Unlike the Nosy Neighbor: Digital Privacy in the Modern Age

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These days, nearly everyone has a cell phone. In the United States, there are 396 million cell phone service accounts for a nation of 326 million people.[2] Gone are the days of phone booths and home landlines. In the age of smartphones, documents and records that were once filed safely away in the drawers of our homes are carried with us everywhere we go. These little devices contain our health and bank records, photos, location information, music, and social media accounts. The nature and vast amount of information stored on cell phones has begun to raise questions about privacy and Fourth Amendment protections.

In a highly anticipated Supreme Court decision from this past June, the Court updated Fourth Amendment protections for the digital era. In a 5-4 opinion

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authored by Chief Justice John Roberts, the Supreme Court decided *Carpenter v. United States*.[3]

The case arises from a sequence of robberies in metro Detroit, Michigan, and northern Ohio.[4] Ironically, the perpetrators were stealing cell phones—robbing Radio Shack and T-Mobile stores at gunpoint and then filling plaid laundry bags full of smartphones.[5] The police arrested four men, including Timothy Carpenter, who was then convicted and sentenced to 116 years in prison.[6] Law enforcement was able to establish that Carpenter had been at the crime scenes by obtaining over one hundred days of his smartphone data records from Sprint and Metro PCS without a warrant.[7]

Mr. Carpenter challenged this as a violation of his Fourth Amendment rights.[8] Though the Fourth Amendment never specifically says "privacy," it protects citizens against unreasonable search and seizures without a warrant.[9] Carpenter argued that he has a privacy interest in the data he provides to his cell phone company.[10] In the modern age, you cannot have a smart phone without disclosing data. Because of this, Carpenter argued that the government should have probable cause to be able to search it.[11]

Law enforcement officers were able to get access to Carpenter's records under the Stored Communications Act of 1986.[12] This Act "[a]llows phone companies to disclose records when the government provides them with *specific and articulable* facts showing that there are reasonable grounds to believe that the records are *relevant and material* to an ongoing investigation."[13] The act essentially allows third parties to disclose relevant information to the police without a warrant.

This was, in essence, the government's argument— that information you reveal to third parties is public and the police do not need a warrant to seize it.[14] The third-party doctrine was first established in 1976 and is a legal principle allowing information that customers provide to a third party, like a bank, to be disclosed to the police.[15] The principle was expanded three years later to include call records collected by phone companies.[16]

Though the court was split, the majority concluded that the government's search of Carpenter's phone was a violation of the Fourth Amendment and declined to give the state unrestricted access to cell carrier's physical location data.[17] Chief Justice John Roberts stated, "In light of the deeply revealing nature of [cell-site location information], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection."[18] He differentiated between cell phone data and other types of third party data, explaining that "Sprint Corporation and its competitors are not your typical

witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible."[19]

This is a win for digital privacy, but it is unclear what this ruling might mean for other forms of government surveillance.[20] Roberts kept his decision narrow in scope, not "call[ing] into question conventional surveillance techniques and tools,"[21] "other business records that might incidentally reveal location information[,]"[22] or "other collection techniques involving . . . national security."[23] Though it is a narrow holding, this case is a win for digital privacy and will establish the law in this area going forward.

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[2] 138 S. Ct. 2206, 2211 (2018).

[3] *Id.*

[4] *Id.* at 2212.

[5] Louise Matsakis, *The Supreme Court Just Greatly Strengthened Digital Privacy*, WIRED.COM (June 22, 2018, 12:26 PM), https://www.wired.com/story/carpenter-v-united-states-supreme-court-digital-privacy/.

[6] *Id.*

[7] *Id.*

[8] *Carpenter*, 138 S. Ct. at 2213.

[9] U.S. CONST. amend. IV.

[10] *Carpenter*, 138 S. Ct. at 2212.

[11] *Id.*

[12] *Id.* at 2221.

[13] 18 U.S.C.S. § 2703(d) (emphasis added).

[14] *Carpenter*, 138 S. Ct. at 2219–20.

[15] *See generally* United States v. Miller, 425 U.S. 435 (1976).

[16] *See generally* Smith v. Maryland, 442 U.S. 735 (1979.

[17] *Carpenter*, 138 S. Ct. at 2223.

[18] *Id.*

[19] *Id.* at 2219.

[20] *See* Amy Howe, *Opinion Analysis: Court holds that police will generally need a warrant for sustained cellphone location information*, SCOTUSBLOG.COM (June 22, 2018, 6:01 PM), http://www.scotusblog.com/2018/06/opinion-analysis-court-holds-that-police-will-generally-need-a-warrant-for-cellphone-location-information/.

[21] *Carpenter*, 138 S. Ct. at 2220.

[22] *Id.*

[23] *Id.*

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