the Step 1 search—the initial geofence query—it is the *only* probable cause determination that a judicial officer ever made. The warrant's structure ensured that no magistrate would evaluate probable cause for either of the two subsequent searches authorized by the warrant.

That structure is fatal. The Fourth Amendment places a "neutral and detached magistrate" between the government and the people precisely because probable cause determinations must not be left to "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). The duty to determine probable cause "is one which may not be delegated, in part or in whole, regardless of the qualifications of the person on whom reliance is placed." Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.2(d) (6th ed. 2024). Yet that is

precisely what this warrant did. After the Step 1 search was executed, the investigating officer—not a magistrate—decided whether the fruits of each search established probable cause to justify the next. He did not return to the court between searches. For the Step 2 and Step 3 searches, the officer made a judgment that the Fourth Amendment reserves for a judicial officer, and the warrant's design made that delegation inevitable.

That is because probable cause must be evaluated "at the time [the officer] sought the warrant," not in light of subsequent developments. *Smith* v. *Munday*, 848 F.3d 248, 253 (4th Cir. 2017). When the magistrate signed this warrant, the persons whose data would be searched at Steps 2 and 3 were unknown. Indeed, they were unknowable—they could not have been identified, at the earliest, until after the Step 1 search was executed. The magistrate thus had *no facts* about any individual from which to evaluate probable cause for those subsequent searches. A constitutionally adequate process would have, at the very least, required the officer to return to the magistrate after Step 1 with individualized evidence, to obtain a judicial determination of probable cause as to specific accounts to be searched at Step 2, and to do so again before unmasking identities at Step 3. The warrant dispensed with that iterative process entirely. See Pet. App. 126a (Berner, J., concurring) (insisting that "[p]robable cause

determinations cannot be delegated"); *id.* at 137a (Gregory, J., dissenting) (finding "the warrant ceded authority and decision-making from an independent judicial officer").

The merits of the Step 2 and Step 3 probable cause determinations confirm why that safeguard exists. Left to make probable cause judgments on his own, the officer treated mere propinquity to the crime scene as sufficient justification to progressively expand each subsequent search—precisely the kind of reasoning the Fourth Amendment's insistence on a "neutral and detached magistrate" is designed to check.

This Court's decision in *Ybarra* v. *Illinois*, 444 U.S. 85 (1979) illustrates the deficiency. There, this Court held that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* at 91. A warrant to search a tavern and its bartender gave officers "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." *Id.* at 91–92. Cases involving multi-occupancy buildings confirm the principle: a warrant for a multi-unit building must be supported by probable cause as to *each unit*. See Pet. App. 123a (Berner, J., concurring) ("The government cannot, for example, search every unit in an apartment building because it has probable cause

to believe that some unknown part of the building holds evidence of a crime."). Here, the officer's probable cause judgments at Steps 2 and 3 rested on nothing more than propinquity and the deficiencies at each step illustrate the point independently.

At Step 2, the warrant authorized the officer to obtain expanded location histories for devices they selected—with the geographic boundary removed and the time window doubled. Pet. App. 296a. That search plainly went beyond what Step 1 had revealed, sweeping in users who could have been located at the church, a hotel, a self-storage business, an apartment complex, a senior living facility, one of several residences, two streets, or a Ruby Tuesday. *Id.* at 303a. The only basis for the officer's decision to conduct that search was that these users' devices had been detected by the Step 1 geofence search (within 150 meters of a bank during a 1-hour window). That is textbook propinquity, not probable cause. "[T]he detective could make a single representation about the Google users he would ultimately search: they would be among those near the crime scene. That information unequivocally falls short of establishing probable cause." *Id.* at 122a. A distinct search aimed at different information requires an independent probable cause showing. Cf. *Walter* v. *United States*, 447 U.S. 649, 659 n.13 (1980) (invoking Judge Learned Hand's principle that a partial invasion of privacy "is altogether separate from the interest in

protecting [one's] papers from indiscriminate rummage"). Yet no magistrate ever evaluated whether that expanded search was supported by probable cause. The officer made that judgment, based on his own review of the Step 1 results, without returning to the court.

At Step 3, the warrant authorized the officer to unmask the personal identities of users he selected from the Step 2 results. Pet. App. 296a. That was a new search aimed at obtaining qualitatively different information. And the decision about *whose* identity to unmask was made entirely by the officer based on his review of the Step 2 search results. *Id.* at 300a–301a. No magistrate evaluated whether there was probable cause to believe that any specific individual's identity would yield evidence of the crime. *Id.* Once again, the officer made that judgment alone—and the only basis for that judgment was, once again, the user's proximity to a bank. A neutral magistrate, presented with that evidence and applying this Court's precedents, might well have found probable cause lacking. But the warrant's structure ensured that question would never be put to a judicial officer.

