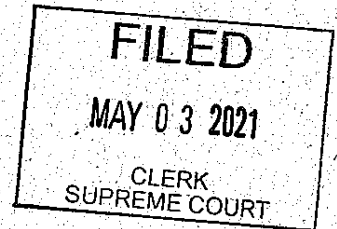


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY



CASE NO. 2020-SC-0116

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

DOVONTIA REED

APPELLEE

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2018-CA-001574-MR
WOODFORD CIRCUIT COURT CASE NO. 17-CR-00034

**MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE
AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY FOR
ENLARGEMENT OF TIME TO FILE A MOTION FOR LEAVE TO FILE AN
AMICI CURIAE BRIEF**

Submitted by:

COREY M. SHAPIRO
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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned certifies that copies of this motion and accompanying brief were mailed, first class postage prepaid, to the Clerk of this Court; Adam Meyer, Assistant Public Advocate; Kathleen K. Schmidt, Assistant Public Advocate; Department of Public Advocacy, 5 Mill Creek Park, Section 100, Frankfort, KY 40601; Hon. S. Chad Meredith, Solicitor General; Hon. Jeff A. Cross, Assistant Attorney General; Hon. Matthew F. Kuhn, Deputy Solicitors General; and Hon. Brett R. Nolan, Special Litigation Counsel; Commonwealth of Kentucky, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, KY 40601 on March 24, 2021.

/s/ Corey M. Shapiro
COREY M. SHAPIRO
Counsel for Amici

Pursuant to Kentucky Rule of Civil Procedure (CR) 6.02, the American Civil Liberties Union and the American Civil Liberties Union of Kentucky (collectively, *amici*) move for an enlargement of time to file a motion seeking leave to file an *amici curiae* brief supporting Appellee. There is good cause to grant this motion. In support of its motion, *amici* state the following:

1. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles of liberty and equality embodied in the United States Constitution and national civil rights laws. The ACLU of Kentucky, a state affiliate of the national ACLU, is a statewide, nonprofit organization dedicated to protecting and advocating for the civil rights and civil liberties of Kentucky residents under the state and federal constitutions and civil rights laws. *Amici* have participated in numerous cases involving the application of the Fourth Amendment to searches and seizures using modern technologies. Of particular relevance here, the ACLU was counsel in *Carpenter v. United States*, 138 S. Ct. 2206 (2018).
2. Under the Rules, the motion for leave to file an *amicus* brief was due on January 30, 2021. However, *amici* first learned about this case on March 9, 2021, when one of their employees came across the case in the course of conducting unrelated research.
3. *Amici* prepared their motion for leave to file and proposed brief as quickly as possible in order to be able to file no later than the initial deadline for Appellee's brief. *Amici* initially submitted their motion for leave and brief on March 16, 2021.

4. On March 19, 2021, the court clerk's office posted a deficiency notice advising that the previously submitted combined "Motion for Enlargement of Time and Motion for Leave to File an *Amici Curiae* Brief Supporting Appellee" needed to be submitted as two separate documents.
5. The late filing of *amici*'s brief will not prejudice any party. Appellee's response is now due May 16, 2021, and Appellant will thereafter have the opportunity to file a reply. To the extent either party wishes to address arguments raised by *amici*, it will have ample time to do so.
6. Counsel for the Appellee consents to this motion.
7. Counsel for the Commonwealth consents to this motion.
8. Additional grounds for granting this motion are set forth in *Amici*'s contemporaneously filed Motion for Leave to File a Brief *Amici Curiae*.
9. *Amici* respectfully submit that granting this motion and accepting for filing the motion for leave to proposed brief will contribute to the Court's overall analysis of the issues in this case.

On these grounds, *amici* respectfully request that this Court grant this motion for enlargement of time and permit the filing and consideration of the contemporaneously filed motion for leave to file the attached proposed *amici curiae* brief.

March 24, 2021

Respectfully submitted,

/s/Corey M. Shapiro
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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

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COMMONWEALTH OF KENTUCKY

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v.

