No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIO RIOS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER LAW-ENFORCEMENT OFFICERS MUST SECURE A WARRANT TO OBTAIN REAL-TIME CELLULAR-PHONE LOCATION DATA.

II. WHETHER COURTS MUST INSTRUCT JURIES ON THE REQUIRED UNANIMITY REGARDING THE SPECIFIC CATEGORIES OF ACTS IN RICO CONSPIRACY CASES, AND LIKEWISE WHETHER THIS COURT'S CONCLUSIONS IN *RICHARDSON V. UNITED STATES*, 526 U.S. 813 (1999), APPLY IN RICO CASES.

III. WHETHER COURTS SHOULD DELIVER UNIFORM JURY INSTRUCTIONS ON REASONABLE DOUBT AND PRESERVE THE STANDARD OF PROOF NECESSARY TO SUSTAIN A CRIMINAL CONVICTION.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Antonio Rios requests that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on July 21, 2016, affirming the Judgment of the United States District Court for the Western District of Michigan, Southern Division, and the Order entered on September 27, 2016, denying his petition for rehearing.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is published and is attached at **Appendix A**.

The Judgment of the United States District Court for the Western District of Michigan, Southern Division, is unpublished and is attached at **Appendix B**.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit decided this case on July 21, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Mr. Rios filed a timely motion for rehearing, with suggestion for rehearing en banc, on September 6, 2016. The Sixth Circuit denied the petition on September 27, 2016.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, in part, the application of the Fourth Amendment to the United States Constitution, providing that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST, amend IV.

It also involves application of the Fifth Amendment to the United States Constitution, providing that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST, amend V.

STATEMENT OF THE CASE

Grand juries indicted Antonio Rios and thirty other individuals in the first count of a series of indictments, charging Mr. Rios and his co-defendants with conspiracy to commit racketeering and various other offenses related to drug trafficking and weapons. (*See, e.g.*, R. 68: Third Superseding Indictment; R. 480: Fourth Superseding Indictment.) These indictments alleged that the defendants were members of the Holland Latin Kings street gang. (*See* R. 480: Fourth Superseding Indictment, Page ID #2,140-41.) Leading up to trial, Mr. Rios had moved to suppress evidence consisting of 103 grams of powder cocaine seized during a traffic stop occurring on January 26, 2011. (R. 852: Motion to Suppress, Page ID #5,645.) The District Court denied Mr. Rios's motion to suppress. (R. 910: Order Denying Motion to Suppress, Page ID #6,836.)

Mr. Rios and David Casillas proceeded to trial; the other 29 co-defendants pleaded guilty. (R. 1170: Minutes of Jury Trial, Day 1, Page ID #13,697.) Trial commenced on June 2, 2014. (R. 1170: Minutes of Jury Trial, Day 1, Page ID #13,697.) A jury convicted Mr. Rios and Mr. Casillas of Counts 1 and 14; the jury acquitted Mr. Rios of Count 15 (Mr. Casillas was not charged in this count). (R. 1197: Verdict Form, Page ID #13,777-79.) On November 14, 2014, the District Court sentenced Mr. Rios to 239 months of imprisonment, five years of supervised release, and a $200 special assessment. (R. 1391: Minutes of Sentencing, Page ID #20,855.) The District Court entered the judgment on November 20, 2014. (R. 1396: Judgment,

Page ID #20,860.) Mr. Rios filed his notice of appeal on November 21, 2014. (R. 1404: Notice of Appeal, Page ID #20,877.)

The Sixth Circuit considered Mr. Rios's appeal and affirmed the District Court's judgment, publishing its opinion on July 21, 2016. (R. 1703: Slip Opinion, Page ID #21,934; *United States v. Rios*, Nos. 14-2495/2512 (6th Cir. July 21, 2016) (for publication).) Mr. Rios filed a timely motion for rehearing, with suggestion for rehearing en banc, on September 6, 2016. The Sixth Circuit denied the petition on September 27, 2016.