The warrant thus failed the probable cause requirement at Steps 2 and 3—not merely because the evidence was insufficient on the merits, but because the warrant's structure guaranteed that no judicial officer would ever evaluate that evidence. The two

deficiencies are related but independent: even if the officer happened to reach the right result on the merits, the absence of a judicial probable cause determination would remain constitutionally fatal.

B. The warrant lacked particularity at Steps 2 and 3.

The Amendment requires that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The particularity requirement constrains the officer's discretion, ensuring that the search will be tailored to its justifications. See *Marron* v. *United States*, 275 U.S. 192, 196 (1927) ("As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.")

Here, the same structural problem described above—the warrant's non-iterative design, in which a single judicial authorization was expected to govern a series of searches whose targets and scope could not be known in advance—also made particularity impossible. The warrant could not particularly describe searches that would only take shape until *after* the warrant was executed.

At Step 2, the warrant authorized the officer to determine which users' location information would be subject to a temporally and spatially expanded search. Pet. App. 296a. But the warrant included no

particularized description for that selection. It did not specify how many users could be selected, what factors should guide the officer's choice, or what connection to the crime (if any) was required before a user's location history could be expanded. Every one of those determinations was left to the officer's discretion, to be worked out during execution.

That omission was neither an accident nor a transcription error, but a basic feature of the warrant's structure. Because the devices detected at Step 1 could not be known until *after* the Step 1 search was executed, the warrant could not have particularly described the scope of the subsequent Step 2 search when it was issued. The warrant was designed to delegate the judgment of determining who would be subject to that expanded search—and on what terms—to the officer and to Google, without a particularized description and without judicial oversight. Here, particularity, like probable cause, would have required an iterative process in which the officer returned to the magistrate with the fruits of each search so that the next would be particularly described. The warrant dispensed with that process by design.

What actually occurred here at Step 2 illustrates the problem. The officer initially demanded expanded location histories for all 19 devices identified by the Step 1 search. Pet. App. 299a. Google objected. *Id.* at

300a. After negotiations, the officer narrowed the request to 9 devices and Google complied. *Id.* That result was not dictated or in any way guided by the warrant's particularity—the warrant imposed no limit at all. Rather, it was produced entirely by Google's willingness to push back on what it rightly perceived to be an unnecessarily broad query. But the particularity requirement is not a recommendation that the government and a third party may haggle over at their discretion. It is a constitutional command that the scope of the search be fixed by a neutral magistrate before execution, not bargained into shape afterward. See *Katz* v. *United States*, 389 U.S. 347, 356 (1967) ("[T]he inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.").

Similar problems render the Step 3 search invalid. The warrant imposed no particularity whatsoever as to which accounts the detective would select for demasking or why. He merely reviewed the Step 2 results and informed Google that identifying information should be provided for three accounts. Pet. App. 300a–301a. The warrant did not specify how many accounts could be unmasked, what factors should guide the selection, or what evidentiary showing (if any) was required before converting anonymous data into identifying information. Every one of those decisions was left entirely to the detective. That vast discretion is the antithesis of

particularity. See *Stanford* v. *Texas*, 379 U.S. 476, 485–486 (1965) (requiring "the most scrupulous exactitude" in satisfying the particularity requirement); *Marron*, 275 U.S. at 196 (holding that "nothing is left to the discretion of the officer"); Pet. App. 135a (Gregory, J., dissenting) (describing the warrant as delegating "unbridled discretion to determine who would be subject to intrusive and expansive searches").

Lo-Ji Sales, Inc. v. *New York*, 442 U.S. 319 (1979) indicts this warrant's structure. There, a warrant for an adult bookstore specified two previously purchased films but otherwise left it "entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure." *Id.* at 325. The warrant was signed as a two-page document; by the time the search was completed, it had grown to sixteen pages as new items were inventoried and added. *Id.* at 324. The Court held that the Fourth Amendment does not "countenance open-ended warrants, to be completed while a search is being conducted and items seized or after the seizure has been carried out." *Id.* at 325. Here, Steps 2 and 3 of the warrant are open-ended in precisely this sense. When the magistrate signed the warrant, Steps 2 and 3 were shells—they described a *process* for acquiring location data and unmasking identities, but the nature and scope of those searches would be determined only after execution, by a detective and by

Google. The warrant essentially authorized a framework and left the detective to fill in the substance of those searches at his discretion.

The searches authorized under Steps 2 and 3 were neither "carefully tailored to [their] justifications," *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987), nor did they eliminate—indeed, they empowered—the "discretion of the officer executing the warrant," *Marron*, 275 U.S. at 196. By design, this was a general warrant executed in violation of the Fourth Amendment.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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