DOVONTIA REED

APPELLEE

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2018-CA-001574-MR
WOODFORD CIRCUIT COURT CASE NO. 17-CR-00034

**MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE
AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY FOR LEAVE TO FILE
AN *AMICI CURIAE* BRIEF SUPPORTING APPELLEE**

Submitted by:

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/s/ Corey M. Shapiro
COREY M. SHAPIRO
Counsel for Amici

Pursuant to Kentucky Rule of Civil Procedure (CR) 76.12(7), the American Civil Liberties Union and the American Civil Liberties Union of Kentucky (collectively, *amici*) move for leave to file an *amici curiae* brief supporting Appellee and seeking affirmance of the decision below holding that the Commonwealth's real-time location tracking of Mr. Reed was a search under the Fourth Amendment and required a warrant. There is good cause to grant this motion. In support of its motion, *amici* state the following:

1. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles of liberty and equality embodied in the United States Constitution and national civil rights laws. The ACLU of Kentucky, a state affiliate of the national ACLU, is a statewide, nonprofit organization dedicated to protecting and advocating for the civil rights and civil liberties of Kentucky residents under the state and federal constitutions and civil rights laws. *Amici* have participated in numerous cases involving the application of the Fourth Amendment to searches and seizures using modern technologies. Of particular relevance here, the ACLU was counsel in *Carpenter v. United States*, 138 S. Ct. 2206 (2018).
2. *Amici's* brief will provide the Court with context and argument that the parties' briefs likely will not. The brief offers a detailed technological explanation of the two methods through which police can track cell phones in real time—triangulation and GPS—and explains how differences between the generation of real-time and historical cell phone location information affect the Fourth Amendment analysis. For example, the third-party doctrine does not apply to this data because it is generated by government action and is not a third-party record.

Moreover, the details of how the government obtains real-time cell phone location information mean that doing so is a Fourth Amendment search regardless of the potential or actual sensitivity of the location information returned. *Amici*'s brief also seeks to assist the Court by providing a clear, administrable, and Fourth Amendment-compliant rule regarding what duration of tracking requires a warrant, and explaining why even a single real-time tracking "ping" impinges on reasonable expectations of privacy and is therefore a search that requires a warrant. Finally, *amici* will explain why, separate and apart from concluding that the government's conduct was a search under the reasonable-expectation-of-privacy test under the Fourth Amendment, real-time tracking is also a search because it intrudes on people's protected property interests in their persons, papers, and effects.

3. Counsel for the Appellee consents to this motion.
4. Counsel for the Commonwealth consents to this motion.
5. Additional grounds for granting this motion are set forth in *Amici*'s contemporaneously filed Motion for Enlargement of Time.
6. *Amici* respectfully submit that granting this motion and accepting for filing the proposed brief will contribute to the Court's overall analysis of the issues in this case.

On these grounds, *amici* respectfully request that this Court grant the motion for leave to file the attached proposed *amici curiae* brief.

March 24, 2021

Respectfully submitted,

/s/ Corey M. Shapiro
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**AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND
AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY IN SUPPORT OF
APPELLEE**

Submitted by:

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/s/Corey M. Shapiro
COREY M. SHAPIRO
Counsel for Amici

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The **American Civil Liberties Union** (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to defending the civil liberties and civil rights guaranteed by the Constitution. The **American Civil Liberties Union of Kentucky** (“ACLU of Kentucky”), a state affiliate of the national ACLU, is a statewide, nonprofit organization dedicated to protecting and advocating for the civil rights and civil liberties of Kentucky residents under the state and federal constitutions and civil rights laws. *Amici* have participated in numerous cases addressing application of the Fourth Amendment to searches and seizures effected using modern technologies. Of particular relevance here, the ACLU was counsel in *Carpenter v. United States*, 138 S. Ct. 2206 (2018).¹

¹ No other person or entity paid for or authored this Brief.

