No. 2019-2020

In the Supreme Court of the United States

BOBBY BRONNER, PETITIONER

v.

THE STATE OF OLYMPUS, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OLYMPUS

BRIEF FOR BOBBY BRONNER

QUESTIONS PRESENTED

Question 1: This Court held that individuals have a "legitimate expectation of privacy in the record of [their] physical movements as captured through [cell site location data]" in *Carpenter* v. *United States*, 585 U.S. ___ (slip opinion, at 11). Here, the police obtained real-time information regarding Bobby Bronner's physical movements from a cellular provider without a warrant. Were Bronner's Fourth Amendment rights violated?

Question 2: The Confrontation Clause states that "in all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him." Andy Sommerville was not present in court to testify, nor was he cross-examined previously. His statement, as reported by a school resource officer, helped to convict Bronner. Were Bronner's Sixth Amendment rights violated?

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STATEMENT OF THE CASE

Bobby Bronner was convicted of human trafficking and possession of child pornography in Olympus State Court following a jury trial. *Record* at 7. Judge D. R. Fair sentenced Bronner to 30 years in prison. The Supreme Court of the State of Olympus affirmed. *Id.* at 1.

A. Actions of the Task Force

The Federal Bureau of Investigation (FBI) established the Human Trafficking Task Force in 2015 to fight the increased human trafficking expected to accompany the 2016 Super Bowl. *Id* at 2. Police Captains Myles Chaney and Sarah Geesaman led the Task Force's investigation of William DeNolf, a notorious human trafficker. *Id*. An informant, Chester Comerford, gave the Task Force cellphone numbers for some of DeNolf's human trafficking associates.

The Task Force then obtained a series of warrants for cellphone data. Each warrant was for data from Olympus Cellular. *Id* at 2n4. Olympus Cellular has data retention policies similar to those of Verizon, *id*. at 3n6, and Verizon keeps call details, text message data, and cell tower information for one rolling year, *Id*. at 14. The Task Force used location data obtained with the first warrant to start studying DeNolf's human trafficking operation. *Id*. However, the data from a second warrant showed DeNolf had stopped using his cell phone. Comerford confirmed that DeNolf was using a burner phone, and he gave the Task Force its number. *Id*. at 2-3.

The police then focused on DeNolf's burner phone. The police obtained two warrants for phone numbers with which DeNolf's burner phone had communicated. *Id*. at 3. The number for a cellphone licensed to Bobby Bronner appeared in these records. Comerford did not know if Bronner was a human trafficker. However, he told the Task Force that Bronner was thought to frequent a bar in Apollo and a restaurant in Zeusville that were owned by "pals with DeNolf" as well as a brothel. *Id*. Moreover, two Internet ads for "Super Bowl Specials" said to "ask for B.B."

Id. The Task Force obtained a fifth warrant on January 2, 2016 for phone numbers that communicated with Bronner's phone number or DeNolf's burner phone number six or more times over the last three months. The data connected Bronner to ten burner phone numbers which had communicated with DeNolf's burner phone. *Id*.

The Task Force started to focus "almost exclusively" on Bronner's phone. *Id*. at 3-4. Chaney and Geesaman reportedly grew concerned that "time was of the essence." *Id*. at 4. On January 16, 2016, Chaney and Geesaman asked an Olympus Cellular representative to notify them whenever Bronner's cellphone was within five miles of ten specific addresses in four municipalities. They also requested every phone number with which Bronner communicated within ten miles of the addresses. *Id*. The Task Force obtained no court order but convinced Olympus Cellular "the safety and health of the community were at risk." *Id*. The Task Force received data on each day between January 16 and 24 except for January 20. *Id*. The tracking data was introduced into evidence at Bronner's trial over his motion to suppress. *Id*. at 6.

Chaney and Geesaman used the data to focus on eight burner phones. *Id*. at 4. They obtained two more warrants on January 25 and February 1 for data from Bronner's phone, DeNolf's phone, and the eight burner phones. The first was for the same kind of location data the Task Force had obtained without a warrant. *Id*. But on February 1, the Task Force learned that eight burner phones were no longer being used, and on February 2 they learned DeNolf was changing phones every week to prevent the police tracking his calls. *Id*.

On February 5 and 6, the Task Force learned from Comerford and Backpage.com advertisements that Bronner might travel to Las Vegas after the Super Bowl. *Id*. On February 7, Super Bowl Sunday, Chaney and Geesaman asked Olympus Cellular for additional data, again without a warrant. They obtained every number with which Bronner communicated, the location

of each of those numbers, and every phone number within five miles with which Bronner's contacts had communicated. *Id*. This data helped the police to arrest 50 people. *Id*. Bronner was arrested two days later. *Id*. at 5.

B. Andy Sommerville's statements to Officer Rael

Bronner was arrested on February 9, 2016, and directly afterward Andrea Sommerville and her eight-year-old son Andy Sommerville were questioned by police. *Record* at 5. The next day, Officer Rael, a School Resource Officer at Andy Sommerville's school, noticed that Andy Sommerville had become sullen and reclusive, and that his eyes appeared to be red and moist from crying. *Id.* Officer Rael had interacted with Andy Sommerville before, having resolved a fight between him and another student. *Id.* Officer Rael, wearing his full police uniform, approached Andy Sommerville and asked him if he was okay and if he needed any help. *Id.* Andy Sommerville replied, "I am fine." *Id.*

However, on February 11, 2016, Andy Sommerville came to Officer Rael's office. There was nothing in the office that specifically identified Officer Rael as a police officer, but he was wearing his soft uniform consisting of a shirt with an embroidered star. *Id.* at 5n8. Andy Sommerville asked if they could talk, and he proceeded to tell Officer Rael that he had seen something that was bothering him that he did not quite understand. *Id* at 5. He said he turned on the TV and saw "one of Bobby's dirty movies" playing. *Id.* After he explained what he had seen, he asked what would happen now that Bronner had been arrested. *Id.* at 6. Officer Rael told Andy Sommerville that he was not sure. *Id.*