STATEMENT OF FACTS

This case represented the culmination of a lengthy investigation into the activities of a group that police called the Holland Latin Kings. The government sought a series of indictments, culminating in a Fourth Superseding indictment that charged Mr. Rios and 27 other defendants with, primarily, a racketeering conspiracy (a violation of 18 U.S.C. § 1962(d)). (R. 480: Fourth Superseding Indictment, Page ID #2,140.) The indictment alleged that Mr. Rios and the others had participated in the Holland Latin Kings' activities, which supposedly included murder, arson, assault, witness tampering, obstruction of justice, drug trafficking, weapons trafficking, and "other crimes." (R. 480: Fourth Superseding Indictment, Page ID #2,141.) These activities allegedly occurred in Holland, Michigan, and other parts of Southwest Michigan and the Southern Division of the Western District of Michigan. (R. 480: Fourth Superseding Indictment, Page ID #2,141.)

Specifically, Count One alleged the commission of 129 overt acts in furtherance of a twenty-year racketeering conspiracy. *United States v. Rios*, Nos. 14-2495/2512, slip op. at 2 (6th Cir. July 21, 2016) (for publication). Count One also contained eleven special sentencing allegations that charged various defendants with conspiring to distribute five kilograms or more of cocaine between 1993 and 2013, and the commission of ten assaults with the intent to commit murder. *Id.* Mr. Rios was charged in Count One and its special sentencing allegation regarding the distribution of cocaine, and with three of the assaults with the intent to commit murder. *Id.* Mr. Rios was also charged in Count Fourteen, which alleged a conspiracy to possess with the intent to distribute five kilograms or more of cocaine between 2006 and 2012. *Id.* And he was charged in Count Fifteen, which alleged a conspiracy to possess with the intent to distribute one-hundred kilograms or more of marijuana between 2009 and 2012. As will be discussed below, the jury specifically found that Mr. Rios did not participate in a number of these alleged offenses, including the assaults with intent to commit murder and the conspiracy to possess, with the intent to distribute, more than 100 kilograms of marijuana.

Preceding trial, Mr. Rios moved to suppress evidence consisting of 103 grams of powder cocaine seized during a traffic stop effected on January 26, 2011. (R. 852: Motion to Suppress, Page ID #5,645.) On that day, authorities had established surveillance of Mr. Rios; Mr. Rios drove a vehicle and a detective believed that "officers were spotted." (R. 1273: Trial Trans., Vol. 8, Page ID #17,422.) An officer prepared an affidavit to request a search warrant that would allow him to track Mr.

Rios's cell phone; the warrant issued and a detective determined that Mr. Rios drove to Detroit, Michigan, and stayed for approximately ten hours. (R. 1273: Trial Trans., Vol. 8, Page ID #17,423.) Later that day, in Holland, Michigan, officers conducted a traffic stop of Mr. Rios's vehicle; authorities searched the vehicle and located baggies containing a substance weighing 103 grams, which they later determined to be cocaine. (R. 1273: Trial Trans., Vol. 8, Page ID #17,427-28.)

In his motion to suppress, Mr. Rios raised three arguments. He fleshed these arguments out further in his appellate brief. First, he argued that authorities tracked the vehicle using the GPS signal from his telephone based on a search warrant issued without probable cause. Next, he argued that the affidavit filed in support of the warrant included a false statement that was material to any probable-cause determination. Last, he argued that, based on the information available to the authorities, officers had no reason to have a drug K-9 unit waiting to be dispatched to Mr. Rios's vehicle; the circumstances presented no evidence of criminal conduct, other than the speeding violation that served as the pretext to support the stop. The District Court denied Mr. Rios's motion to suppress, entering its order on the matter on January 31, 2014. (R. 910: Order Denying Motion to Suppress, Page ID #6,836).

This order had a marked effect on the case. The jury convicted Mr. Rios of participation in a cocaine conspiracy. Given almost the same testimony, the jury acquitted Mr. Rios of the marijuana conspiracy. The evidence related to the two substances differed because the government presented the cocaine seized from the vehicle. Without that evidence, the 103 grams of cocaine, the jury likely would have

rejected the testimony regarding cocaine. The jury did, after all, reject the testimony about marijuana, testimony provided by the same witnesses who testified regarding cocaine.