SUMMARY OF ARGUMENT

For nearly every American and Kentuckian, cell phones have become “such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society.” *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (quotation marks and citation omitted). In this case, as in thousands each year, the government sought to exploit this essential technology by demanding that a suspect’s cellular service provider track his phone in real time. Service providers typically comply with such demands by sending a signal to the phone that surreptitiously enables its GPS chip and obtains the phone’s precise coordinates. Because people carry their phones with them virtually everywhere they go, this capability effectively enables the government to instantaneously install a precise tracking beacon on any person at any time. That capability poses a grave threat to privacy and constitutes a sweeping expansion of government power.

In *Carpenter*, the Supreme Court held that the government’s warrantless acquisition of a person’s historical cell phone location records infringes on reasonable expectations of privacy under the Fourth Amendment. Because of the high sensitivity of this data, the unavailability of its creation, and its ability to reveal the whole of a person’s movements over time, the Fourth Amendment’s protections apply.

Just as with the historical cell phone location records at issue in *Carpenter*, there is a reasonable expectation of privacy in the real-time cell phone tracking data in this case. Like acquiring historical cell phone data, tracking a phone in real time can reveal a wealth of information about patterns of activity that lays bare “familial, political, professional, religious, and sexual associations.” *Id.* at 2217 (citation omitted). Moreover, the GPS coordinates obtained here—markedly *more* precise than the cell site records at issue in

Carpenter—can reveal location in homes, offices, hotel rooms, and other spaces that receive the highest protection under the Fourth Amendment, and for which warrantless searches using both traditional and technological means are forbidden. *See Kyllo v. United States*, 533 U.S. 27, 40 (2001). Even shorter-term tracking, especially when accomplished with data as precise as the data the government generated here, discloses this sensitive information that the *Carpenter* Court held the Fourth Amendment protects. *Carpenter*, 138 S. Ct. at 2217; *see United States v. Jones*, 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring). Real-time cell phone tracking threatens to undermine the “degree of privacy against government that existed when the Fourth Amendment was adopted,” *Carpenter*, 138 S. Ct. at 2214 (citation omitted), because it gives police a capability unimaginable before the cell phone age: the power to pluck a person’s precise location out of thin air and follow them for as long as officers desire, at no expense, and without detection. In order to prevent this capability from feeding a “too permeating police surveillance,” *id.* (citation omitted), the Fourth Amendment’s warrant requirement applies.

Alternatively, real-time cell phone location tracking implicates the Fourth Amendment because, by forcing a person’s cell phone to transmit its coordinates, the government reduces that person to a trackable object, converts the phone into a tracking device, and misappropriates the person’s location data without consent. This interference with people’s rights to control the use of their persons, papers, and effects—i.e., their property rights—constitutes a Fourth Amendment search. *See Carpenter*, 138 S. Ct. at 2268–69 (Gorsuch, J., dissenting); *Jones*, 565 U.S. at 405.

Even without regard to the sensitivity of the information returned, a police request for real-time cell phone location information constitutes a Fourth Amendment search

because it forces a phone to calculate and transmit location information that it otherwise would not. Because warrantless searches are *per se* unreasonable under the Fourth Amendment unless conducted pursuant to a recognized exception to the warrant requirement, this Court should hold both that the 1.5 hours of tracking in this case violated the Fourth Amendment, and also that *all* real-time tracking of a cell phone—regardless of duration—requires a warrant.

ARGUMENT

I. Cellular Service Providers Are Able to Provide Law Enforcement with Precise and Voluminous Cell Phone Location Data Upon Request.

Because of capabilities built into cell phone networks and handsets in response to federal regulatory requirements, cellular service providers are able to locate cell phones—and by extension the phones’ users—upon law enforcement’s request. They can do so with enough precision to place a person within a specific room of a home, and can continue the tracking day and night for weeks or months.