Immediately after Andy Sommerville left his office, Officer Rael wrote down everything Andy Sommerville had told him. *Id*. After that, he placed a call to a counselor and to the principle of the school. *Id*. While he did not contact any law enforcement officers directly after the

conversation, officers Chaney and Geesaman arrived at the school and came to his office. *Id.* Officer Rael reported all that Andy Sommerville had said to him and stressed that he was worried about him. When asked if he knew whether Andy Sommerville understood that he was a police officer, Officer Rael said Andy Sommerville might know, at least on the days he wore his full uniform. *Id.*

Because of the State of Olympus has a statute that bars children under ten years from testifying in court, Andy Sommerville was not present at Bronner's trial. *Id.* The statute was designed specifically to protect child victims of sexual crimes, although the statute does not require that the child witness be observed or interviewed by a judge or mental health professional prior to being excused from testifying in court. *Id.* Despite the best efforts of the police, none of the child pornography evidence that Andy Sommerville had described was found. *Id.* 6n9.

Bronner was tried in an Olympus state court when Andy Sommerville was nine years old. *Id*. at 6. Bronner objected to the use of Andy Sommerville's hearsay statements during the trial, but Judge Fair overruled the objection and allowed Officer Rael to testify in Andy Sommerville's place. *Id.* at 7. Bronner's attorneys cross-examined Officer Rael during the trial. *Id.* Of the ten individuals who also testified in court during Bronner's trial, one local grifter Alfie Sasaki said he had heard somewhere that Bronner may have possessed child pornography, but that he had never seen Bronner's collection. *Id.* Bronner was convicted of both human trafficking and possession of child pornography and sentenced to 30 years in prison. *Id.*

Bronner appealed on the grounds that his Fourth and Sixth Amendment rights had been violated during the trial court proceedings. *Id*.

SUMMARY OF THE ARGUMENTS

The Fourth Amendment applies not only when the government enters a person's physical property but also when the government intrudes where a person has a reasonable expectation of privacy. A person's location is one area where reasonable expectations of privacy exist. Individuals inevitably do disclose their locations to some degree. However, an electronic record of one's movements reveals information of a far more revealing nature. In *Carpenter* v. *United States*, this Court held that police violate reasonable expectations of privacy when they obtain seven days of historical cell site location information. *Carpenter* v. *United States*, 585 U.S. ___ (2018) (slip opinion, at 11n3). This Court should extend *Carpenter* and hold that police violate reasonable expectations of privacy if they obtain any subset of cell location data.

The *Katz* reasonable expectation of privacy test has two prongs. Individuals must show the existence of a subjective expectation of privacy and that their expectation is objectively reasonable. E.g. *Smith* v. *Maryland*, 442 U.S. 735 (1979). Individuals generally do not expect the police to expend substantial resources in tracking their location. See *Carpenter* v. *United States*, 585 U.S. ___ (2018) (slip opinion at 12). Myles Chaney and Sarah Geesaman asked Olympus Cellular to tell them every time Bronner came within five miles of ten specific locations. *Record* at 4. Individuals would not have expected the Task Force to devote the considerable resources necessary to obtain this information using traditional surveillance techniques. Therefore, the objective prong is satisfied.

Bronner also satisfies the subjective prong because of the intimacy of the data and the privacy concerns it raises. In *Carpenter* v. *United States*, this Court held that exposure to a third party is not dispositive. *Carpenter* (slip opinion at 16). Instead, this Court considered other factors in a balancing test. Here, those factors indicate society has a reasonable expectation of privacy in

this data because of the privacy threat it poses. Chaney and Geesaman were notified when Bronner entered geographical areas centered on specific addresses. *Record* at 4. Chaney and Geesaman could likely infer intimate details about Bronner's life such as when he visited a brothel or a home. The Task Force acquired the data inexpensively, and it came from the comprehensive record that Bronner's cellphone generates. Police could scale this kind of surveillance to surveil millions of Americans, especially since the Task Force did not even obtain a court order for the data. *Id*. Moreover, exposure to a third party has weakened relevance since many individuals cannot choose not to have a cellphone, and cellphones transmit data without any deliberate action by the user. See *Carpenter* (slip opinion at 17). The above factors indicate that a reasonable expectation of privacy exists. Therefore, a search occurred.

The search was unreasonable because the exigent circumstances exception does not apply. Whether exigency was present is an objective question. *Kentucky* v. *King*, 563 U.S. 452, 464 (2011). No facts suggest exigency was present here. When Chaney and Geesaman made their request on January 16, they were not responding pursuing a fleeing suspect or rescuing specific victims. They also were not preventing the destruction of evidence since cell carriers generally retain cell tower information for at least a rolling year. See *Record* at 14.

Finally, this Court should not hold that exigency always exists in human trafficking cases. In *McNeely* v. *Missouri*, the Court refused to adopt a similar rule for drunk-driving blood tests because in some cases the police would have time enough to obtain a warrant while driving to a hospital. *McNeely* v. *Missouri*, 569 U.S. 141, 153 (2013). Similarly, in some human trafficking cases the police will be able to obtain a warrant before the cellphone company will be able to provide the data. No exigency was present, and so the search was unreasonable.

The Sixth Amendment guarantees that all who find themselves accused before the law have the right to confront the witnesses against them. Andy Sommerville named Bronner in connection with a heinous crime, so it is Andy Sommerville who should have testified in court and not Officer Rael. Andy Sommerville's statements implicate the Confrontation Clause because they were testimonial. To determine whether a statement is testimonial or nontestimonial, the primary purpose test is applied. In *Davis* v. *Washington*, this Court said that statements whose primary purpose is helping the police to meet an ongoing emergency are nontestimonial, while statements are testimonial when they are made in the absence of an emergency to establish past events that may be relevant to prosecution. *Davis* v. *Washington*, 547 U.S. 813, 822 (2006).

