Written by **Michael Tennant** on November 28, 2017

Supreme Court to Decide Whether Cellphone Data Falls Under Fourth Amendment

On Wednesday, the Supreme Court will begin hearing arguments in a case with enormous implications for Americans' rights to privacy, freedom of speech, and freedom of association. Specifically, the court is being asked to decide whether the government may obtain information about individuals' cellphone usage without first getting a warrant — a vital matter given the intimate details about a person's life such data could reveal.

The case concerns Timothy Carpenter, a man convicted of acting as a getaway driver for a series of armed robberies in the Detroit, Michigan, area in 2010 and 2011. Carpenter was not among those initially arrested for the crimes, but when one of the captured robbers turned his cellphone over to the authorities, they — without first obtaining a warrant — demanded and received from various wireless carriers data related to telephone numbers found on the phone. That information — specifically, location data showing Carpenter was in the vicinity of several of the robberies — ultimately led to Carpenter's arrest and conviction.

Carpenter appealed his conviction on the basis that his cellphone data was obtained in violation of the Fourth Amendment. The Sixth Circuit Court of Appeals upheld his conviction, so Carpenter appealed to the Supreme Court.

Carpenter's argument is straightforward: The Fourth Amendment requires the government to obtain a warrant based on probable cause before it can search a person's private records, regardless of who is in possession of those records.

The government's case, on the other hand, relies on the controversial "third-party doctrine," which holds that certain information, such as bank records and telephone call logs, is exempt from the warrant requirement because the nominal owner of the information has turned it over to a third party.

According to *New York* magazine:

> The Supreme Court has not directly applied [the third-party doctrine] in a case … since 1979. It is an open question today whether the third-party doctrine still operates. The stakes are also now much higher. The variety and amount of personal electronic data have increased exponentially over the last few decades. Almost every form of electronic information, from our emails to our Google searches to our contact lists to the websites we visit, is exposed to third parties. So if the Supreme Court affirms the third-party doctrine in the Carpenter case, all of this information may be unprotected by the Fourth Amendment. In other words, the Carpenter case is about a lot more than just cell phones. It is about whether the government can gather personal and often intimate details about any or every citizen, without any Fourth Amendment limits.

This, in turn, has First Amendment implications. Individuals could be monitored for their political

activities, and their companions in these activities could be identified and monitored as well. Journalists and their sources would be prime targets for such surveillance. As the Reporters Committee for Freedom of the Press pointed out in its brief in support of Carpenter, cellphone location information "can reveal the stories a journalist is working on before they are published, where a journalist went to gather information for those stories, and the identity of a journalist's sources."

"A defeat for Carpenter would be a defeat for privacy rights, but it would also mean a dramatic curtailment of First Amendment freedoms," Columbia University's Jameel Jaffer and Alexander Abdo wrote in the *Guardian*.

No one knows how the Supreme Court will rule in the case, but recent decisions suggest that the justices are aware of the dangers of permitting unchecked government surveillance of electronic records.

In a 2011 decision against installing a GPS device on a suspect's car without a warrant, Justice Sonia Sotomayor argued that the third-party doctrine "is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."

Two years later, in ruling that the government needed a warrant to search a suspect's cellphone, Chief Justice John Roberts warned, "Awareness that the government may be watching chills associational and expressive freedoms."

The court clearly should come down on Carpenter's — and the Constitution's — side. As Jaffer and Abdo observed, "Without strong protections for individual privacy, the freedoms of speech, association and the press will wither."