This capability stems from rules first adopted in 1996 under which the Federal Communications Commission (“FCC”) required cellular service providers to be able to identify “the location of all 911 calls by longitude and latitude.” 47 C.F.R. § 9.10(e). The precision and accuracy of this mandated cell phone location capability is increasing. The FCC has adopted rules to increase law enforcement’s ability to locate callers when they are indoors, and to require service providers to develop techniques to determine the altitude of the phone, and thus on which floor of a building it is located. *id.* § 9.10(i).

Although this capability was initially developed to assist in responding to 911 calls, service providers now provide the same cell phone location information to law enforcement

pursuant to investigative requests. Rather than wait for the customer to initiate an emergency call, the service provider is able to connect to the customer's phone and thereby determine its location. That is, law enforcement can demand that a wireless carrier generate new, precise, real-time location data by acquiring information from the target's phone and can receive the location information contemporaneously via email or text, or by logging into an "automated . . . web interface" provided by the carrier. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1125 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing *en banc*).

Police can locate and track a phone in real time even when it is not in use. As long as a phone is powered on and connected to the network, service providers can engage their location-tracking capabilities to find it at the request of law enforcement—a user cannot disable this functionality without turning the phone off or putting it into airplane mode (which, of course, renders the phone useless as a phone).² Even disabling the location services setting on a smartphone cannot stop the carrier from determining the phone's precise location in real time. While the location privacy setting prevents third-party applications ("apps," like Google Maps) from accessing the phone's location information, it does not impact the carrier's ability to locate the device.³

² *E.g.* *E911 Compliance FAQs*, Verizon Wireless, <http://www.verizonwireless.com/support/e911-compliance-faqs>.

³ National Security Agency, *Limiting Location Data Exposure*, (Aug. 4, 2020), https://media.defense.gov/2020/Aug/04/2002469874/-1/-1/0/CSI_LIMITING_LOCATION_DATA_EXPOSURE_FINAL.PDF ("Disabling location services only limits access to GPS and location data by apps. It does not prevent the operating system from using location data or communicating that data to the network.").

Service providers can obtain the real-time location of a cell phone upon law enforcement demand in at least two ways, depending on the structure of the carrier's network: (1) by using Global Positioning System ("GPS") hardware built into the phone ("handset-based" technology); and/or (2) by triangulating the phone's location based on the phone's interactions with the network's cellular towers, or "cell sites" ("network-based" technology).⁴ Both methods are mandated by federal regulations to produce precise location coordinates. *See* 47 C.F.R. § 9.10(h)–(i).

Handset-based technology uses a mobile device's "special hardware that receives signals from a constellation of global position satellites."⁵ The GPS chip installed in a cellular telephone uses radio signals from GPS satellites orbiting Earth to calculate its own location within ten meters.⁶ Newer receivers, with enhanced communication to ground-based technologies that correct signal errors, can specify location within three meters or closer, and have a vertical accuracy of five meters or better ninety-five percent of the time.⁷ Service providers can remotely activate a phone's GPS functionality and then cause the

⁴ *Electronic Communications Privacy Act (ECPA) (Part II): Geolocation Privacy & Surveillance: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec., & Investigations of the H. Comm. on the Judiciary*, 113th Cong. 45 (2013) (statement of Matt Blaze, Associate Professor, University of Pennsylvania) ("Blaze Hearing Statement"), available at https://fas.org/irp/congress/2013_hr/ecpa2.pdf.

⁵ *Id.* at 51; *see also* 47 C.F.R. § 9.3(4)(2).

⁶ Blaze Hearing Statement at 51; *see also In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 540 (D. Md. 2011) [hereinafter "*Maryland Real-Time Order*"] (noting that GPS-derived cell phone location data can be precise enough to locate a cell phone within a residence).