Andy Sommerville's statements were testimonial for several reasons. First, he was recounting past facts about a criminal act. In *Davis*, the first half of a 911 call was held to be nontestimonial because the statements were communicated in the middle of the criminal act McCottry was reporting. *Ohio* v. *Clark,* 135 S. Ct. 2173, 2179 (2015). However, once McCottry began to relay past facts about the crime, her statements were held to be testimonial. *Davis,* at 828-829. Similarly, what Andy told Officer Rael about was strictly in the past. His goal was to explain what had already happened

Second, because Andy Sommerville was not in physical danger when he made the statements, his statements should be held as testimonial. In *Davis* v. *Washington*, McCottry's nontestimonial statements were made while she was being assaulted. In contrast, the declarant in *Hammon* v. *Indiana* was no longer in danger when she made the statements. *Clark*, at 2179 (2015) (referencing *Hammon* v. *Indiana*, 547 U.S. 813 (2006)). In *Clark,* this Court found there was an ongoing emergency when L.P. made his statements because he was about to be sent home to his potential physical abuser. *Clark*, at 2181.

Third, Andy Sommerville's statements were made not to resolve an emergency but to learn what had happened in the past. Officer Rael, knowing that what he had heard was a criminal accusation, wrote down everything Andy Sommerville had told him and then reported it to law enforcement at the next opportunity. *Record*, at 6. Andy Sommerville's intent is also relevant. Andy Sommerville had seen Officer Rael in his full police uniform and chose to come to his office to report what he had seen. *Record* at 5. Andy Sommerville understood what he had seen was criminal, as he later asked whether Bronner would go to jail. *Record* at 6. At the very least, neither Officer Rael's nor Andy Sommerville's intent was to address an ongoing emergency.

Finally, because Andy Sommerville reported what he had seen to a police officer, his statements are presumptively testimonial. *Crawford* v. *Washington*, 541 U.S. 36, 52 (2004); *Davis*, at 822 (2006), *Clark*, at 2181 (2015). To make statements that establish past facts about a criminal act to a law enforcement officer is a softer substitute for trial testimony. If someone accuses someone else of a crime, the accuser must be present in court to be cross-examined and observed in compliance with the Confrontation Clause.

The State of Olympus did not constitutionally excuse Andy Sommerville from testifying. The state interest in protecting child victims of sex crimes from further trauma can take priority over confrontation in some cases. *Maryland* v. *Craig,* 497 U.S. 836, 848. If an individualized finding is made by the court, the child may testify through the use of a one-way closed circuit television or something similar. *Craig,* at 855 (1990). Because Olympus State did not make an individualized finding, and because the state did not provide for an alternative to Andy Sommerville testifying in court, Bronner's right to confrontation was unconstitutionally stripped from him.

THE ARGUMENT

I. Chaney and Geesaman violated Bronner's Fourth Amendment rights by invading his reasonable expectation of privacy without a warrant.

Myles Chaney and Sarah Geesaman invaded Bronner's privacy by acquiring data that revealed intimate details of his life. In holding that no search occurred, the Supreme Court of the State of Olympus wrongly applied the *Jones* standard. The correct standard is the reasonable expectation of privacy test. Moreover, the lower court erred in holding that the exigent circumstances exception applies, since there was no exigency. Without an exigency, the search was unreasonable, and so Petitioner respectfully asks the Court to hold that Bronner's Fourth Amendment rights were violated.

A. Chaney and Geesaman violated Bronner's reasonable expectation of privacy under the *Katz* test because of the intimate nature of the cell phone data they obtained.

The Supreme Court of the State of Olympus was wrong to inquire only whether a trespass occurred under *United States* v. *Jones*. This Court has long applied the *Katz* reasonable expectation of privacy test in ruling on Fourth Amendment cases that do not involve a trespass. See *Katz* v. *United States*, 389 U.S. 346 (1967). See *Smith* v. *Maryland*, 442 U.S. 735 (1979). This Court again looked to see whether a reasonable expectation of privacy had been violated in *Carpenter* v. *United States*, the case with facts most similar to those of this case. *Carpenter* v. *United States*, 585 U.S. ___ (2018). Even in his majority opinion in *Jones*, Justice Scalia acknowledged that the reasonable expectation of privacy test would continue to govern cases without a trespass. *United States* v. *Jones*, 565 U.S. 400, 411 (2012).

Under the *Katz* test, Bronner must show that the government has violated a reasonable expectation of privacy. The *Katz* test has traditionally had two prongs. Individuals must show first

that they had a subjective expectation of privacy, and second that such an expectation is objectively reasonable. See, e.g., *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979).

The Court should only consider the objective prong of the *Katz* test because ignorance of social norms should not forbid someone the Fourth Amendment's protection. In his dissent in *Carpenter*, Justice Thomas observed that the Court has "minimized" the first prong over time, leaving only the second objective prong. *Carpenter*, 585 U.S. ___ (slip opinion at 5) (Justice Thomas, dissenting). The majority opinion in *Carpenter* and Justice Alito's concurrence in *Jones* do not apply the traditional two-pronged *Katz* analysis. See *Carpenter*, 585 U.S. ___. See *United States* v. *Jones*, 565 U.S. 400 (Justice Alito, concurring in judgment). This approach should continue. As the Court recognized in *Smith* v. *Maryland*, influences "alien" to the Fourth Amendment can influence subjective expectations. *Smith* v. *Maryland*, 442 U.S. 735, 740-41n5. Incorrect subjective expectations should not decide a Fourth Amendment case when a socially accepted expectation of privacy does in fact exist. Petitioner still prevails, however, should the Court consider the subjective prong.