Mr. Rios's and Mr. Casillas's trial began on June 2, 2014. (R. 1170: Minutes of Jury Trial, Day 1, Page ID #13,697.) In instructing the jury, the District Court declined to give a unanimity jury instruction on the specific acts or categories of the RICO charge. *Rios*, Nos. 14-2495/2512, slip op. at 34. The District Court also modified the pattern instruction on reasonable doubt. Rather than defining reasonable doubt as "proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives," the District Court defined it as "proof which is so convincing that you would not hesitate to rely and act on it in making an *important decision* in your own life." *Id.* at 31-32.

The jury convicted Mr. Rios and Mr. Casillas of Counts 1 and 14, and acquitted Mr. Rios of Count 15 (Mr. Casillas was not charged in this count). (R. 1197: Verdict Form, Page ID #13,777-79.) Regarding Count 1, the jury found that Mr. Rios had been involved with five or more kilograms of cocaine. (R. 1197: Verdict Form, Page ID #13,777.) Also regarding Count 1, the jury specifically found that Mr. Rios did not commit the offense of assault with intent to murder against Robert Leal. (R. 1197: Verdict Form, Page ID #13,777.) Likewise, the jury found that Mr. Rios had not committed assault with intent to murder against Darryl Patton. (R. 1197: Verdict Form, Page ID #13,778.) Regarding Count 14, the jury found Mr. Rios responsible for more than five kilograms of cocaine. (R. 1197: Verdict Form, Page ID #13,778.)

The District Court sentenced Mr. Rios to 239 months of imprisonment on November 14, 2014. (R. 1391: Minutes of Sentencing, Page ID #20,855.) Mr. Rios filed his notice of appeal on November 21, 2014. (R. 1404: Notice of Appeal, Page ID #20,877.) The Sixth Circuit affirmed the District Court's judgment on July 21, 2016. *Rios*, Nos. 14-2495/2512, slip op. at 3. The Court of Appeals rejected Mr. Rios's argument that the search warrant for his phone data and real-time location information did not stand on probable cause. *Id.* at 26-27. The Court of Appeals found that it had "already held that individuals do not have a reasonable expectation of privacy in the real-time location data that their cellular telephones transmit, making it unnecessary to obtain a warrant to obtain such information." *Id.*

Likewise, the Court of Appeals rejected Mr. Rios's arguments regarding the jury instructions given at the close of trial. *Id.* at 33-35. Before the District Court instructed the jury, Mr. Rios objected to the District Court's proposed instruction on reasonable doubt. *Id.* at 31. Mr. Rios requested the Sixth Circuit Pattern Instruction on the matter. *Id.* The District Court, however, delivered an instruction that varied from the pattern instruction and altered the definition of reasonable doubt, lowering the standard of proof. *Id.* at 32. Mr. Rios also requested that the District Court give a unanimity instruction to address either the specific acts or categories for the RICO charge. *Id.* at 34. As with the issue of reasonable doubt, the District Court denied Mr. Rios's request. *Id.* On appeal, Mr. Rios argued that the District Court should have given a unanimity instruction because the jury was required to be unanimous as to the specific overt acts found to establish the RICO conspiracy, or at least the

jury should have been unanimous as to the specific categories of overt acts. *Id.* The Sixth Circuit rejected Mr. Rios's arguments, finding that the jury need not have agreed on which overt act, among several, constituted the means by which the offense was committed. *Id.*

In reaching all of its conclusions, however, the Sixth Circuit failed to consider certain key points. The Court of Appeals ignored the privacy issues implicated in real-time tracking of a cellular phone and this Court's concerns in *United States v. Jones*, 132 S. Ct. 945 (2012). And it failed to appreciate the significance of unanimity and reasonable-doubt jury instructions, contributing to the existing jurisprudential conflicts on these matters.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT CERTIORARI IN MR. RIOS'S CASE TO RESOLVE CONFLICTS OVER THE NEED FOR A WARRANT FOR REAL-TIME CELLULAR-PHONE LOCATION DATA. IF THIS COURT DOES NOT GRANT CERTIORARI IN HIS CASE, MR. RIOS ASKS THE COURT TO CONSIDER HIS CASE IN CONJUNCTION WITH THAT OF *GRAHAM V. UNITED STATES*.