⁷ This is sometimes referred to as Assisted GPS or A-GPS. Sam Pullen, Jari Syrjärinne & Lauri Wirola, *GNSS Solutions: Quantifying the Performance of Navigation Systems and Standards for Assisted-GNSS*, Inside GNSS (Sept./Oct. 2008), <http://insidegnss.com/wp-content/uploads/2018/01/sepoct08-gnssolutions.pdf>; *What is GPS?*, Garmin, <http://www8.garmin.com/aboutGPS/>.

phone to transmit its coordinates back to the provider “without disclosing to a telephone user the existence either of the Carrier’s signal requesting the telephone to send a current GPS reading or that telephone’s response.” *Maryland Real-Time Order*, 849 F. Supp. 2d at 535.

Network-based technologies use existing cell site infrastructure to identify and track location by silently “pinging” the phone and then triangulating its precise location based on which cell sites receive the reply transmissions.⁸ Service providers do so even when no call is in process, and can locate a phone with GPS-level accuracy. *Id.* at 534.

The power to track and locate any person’s cell phone affects virtually all Kentuckians. Ninety-six percent of Americans now own cell phones,⁹ and most carry them everywhere they go. Without constitutional regulation, this power will give the government the unfettered ability to “achieve[] near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.” *Carpenter*, 138 S. Ct. at 2218.

II. Real-Time Cell Phone Location Tracking is a Fourth Amendment Search.

The United States and Kentucky Constitutions require law enforcement to obtain a warrant prior to collecting real-time location information from a cell phone. U.S. Const. amend. IV ; Ky. Const. § 10.¹⁰ Under well-established federal and state law, police subjected Mr. Reed to a Fourth Amendment search.

⁸ Blaze Hearing Statement at 60–61.

⁹ *Mobile Fact Sheet*, Pew Research Center (June 12, 2019), <http://www.pewinternet.org/fact-sheet/mobile/>; see also *Carpenter*, 138 S. Ct. at 2218.

¹⁰ Kentucky law treats the protections offered by Section 10 as co-extensive with the Fourth Amendment. *Cobb v. Commonwealth*, 509 S.W.3d 705, 712 (Ky. 2017); *Commonwealth v. Cox*, 491 S.W.3d 167, 169 n.2 (Ky. 2015).

A. Obtaining Real-Time Location Information from a Phone is a Search, and the Third-Party Doctrine Does Not Apply.

The third-party doctrine does not permit the government to conduct real-time cell phone location tracking without a warrant.¹¹ In *Carpenter*, the U.S. Supreme Court grappled with the boundaries of the third-party doctrine, holding that the doctrine does not apply to requests for at least seven days of historical cell site location information held by a cellular service provider. 138 S. Ct. at 2220. In contrast, real-time location tracking does not implicate the third-party doctrine at all. As discussed above, when a service provider receives a law enforcement request to track a phone in real time, it typically obtains the phone's location by forcing the device to send its GPS coordinates to the provider, or by continuously "pinging" it. The GPS and "pinging" data are "not collected as a necessary part of cellular phone service, nor generated by the customer in placing or receiving a call." *Maryland Real-Time Order*, 849 F. Supp. 2d at 538 n.6. "[W]hen the police ping a cell phone, as they did in this case, they compel it to emit a signal, and create a transmission identifying its real-time location information. This action and transmission is initiated and effectively controlled by the police." *Commonwealth v. Almonor*, 120 N.E.3d 1183, 1193 (Mass. 2019) (citation omitted). Thus, the user did not "voluntarily expose[] such information to a third party." *Maryland Real-Time Order*, 849 F. Supp. 2d at 538 n.6; accord *Tracey v. State*, 152 So. 3d 504, 522–23 (Fla. 2014). Indeed, real-time tracking is quintessentially a case of the government "requiring a third party to collect" information, *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 610 (5th Cir. 2013)

¹¹ The third-party doctrine is a legal theory asserting that law enforcement can collect some, but not all, types of data that a subscriber voluntarily discloses to a service provider.

[hereinafter “*Historical CSLP*”], which has always constituted a Fourth Amendment search, *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 614 (1989).