1. Bronner has an objective expectation of privacy in the data collected given the impossibility of collecting the data by means of traditional surveillance.

This Court looks to the capabilities of traditional surveillance when deciding whether new surveillance techniques violate subjective expectations of privacy. For example, individuals generally do not expect the police to tail them for long periods of time. A general pattern of police behavior produces this expectation. In most cases, police simply cannot afford to "secretly monitor and catalogue every single movement of an individual's car for a very long period." *Carpenter* v. *United States*, 585 U.S. ___ (2018) (slip opinion at 12) (quoting 565 U.S. 400, 430 (Justice Alito, concurring in judgment)). The principle behind the Court's reasoning is that high-tech surveillance

may violate subjective expectations of privacy when traditional means cannot obtain similar results without extraordinary effort.

Bronner had a subjective expectation of privacy because traditional surveillance could not have achieved this tracking without massive expense. Chaney and Geesaman did not track Bronner's every movement. However, the data they gathered would have required massive resource expenditure a few decades ago. Olympus Cellular notified the Task Force every time over nine days that Bronner came within a five mile radius of ten specific addresses. *Record* at 4. Traditional surveillance could have provided such notification in one of two ways. The Task Force could have established five-mile perimeters around each of the addresses, or the Task Force could have tracked all of Bronner's movements between January 16 and 24.

Both approaches would have been costly. In *Carpenter*, the Court held that obtaining even seven days of historical cell site location information violates expectations of privacy. *Carpenter*, 585 U.S. ___ (2018) (slip opinion at 11n3). The Court's holding implies that tracking a person's every movement for seven days runs against general subjective expectations of what is feasible for the police. Therefore, watching one man for nine days would also defy expectations. Setting up ten perimeters would defy expectations even more. The police would have to watch all routes entering ten large areas, each with a circumference about 30 miles long. Surveilling all ten areas for nine days would require at least as much resources as tracking a single person for seven days.

Although the Record does not state that Bronner in particular expected this data to remain private, a general inquiry into subjective expectations of privacy is enough. In *Katz* v. *United States* the Court took a similar approach. The Court discussed the general expectations of those using telephone booths instead of the petitioner's precise state of mind. *Katz* v. *United States*, 389 U.S. 347, 352 (1967). Nor should the nature of Bronner's alleged crime be considered. This Court has

never before considered the offense in deciding whether a search occurred. *United States* v. *Jones*, 565 U.S. 400, 412 (2012).

It makes no difference that some of the locations were likely establishments open to the public, or that Bronner had to travel along public thoroughfares to arrive at them. In *Carpenter* the Court stated that the acquisition of a record listing many of a person's movements is fundamentally different in nature than discovering a person's presence at one particular time. *Carpenter*, at 16. Bronner may have had no expectation of privacy in his presence at one particular location or on one particular road. But people, including Bronner, do not expect anyone to observe the sum of their movements. While members of the public could have observed Bronner entering a restaurant, no single stranger could have been expected to observe Bronner at all ten locations. Bronner had a subjective expectation of privacy in the record of his movements among the ten addresses.

2. Bronner has a reasonable expectation of privacy in the data collected because it reveals intimate details of his life and threatens more widespread surveillance.

The Court should weigh the data's exposure to a third party against other factors in deciding whether Bronner's expectation of privacy was reasonable. As Justice Gorsuch and Justice Kennedy recognized in their dissents, the majority opinion in *Carpenter* applied a balancing test. 585 U.S. ___ (slip opinion at 16) (Justice Kennedy, dissenting); 585 U.S. ___ (slip opinion at 2) (Justice Gorsuch, dissenting). Exposure to a third party was not dispositive. Instead, the Court weighed the extent to which exposure weakened society's privacy interest in the data against other factors that strengthened it. Chief Justice Robert's majority opinion referenced *United States* v. *Miller* to show that this approach was hardly novel. Even in *Miller*, a 1976 case involving bank documents, the Court considered "the nature of the particular documents sought." 585 U.S. ___ (slip opinion at 16), quoting *United States* v. *Miller*, 425 U.S. 435, 442 (1976).

In *Carpenter*, the Court analyzed a number of other factors in weighing the strength of the privacy interest implicated by historical cell site location information. The Court considered the data's intimacy, the cost of gathering it, its comprehensiveness, the threat of "tireless and absolute surveillance," and the extent to which it was voluntarily exposed to third parties. 585 U.S. ___ (slip opinion at 12-14, 17). Analysis of the *Carpenter* factors in this case shows society has a substantial privacy interest in the data obtained by Chaney and Geesaman.

First, the data allowed Chaney and Geesaman to infer intimate details about Bronner's life. Location data can reveal intimate "familial, political, professional, religious, and sexual associations." *Jones*, 565 U.S. 400, 415 (Justice Sotomayor, concurring). Here, Chaney and Geesaman knew when Bronner came within a five mile radius of ten "specific addresses." *Record* at 3. The Record does not state the addresses. However, Bronner was thought to patronize a bar and a restaurant owned by "pals" of DeNolf as well as a brothel. *Id*. Chaney and Geesaman may have wanted to know when and if Bronner visited brothels or establishments run by DeNolf's friends. Such data would have allowed the police to infer intimate personal associations.

Other addresses may have been homes. Yet the privacy of the home is at the "very core" of the Fourth Amendment. *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001), quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). Using a beeper to infer that a container of ether is in a home constitutes a search. *United States* v. *Karo*, 468 U.S. 705 (1984), as cited in *Kyllo*, 533 U.S. 27, 36-37. Inferring that a particular person is in a home should also be considered a search.

The need for inference does not eliminate privacy concerns. It is true that Chaney and Geesaman had to infer that Bronner arrived at the specific addresses in question. However, this Court held in *Kyllo* v. *United States* that inference does not insulate a search. *Kyllo* v. *United States*, 533 U.S. 27, 36 (2001). It is enough that data, when used with other sources, allows the

police to draw conclusions about intimate details of someone's life. See *Carpenter*, 585 U.S. ___ (slip opinion, at 14). Chaney and Geesaman knew every phone number with which Bronner communicated within ten miles of the addresses. *Record* at 4. They could have been confident that Bronner was approaching a destination if he called an associated number and then came within five miles of the destination. This Court should also consider whether the prosecution thought it useful. See 585 U.S. ___ (slip opinion, at 14). Since the government submitted the data into evidence at Bronner's trial, *Record* at 6, it likely revealed intimate details about Bronner's life.

Second, the data was similarly cheap to the data in *Carpenter*. In both this case and *Carpenter*, the police avoided the massive cost of using officers or police vehicles to surveil the suspect. However, in one key respect Chaney and Geesaman obtained the data with greater ease than was possible in *Carpenter*. In *Carpenter*, the police obtained two court orders. 585 U.S. ___ (slip opinion, at 3). Here, the Task Force simply asked Olympus Cellular to provide the data. *Record* at 4.

Third, like *Carpenter*, this case deals with comprehensive data. In both cases, a cellphone generated the location data. Today, people "compulsively carry cell phones with them all the time." 585 U.S. ___ (slip opinion at 13). Therefore, cell location data can track a person's every movement. While the police obtained only a subset of the record of Bronner's movements, this should not alter this Court's analysis. The police will generally care about a particular time or location. In *Carpenter*, although the police requested a total of 159 days of data, they were investigating nine specific robberies. Record at 2-3. They could have obtained the information they wanted with a much smaller subset. What is important is not the request's scope but the comprehensiveness of the underlying record. A person cannot know which locations the police will choose to examine. Therefore, allowing warrantless access to any subset of this record means

a person lacks privacy and security in the whole of the record. This would have egregious consequences for American civil society.. As Justice Sotomayor noted in her concurrence in *Jones*, the possibility of government surveillance "chills associational and expressive freedoms." *United States* v. *Jones*, 565 U.S. 400, 416 (2012) (Justice Sotomayor, concurring).

Fourth, although the data was obtained in real time and not historically, it still provides a substantial threat of permeating police surveillance. In *Carpenter*, the Court quoted *United States* v. *Di Re* to say that one of the basic purposes of the Fourth Amendment is "to place obstacles in the way of a too permeating police surveillance." 585 U.S. ___ (slip opinion, at 6), quoting *United States* v. *Di Re*, 332 U.S. 581, 595 (1948). In *Carpenter*, the threat of permeating police surveillance was that the police could discover where any phone-carrying American had been at any time in the past, for up to five years. 585 U.S. ___ (slip opinion, at 13).

Although the data in this case was obtained in real time, it poses a similar threat of permeating police surveillance. In *Carpenter* the police obtained two court orders from Federal Magistrate Judges after providing "specific and articulable facts showing" the data was "relevant and material to an ongoing criminal investigation." 585 U.S. ___ (slip opinion, at 3), quoting 18 U.S.C §2703(d). Here, Chaney and Geesaman obtained Bronner's data without any court order. If acquisition of real-time data is held not to be a search while retroactive use continues to be a search, the police will have incentive to collect location data preemptively for millions of Americans.

The large areas involved do not ameliorate this threat of mass surveillance. This Court should consider how data of this nature could be used in the future. *Kyllo* established the principle that this Court should account for more sophisticated technology in its holdings. *Kyllo*, 533 U.S. 27, 36 (2001). In the future, police could surveil large geographic areas and combine the results to determine in which region of intersection an individual was. Ten large circular zones could create

over a thousand regions of intersection, for example. Some applications might be able to provide great precision. Chaney and Geesaman may even have used overlapping areas here. Each address lay within the same municipality as several other monitored addresses. *Record* at 4.

Nor does the need to identify locations beforehand protect Americans' privacy. The police associate certain addresses with crime. At the least, they could monitor whether persons thought suspicious visit those locations. At worst, government agencies could track which individuals visit churches, mosques, brothels, party headquarters, and other revealing locations. Warrantless access to location data threatens a dangerous level of police surveillance.

Finally, the data's exposure to Olympus Cellular has little effect on Bronner's privacy interest. Its communication to Olympus Cellular was not truly voluntary for two reasons laid out in *Carpenter*. First, most individuals cannot choose not to have a cellphone. More than 90 percent of American adults have cell phones. *Riley* v. *United States*, 573 U.S. ___ (2014) (slip opinion, at 19). The Court has recognized that a cellphone is "indispensable to participation in modern society." 585 U.S. ___ (slip opinion, at 17). Communicating with colleagues, family, or other associates forces most Americans to carry cellphones.

Second, the user performs no positive act to transmit cellphone data to the carrier. *Id*. Here this case differs from *Smith* v. *Maryland*. Cell location data reaches the carrier even when users do not use their phones. In contrast, it is the act of dialing that exposes a telephone number to the telephone company. *Smith* v. *Maryland*, 442 U.S. 735, 744 (1979). Nor can users opt out of location tracking. A phone's normal operation require it to connect to cell sites. The only way to disable tracking is to turn off a phone's network capabilities. 585 U.S. ___ (slip opinion, at 17). Therefore, exposure to Olympus Cellular does not outweigh the intimacy of the data and the privacy concerns it raises.

B. The exigent circumstances exception does not apply because no objective facts support the existence of an exigency.

The search was an unreasonable one since the exigent circumstances exception does not apply. For a search to be reasonable under the exigent circumstances exception, Chaney and Geesaman must show probable cause and the existence of an exigency. Exigency may exist if "there is compelling need for official action and no time to obtain a warrant." *Michigan* v. *Tyler*, 436 U.S. 499, 509 (1978), as quoted in *Missouri* v. *McNeely*, 569 U.S. 141, 149 (2013).