The Fourth Amendment is concerned not only with *what* information the government obtains, but also *how* it obtains it and from *where*. Police might “learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful.” *Kyllo*, 533 U.S. at 35 n.2. While *Carpenter* did not decide whether police could obtain less than seven days of historical cell phone location information without a warrant, even if they could, that would not permit police to warrantlessly force a person’s phone to calculate and transmit its location. When the government generated and gathered private information *from* Mr. Reed’s cell phone, it was a search. *Cf. United States v. Croghan*, 209 F. Supp. 3d 1080, 1092 (S.D. Iowa 2016) (“There is a significant difference between obtaining an IP address *from a third party* and obtaining it *directly from a defendant’s computer*.”). Because warrantless searches are “*per se* unreasonable” unless they fall within a recognized exception to the warrant requirement, *Arizona v. Gant*, 556 U.S. 332, 338 (2009), a law enforcement request for even a single point of real-time location data is unreasonable without a warrant.¹²

B. The Warrantless Tracking of Mr. Reed’s Phone Violated His Reasonable Expectation of Privacy.

Further, real-time tracking violates reasonable expectations of privacy because it reveals private information about presence in constitutionally-protected spaces and about

¹² Of course, when law enforcement agents have probable cause but exigent circumstances prevent them from applying for a warrant, they may proceed without one. *Carpenter*, 138 S. Ct. at 2222–23.

locations and movements at particular times and places, regardless of duration. This data provides the government with unprecedented new powers that upset people's well-settled privacy expectations.

Indeed, many courts recognized the extraordinary privacy intrusion inflicted by real-time cell phone tracking prior to *Carpenter*. See *Tracey*, 152 So. 3d 504 (Fla. 2014) (warrant required for real-time cell phone location tracking under Fourth Amendment); *United States v. Powell*, 943 F. Supp. 2d 759 (E.D. Mich. 2013) (same); *Maryland Real-Time Order*, 849 F. Supp. 2d 526 (D. Md. 2011) (same); see also *State v. Earls*, 70 A.3d 630 (N.J. 2013) (warrant required for real-time cell phone location tracking under state constitution); *Commonwealth v. Rushing*, 71 A.3d 939, 963 (Pa. Super. Ct. 2013) (same), *rev'd on other grounds*, 99 A.3d 416 (Pa. 2014). And since *Carpenter* was decided, courts have expressed “no difficulty in extending the rationale of *Carpenter* as applied to historical CSLI to prospective orders.” *State v. Brown*, 202 A.3d 1003, 1014 n.9 (Conn. 2019); accord *State v. Muhammad*, 451 P.3d 1060, 1071 (Wash. 2019) (“*Carpenter*[’]s reasoning applies to real-time CSLI”); *State v. Snowden*, 140 N.E.3d 1112, 1126 (Ohio Ct. App. 2019); *Almonor*, 120 N.E.3d at 1194–95.

1. Real-Time Cell Phone Tracking Reveals Private Information About Presence in Protected Spaces.

As the Supreme Court explained in *Carpenter*, “[a] cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales.” 138 S. Ct. at 2218; accord *Riley*, 573 U.S. 373, 395 (2014) (“[N]early three-quarters of smart phone users report being within five feet of their phones most of the time.”). Given the precision of the cell phone

location data at issue here, *see supra* Part I, tracking a cell phone will often reliably place a person within such locations. *Maryland Real-Time Order*, 849 F. Supp. 2d at 540.

The Supreme Court has repeatedly recognized that the Fourth Amendment draws a “firm” and “bright” “line at the entrance to the house.” *Kyllo*, 533 U.S. at 40 (citing *Payton v. New York*, 445 U.S. 573, 590 (1980)). This protection extends to other private spaces as well. *E.g., See v. City of Seattle*, 387 U.S. 541, 543 (1967) (business premises); *Stoner v. California*, 376 U.S. 483, 486–88 (1964) (hotel rooms). In the digital age, the Fourth Amendment’s protections are not limited to physical entry by police; using technology “to explore details of the home that would previously have been unknowable without physical intrusion . . . is a ‘search’ and is presumptively unreasonable without a warrant.” *Kyllo*, 533 U.S. at 40. That rule has been applied to police use of thermal imaging devices that can read heat signatures emanating from the interior of a home, *id.*, as well as to the use of a beeper to track someone into “a private residence.” *United States v. Karo*, 468 U.S. 705, 714 (1984). Even technologies that may be used without a warrant to augment police surveillance in *public* spaces implicate the Fourth Amendment and require a warrant when used to draw inferences about “location[s] not open to visual surveillance,” such as whether an “article is actually located at a particular time in the private residence” or other protected space. *Id.* at 714–15.

Real-time tracking raises these concerns by “exposing a cell phone user’s attendance at a location a person would reasonably expect to be private.” *Muhammad*, 451 P.3d at 1070. This constitutes a search. *See State v. Andrews*, 134 A.3d 324, 349 (Md. Ct. Spec. App. 2016) (using cell site simulator equipment to locate a cell phone inside a

residence is a Fourth Amendment search); *United States v. Lambis*, 197 F. Supp. 3d 606, 610 (S.D.N.Y. 2016) (same).

2. Real-Time Cell Phone Tracking Reveals Private Information About Location and Movement Over Time.

As the Supreme Court explained in *Carpenter*, even when location data does not place a person inside a constitutionally protected space, “[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere.” 138 S. Ct. at 2217. Rather, “individuals have a reasonable expectation of privacy in the whole of their physical movements” because of the “privacies of life” those movements can reveal. *Id.* at 2217 (citing *Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment)); *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring); *Riley*, 573 U.S. at 403. Over any timeframe, the precision of real-time cell phone location information will risk revealing information “the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.” *People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009).

The government should be obliged to obtain a warrant in every real-time tracking case. The duration of tracking in this case—1.5 hours—is more than enough to place an individual in a protected space—such as a home, church, or doctor’s office—and to otherwise reveal private and sensitive information. “[T]he government cannot know in advance of obtaining this information how revealing it will be or whether it will detail the cell phone user’s movements in private spaces.” *Andrews*, 134 A.3d at 349 (citation omitted). “[B]asing the determination as to whether warrantless real time cell site location tracking violates the Fourth Amendment on the length of the time the cell phone is

monitored is not a workable analysis.” *Tracey*, 152 So. 3d at 520. To provide sufficient “guidance” and “deterrence,” a warrant must be *per se* required. *Andrews*, 134 A.3d at 350; *see also Kylo*, 533 U.S. at 38–39 (requiring warrant for thermal imaging scans of homes because “no police officer would be able to know *in advance* whether his through-the-wall surveillance picks up ‘intimate’ details—and thus would be unable to know in advance whether it is constitutional”).

3. Real-Time Cell Phone Tracking Provides the Government Unprecedented Powers of Surveillance that Upset Traditional Expectations of Privacy.

In a series of cases addressing the power of “technology [to] enhance[] the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes,” the Supreme Court “has sought to ‘assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” *Carpenter*, 138 S. Ct. at 2214 (quoting *Kylo*, 533 U.S. at 34) (last alteration in original); *accord Jones*, 565 U.S. at 406. As Justice Alito explained in *Jones*, “[i]n the precomputer age, the greatest protections of privacy were neither constitutional nor statutory, but practical.” 565 U.S. at 429 (Alito, J., concurring in judgment). Accordingly, the Court has remained vigilant “to ensure that the ‘progress of science’ does not erode Fourth Amendment protections.” *Carpenter*, 138 S. Ct. at 2223.