However, no facts indicate that a specific and compelling need existed when Chaney and Geesaman asked Olympus Cellular for the data. On or shortly after January 2, the Task Force discovered Bronner and DeNolf had been communicating with the same group of burner phones. *Record* at 3. On January 16, the Task Force asked Olympus Cellular to provide information about Bronner's location. *Id*., at 4. The only event recorded between the two dates was the Task Force beginning to investigate Bronner's phone "almost exclusively." *Id*., at 4. The question of exigency is an objective one, not a subjective one. *Kentucky* v. *King*, 563 U.S. 452, 464 (2011). Here, there are simply no objective facts that indicate the presence of exigency.

The three possible kinds of exigency are hot pursuit, emergency aid, and preventing the destruction of evidence. See e.g. *Riley* v. *United States*, 573 U.S. ___ (2014) (slip opinion, at 26).. There was no emergency aid exigency. No facts indicate that human trafficking victims could have been rescued by obtaining Bronner's location information. There was no hot pursuit exigency. No facts indicate that Bronner was fleeing when the data was obtained. Chaney and Geesaman did not learn of Bronner's imminent departure until February 5, over two weeks later.

Nor would evidence have been destroyed. Major cellular carriers keep cell tower information and call detail records for at least a rolling year, even for burner phones. *Record* at 14. Olympus Cellular has retention policies similar to one of the major carriers, Verizon. *Id*., at 3n6.

The Task Force could have obtained the same data retroactively with a warrant, even if Bronner had used a burner phone.

Human trafficking does not create an exigency in every case. In *McNeely* v. *Missouri*, this Court rejected the argument that declining blood alcohol levels always create an exigency in drunk driving stops. The Court reasoned that in some cases, police would have time to get a warrant, especially since warrants can be obtained quickly in many states. *McNeely* v. *Missouri*, 569 U.S. 141, 153-54 (2013). The same reasoning applies here. The police will need time to contact the cellular company and set up a data collection mechanism. In some cases, the police might be able to obtain a warrant before the police can start collecting phone location data from the cellular company. Therefore, a categorical rule is not appropriate.

According to the facts of the Record, the only exigency was in the mind of the Task Force. Chaney and Geesaman were "concerned that tine was of the essence." *Record* at 4. However, this Court has long rejected subjective analysis of an officer's state of mind. *King*, 563 U.S. 452, 464. Chaney and Geesaman have presented no facts supporting their concern, and so the Court should hold that no exigency was present. Petitioner respectfully asks the Court to hold that the acquisition of Bronner's cell location data was an unreasonable search that violated the Fourth Amendment.

II. Bronner's Sixth Amendment rights were violated when Olympus State did not allow him to confront Andy Sommerville, the witness against him.

Bobby Bronner was convicted of a serious crime based only upon the hearsay statements of a witness who was not cross-examined. The truth-finding benefits of cross-examination are fundamental to the confrontation right of the Sixth Amendment, and to deny a defendant this right is to threaten the integrity of an American's right to a fair trial. Because Andy Sommerville's statements were testimonial, and because the State of Olympus did not follow correct procedures in exempting Andy Sommerville from testimony, the State of Olympus violated Bronner's Sixth Amendment right to confront witnesses against him.

A. Andy Sommerville's statements to Officer Rael were testimonial.

To determine the admissibility of a hearsay statement, this court has applied the primary purpose test. This test seeks to discover the inherent nature of a statement—whether it is testimonial or nontestimonial. In *Davis* v. *Washington,* this court said that "statements are nontestimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," and that "they are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis* v. *Washington*, 547 U.S. 813, 822 (2006).

In *State* v. *Henderson*, the Supreme Court of Kansas listed the four parts of the primary purpose test that this Court examined in deciding *Davis* v. *Washington* and *Hammon* v. *Indiana*: "(1) whether the declarant was speaking about events as they were actually happening, instead of describing past events; (2) whether the declarant made the statement while in immediate danger, i.e., during an ongoing emergency; (3) whether the statement was made in order to resolve an

emergency or simply to learn what had happened in the past; and (4) the level of formality of the statement." *State* v. *Henderson,* 160 P. 3d 776, 784 (Kan. 2007). These four factors should guide this Court's analysis in the present case.

1. Andy Sommerville's statements were testimonial as he was recounting past facts about a criminal act.

A key indicator of testimonial evidence is that the statements recount past facts. Statements that answer police questioning with an account of criminal activity are testimonial since "they do precisely *what a witness does* on direct examination." *Davis*, 547 U.S., at 830 (emphasis in original). For example, in *Hammon* v. *Indiana,* a case this Court decided within *Davis,* this Court analyzed the primary purpose of a police interrogation of a woman at her own home after criminal events had taken place. This Court held that the statements received were testimonial because the police were not responding to a current emergency but were investigating past criminal activity. *Hammon* v. *Indiana*, 547 U.S. 813, 829-830 (2006).

Davis's analysis of a 911 call also inquired whether statements describe past events or current events. Because the first half of the 911 call in *Davis* happened during and right after the crime that McCottry was reporting, this Court held that those statements were nontestimonial. However, this court decided that the second half of the call was testimonial because at that point McCottry began recounting past events to the 911 operator. No longer was the purpose of the conversation to assist in an ongoing emergency, but to establish past facts about a criminal act. *Davis,* 547 U.S., at 828-829 (2006). Additionally, in *Hammon*, the officer was not seeking to determine "what was happening," but rather "what happened." Those statements were considered testimonial. *Hammon,* 547 U.S., at 830.

Andy Sommerville also described past events. He told Officer Rael that he had seen child pornography belonging to Mr. Bronner "a couple of nights ago," describing something criminal

he had seen in the past. *Record* at 5. Mr. Bronner was not actively committing a crime that Andy Sommerville was simultaneously witnessing and reporting to the police. Instead, Andy Sommerville was recounting past events about a criminal act, his statements serving to establish what had happened instead of providing information on an ongoing emergency. Therefore, Andy Sommerville's statements should be considered testimonial.

2. The statements were testimonial because there was no ongoing emergency.

The second part of the Primary Purpose Test is whether Andy Sommerville was in immediate danger when he made the statements. Again, looking at *Davis* and *Hammon*, there is a clear distinction between what does and does not constitute an emergency. The Kansas Supreme Court in *Henderson* interpreted an "ongoing emergency" to mean that the declarant is in immediate danger. *Henderson,* 160 P. 3d, at 784. This reasoning is consistent with *Davis*. The standard in *Davis* is that the circumstances must objectively show that the primary purpose of an interrogation was helping the police address an ongoing emergency if the statements are to be considered nontestimonial. *Davis*, at 822. For example, Michelle McCottry's nontestimonial statements during the 911 call were made while she was being assaulted. *Davis*, at 817. Similarly, in *Ohio* v *Clark,* this Court found there was an ongoing emergency when L.P. made his statements because he was about to be sent home, where he might have suffered physical abuse. *Ohio* v. *Clark*, 135 S. Ct. 2173, 2181 (2015). In contrast, Amy Hammon spoke to the police after they had separated her from her abusive husband; she was no longer in physical danger when she made the statements. *Hammon*, at 819

In this case, Andy Sommerville was not in immediate physical danger like McCottry or L.P. The only potential physical threat to him was from his stepfather, Bronner. However, both Andy and Officer Rael understood that Bronner had already been arrested. *Record* at 5, 6. Andy

was not the victim of any kind of assault, nor did he make the statements in the middle of an ongoing emergency of that nature. Therefore, the objective circumstances indicate that there was no reason for Andy Sommerville's statements to be considered nontestimonial because of an ongoing emergency.

3. The statements were testimonial because they were made not to resolve an emergency but to learn what had happened in the past.

Third, the Primary Purpose test examines whether the purpose of the statement was "to resolve an emergency or simply to learn what had happened in the past." *Henderson,* at 784. This criterion is different from the first two in that it looks primarily at the mindsets of the receiver of the statements and of the declarant. While Andy Sommerville's statements objectively recounted past events concerning a criminal act and he was not in immediate danger, his intent in making the statements and Officer Rael's intent in receiving the statements still can help in determining the nature of the statements. In *Clark,* this Court not only held L.P.'s statements to be nontestimonial because of the presence of an ongoing emergency, but also because the intention of his teachers was simply to protect L.P. and not to gather evidence for a prosecution. *Clark*, 135 S. Ct., at 2181. Moreover, this Court held that statements by very young children like L.P., who was three years old, will rarely implicate the Confrontation Clause, because young children do not make statements with the understanding that their statements can be used during a criminal trial. *Id.* at 2182.

Officer Rael's intent in receiving the statements certainly did begin as one of concern for Andy Sommerville, but his intent shifted by the end of the conversation. As a reasonable police officer, he would have understood that what he had just heard were statements about observed criminal activity. He made sure to take notes after the conversation, and when officers Chaney and Geesaman arrived at the school to interrogate him, he reported to them everything that Andy had told him. *Record* at 6. As a school resource officer, or SRO, Office Rael was a sworn officer of

the law. An SRO's responsibilities "are similar to regular police officers in that they have the ability to make arrests, respond to calls for service, and document incidents that occur within their jurisdiction." *Record* at 5n7. Andy Sommerville had just reported witnessing something criminal, child pornography. Regardless of Officer Rael's original intent in listening to Andy Sommerville, in the same way the nature of the 911 call changed from nontestimonial to testimonial in *Davis*, the circumstances suggest that Officer Rael's understanding of the conversation changed. He simply let Andy Sommerville leave his office, knowing he was safe, and dealt with what he had heard like a proper law enforcement officer—he reported it at the next opportunity. See *Record*, at 6.

There are several reasons to believe that Andy Sommerville's understanding in giving the statements should render his statements testimonial. First, Andy Sommerville approached Officer Rael of his own accord and made a clear statement connecting his stepfather to the thing he had witnessed. He said, "One of Bobby's dirty movies started playing." *Record* at 5. Second, after he had made the statements, he specifically asked Officer Rael if Bronner would go to jail now that he had been arrested. *Record* at 6. Andy knew that his stepfather had done something to get himself arrested, and the fact that Andy asked Officer Rael that question indicates that Andy Sommerville understood that what he had seen could be a part of Bronner's criminal activity. Third, Andy Sommerville was eight years old when he gave his statements. His age was much older than L.P.'s three years, making it more likely that he understood that he had reported something bad to someone he knew to be a police officer. *Record* at 5 and 6. Additionally, he had at least some understanding of the criminal justice system and the court system, since he had assisted his sister in high school mock trial. *Record* at 6.

However, the mindsets of Officer Rael and Andy Sommerville are not the sole factor in determining the nature of a statement. Regardless of his state of mind, the statements Andy Sommerville made were statements about a past event, not a current one. They were statements made not to address an ongoing emergency, but to report past facts about a criminal act. And they were not received and dealt with by Officer Rael as if he were responding to an ongoing emergency, but as if he had just heard a criminal accusation. As this court said in *Davis*, testimonial statements are those made "to establish or prove past events potentially relevant to later criminal prosecution," and Andy Sommerville's statements did just that. *Davis,* at 822.