Even over a short period, cell phone tracking provides the government with an unprecedented power that upends traditional expectations of privacy. Enabling real-time cell phone location tracking, “is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can [follow a person] at practically no expense.” *Carpenter*, 138 S. Ct. at 2217–18. Prior to the cell

phone age, police “had the capacity to visually track a suspect from some starting location, and electronic tracking devices . . . [like beepers and GPS devices] have augmented this preexisting capacity.” *Prince Jones v. United States*, 168 A.3d 703, 712 (D.C. 2017). That power has always been limited, however, by the need for police to know where they could find the suspect, so they could either surveil that person visually or install a tracking device “on some object that the target will later acquire or use.” *Id.* Today, by contrast, police can locate a person without knowing in advance where or even who they are, by “remotely activat[ing] the latent tracking function of a device that the person is almost certainly carrying in his or her pocket or purse: a cellphone.” *Id.* Police can pluck a suspect’s precise location out of thin air and follow them for as long as they wish. *See Tracey*, 152 So.3d at 525. And, because costs are minimal, they can order this tracking on however many people they wish. Even shorter-term use of cell phone tracking data to locate people whose whereabouts are otherwise unknown provides police with an unprecedented capability and is a search that requires a warrant.

C. The Warrantless Tracking of Mr. Reed’s Phone Interfered with the Security of His Person, Papers, and Effects.

This case can also be analyzed under a “property-based approach.” *Jones*, 565 U.S. at 405. That approach likewise leads to the conclusion that law enforcement’s tracking of Mr. Reed’s cell phone was a Fourth Amendment search. At a minimum, “[w]hen the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred.” *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (quotation marks omitted) (citing *Jones*, 565 U.S. at 406 n.3). Here, the government’s warrantless tracking of Mr. Reed’s

cell phone interfered with the security of, and his property interests in, his person, his papers (the location data generated on his phone), and his effects (his cell phone).

First, cell phones “are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.” *Riley*, 573 U.S. at 385. By transforming Mr. Reed’s cell phone into a real-time tracking device, the government effectively installed a tracking beacon on his person. *Cf. Grady v. North Carolina*, 575 U.S. 306, 307–08 (2015) (attaching GPS ankle monitor to a person is a Fourth Amendment search).

Second, “cell phones are ‘effects’ as that term is used in the Fourth Amendment.” *Tracey*, 152 So. 3d at 524. In *Jones*, the Supreme Court held that “the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’” 565 U.S. at 404. That is so because the attachment of the GPS device to the defendant’s car without consent was a common-law trespass to chattels. *Id.* at 405, 426. When the government requested that Mr. Reed’s service provider begin tracking the phone in real time, it effectively sought to “hijack[] the phone’s GPS.” *Historical CSLI*, 724 F.3d at 615. In doing so, it interfered with his control over his phone. In effect, the government “usurp[ed]” Mr. Reed’s property, *Silverman v. United States*, 365 U.S. 505, 511 (1961), by divesting him of his “right to exclude others” from obtaining data from the phone. *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.”). Like the trespass to chattels in *Jones*, the conversion of Mr. Reed’s property for the purpose of gathering information was a search.

Finally, the warrantless acquisition of Mr. Reed's cell phone location data interfered with the security of his papers. Private and sensitive records in the hands of a third party can fall under the Fourth Amendment's protection of a person's "papers" based on positive law protections that shield certain types of data from nonconsensual disclosure or use. *Carpenter*, 138 S. Ct. at 2270 (Gorsuch, J., dissenting). Of course, here the location data was not even in the hands of any third party, but was generated by Mr. Reed's cell phone at the government's behest. Even so, the law protects this data. *See, e.g.*, 47 U.S.C. §§ 207, 222(f) (requiring "express prior authorization of the customer" before a service provider can "use or disclos[e] . . . call location information"); 47 U.S.C. § 1002(a)(2) (prohibiting use of the federal pen register statute to obtain "any information that may disclose the physical location of the subscriber[']s cell phone]").

As a result of these protections, "customers have substantial legal interests in this information, including at least some right to include, exclude, and control its use." *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting). Those interests create a property right in the data, and make nonconsensual and warrantless access by law enforcement a Fourth Amendment search.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to hold that real-time tracking of a cell phone for any length of time constitutes a search under the Fourth Amendment and Section 10 of the Kentucky Constitution.

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Respectfully submitted,

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