4. The statements were testimonial due to the fact that Andy Sommerville made statements to a police officer.

The fourth criterion of the Primary Purpose Test looks at the formality of the statement. *Ohio* v. *Clark* highlighted the importance of formality. *Clark,* at 2180. The most important factor to consider here is that Andy Sommerville correctly understood that Officer Rael was a police officer. As this Court highlighted in *Crawford, Davis,* and *Clark*, statements received by police officers are more likely to be testimonial—almost presumptively so. *Crawford*, 541 U.S., at 52; *Davis*, 547 U.S., at 822, *Clark*, 135 S. Ct., at 2181. When asked by officers Chaney and Geesaman if Andy Sommerville knew that Officer Rael was a police officer, Officer Rael responded that Andy Sommerville might know—at least when he wore his full police uniform. *Record* at 6. Officer Rael was in his full police uniform the day he first approached Andy Sommerville, and the next day when Andy Sommerville came to his office, he was wearing his soft uniform. *Record* at 5. The soft uniform consisted of a shirt embroidered with a star, khaki pants, and a police radio strapped to his belt. *Record* at 5n8.

Since Andy's statements were taken by a police officer, and since it is likely Andy understood he was making statements to a police officer, Andy Sommerville's statements should

be considered testimonial under the formality criterion. While it is true that police officers can receive nontestimonial statements, the cases in the record show that statements taken by police officers have only been held nontestimonial if they were taken to assist in an ongoing emergency. *Davis*, at 822. Other than when a police officer is taking statements to address an ongoing emergency, making statements about a past criminal act to a police officer heightens the formality of the situation and makes the statements presumptively testimonial.

Andy Sommerville's statements were testimonial. The statements were made in the past tense in the absence of an ongoing emergency. The intent of Andy Sommerville and Officer Rael and the formality of the situation also suggest the statements were testimonial. One final factor to consider is that the way the State of Olympus used the statements also indicates that they were considered testimonial. The Record states that "Officer Rael's comments to law enforcement about conversations he had with Andy Sommerville led prosecutors to call Officer Rael to testify at trial." *Record* at 5. What had taken place required that someone testify in court, instead of merely admitting the notes Officer Rael wrote. If the statements were truly nontestimonial, the notes would have sufficed. Instead, the State of Olympus called Officer Rael to testify although he was not a witness to the crime. *Record* at 7. The only reason Andy Sommerville did not testify himself was because the State of Olympus barred him from doing so.

B. The Olympus statute unconstitutionally barred Andy Sommerville from testifying.

This Court reaffirmed in *Maryland* v. *Craig* that four elements serve "the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings,": physical presence, oath, cross-examination, and observation of demeanor. *Maryland* v. *Craig,* 497 U.S. 836, 845-846. However, this Court has held that "competing interests, if closely examined

may warrant dispensing with confrontation at trial." *Craig,* 497 U.S., at 848 (citing *Ohio v. Roberts,* 448 U.S. 56, 64 (1980)). In some cases, exceptions can be made to the Confrontation Clause.

Those exceptions are few. The Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford* v. *Washington,* 541 U.S. 36, 54 (2004) (referencing *Mattox* v. *United States*, 156 U.S. 237, 243 (1895)). It was common practice to admit statements absent confrontation if the witness was unavailable and there had been a prior opportunity to cross examine. *Crawford*, 541 U.S., at 54 (referencing *Mattox*, 156 U.S., at 243). However, most hearsay exceptions under common law did not include those that would admit testimonial statements against the defendant in a criminal case. *Crawford,* at 56. In looking at common law at the time of the Founding, the only hearsay exception to testimonial statements in a criminal case was unavailability of the witness when there was a prior opportunity to cross-examine. *Id.* at 54.

A child witness may be unavailable when testifying would result in trauma from testifying in the defendant's presence. In *Craig*, a child witness who was sexually abused was allowed to testify through a one-way closed circuit television instead of being in the defendant's presence during the trial. *Maryland* v. *Craig*, 497 U.S. 836 (1990). This Court held that closed-circuit testimony is constitutional as long as the trial court makes a case-specific finding of necessity to dispense with physical confrontation. The trial court must "hear evidence and determine whether the use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Craig,* 497 U.S., at 855 (1990). The defendant and not the process of testifying itself must be the cause of the trauma. *Id.,* at 856. If the trial court makes an individualized finding that the child cannot physically testify in the defendant's presence,

then it may use a one-way closed circuit television or a similar method to preserve the defendant's right to confrontation.

The *Craig* exception should not apply here. The Confrontation Clause is vital to the integrity of the American criminal justice system, and only an interest of the strongest kind should outweigh the defendant's interest in confronting his accuser in court. This Court should hold that the *Craig* exception only applies to victims who have suffered abuse at the hands of the defendant. In *Craig*, the child witness had been physically abused by the defendant. *Craig,* at 840. In contrast, Andy Sommerville was not a victim of abuse in the same way. While viewing child pornography could certainly cause trauma, and exposure to child pornography could be considered negligence or abuse under some statutes, Bronner did not physically abuse Andy Sommerville.

Even if this court were to hold that Andy Sommerville should be considered a victim of a sex crime, Olympus State did not follow the proper constitutional procedure in allowing him to testify without being further traumatized. *Craig* set out to preserve the essential truth-finding benefits of confrontation while still upholding the state interest in protecting child victims in sex crimes. Here, Olympus State's blanket statue barred every child under ten from testifying in court. *Record* at 6. While the stated intent of the law was to protect child victims of sex crimes, the law does not do it within the bounds of *Craig*. No one assessed Andy Sommerville to determine if he was capable of testifying in Bronner's presence, and no other options were considered to allow for at least partial confrontation through a one-way close circuit television. Because the Olympus State trial court did not make a case-specific determination in barring Andy Sommerville from testifying, we respectfully ask this Court to hold that Bronner's right to confrontation was violated.