Conflict exists in jurisprudence on the issue of whether the police must secure a warrant before obtaining real-time location data based on cellular-phone tracking. In 2015, a circuit split developed when a panel of the Fourth Circuit split with other circuits and declared that authorities must secure a warrant to obtain cellular site location information for cellular phones. *See United States v. Graham*, 796 F.3d 332, 338 (4th Cir. 2015). In May 2016, the Fourth Circuit, en banc, reversed the *Graham* panel's decision and ended the circuit split. *United States v. Graham*, No. 12-4659, slip op. at 4-5 (4th Cir. May 31, 2016) (for publication). On September 26, 2016, Mr.

Graham petitioned this Court for a writ of certiorari. *Graham v. United States*, No. 16-6308. In October and November, amici filed briefs in that case. Following the entries of orders extending the time to file, the response to Mr. Graham's petition is now due on February 3, 2017.

If this Honorable Court does not grant Mr. Rios's instant petition, Mr. Rios asks this Court to consider his case in conjunction with Mr. Graham's case. This case presents vital questions related to ubiquitous technology and raises significant legal issues of even greater magnitude than those that warranted this Court's attention in *Kyllo v. United States*, which this Court considered even though no circuit split existed on the issues presented in that case. *See Kyllo v. United States*, 533 U.S. 27, 46 n.4 (2001) (Stevens, J., dissenting). Considering Mr. Rios's case with the *Graham* case would allow this Court to resolve these issues as they relate to historic cell-site location information (as presented in *Graham*) as well as real-time phone tracking (as presented in Mr. Rios's case). Mr. Rios's case involves a question over which federal courts of appeals have split, and a question of federal law that should be settled by this Court. *See* R. S. Ct. 10(a) & (c). It also involves a question of law upon which federal courts of appeals have entered decisions in conflict with state courts of last resort, a basis for review contemplated in this Court's rule 10(a). *Cf. State v. Lunsford*, No. A-61, slip op. at 19, 27-28, 32 (S. Ct. N.J. Aug. 1, 2016) (discussing New Jersey's rejection of the third-party doctrine, and discussing the state court's finding of privacy rights in cell-phone location information). Should the Court choose not to

consider Mr. Rios's case with Mr. Graham's, Mr. Rios asks the Court to hold his case in abeyance pending the outcome of the *Graham* matter.

Circuit law on the matter of cellular-phone location data has not recognized or kept pace with the realities of rapidly evolving technology. In deciding Mr. Rios's case, the Sixth Circuit looked to its precedent in *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012). In that case, the Sixth Circuit concluded that "[b]ecause authorities tracked a known number that was voluntarily used while traveling on public thoroughfares, [the defendant] did not have a reasonable expectation of privacy in the GPS data and location of his cell phone." As will be discussed below, this conclusion ignores key points from relevant precedent from this Court. It also ignores practical concerns, as pointed out by other circuits.

In *United States v. Graham*, 796 F.3d 332 (4th Cir. 2015), the original Fourth Circuit panel rejected the *Skinner* reasoning. The *Graham* panel found that the government's warrantless procurement of the cell-site location data constituted an unreasonable search, violating the defendants' Fourth Amendment rights. *Graham*, 796 F.3d at 338. The panel did find that the good-faith exception applied to save the evidence from suppression. *Id.* The panel held "that the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical [cell site location information] for an extended period of time." *Id.* at 344-45. Examining a person's historical cell site location data "can enable the government to trace the movements of the cell phone and its user across public and private spaces and thereby discover the private activities and personal habits of the user." *Id.* at

345. Cell-phone users enjoy an objectively reasonable expectation of privacy in this location information. *Id.* To inspect this information, the government must obtain a warrant, unless an established exception to the warrant requirement exists. *Id.* The panel emphasized that inspection of long-term cell-phone location data invades a significant privacy interest because people carry cell phones on their persons, so inspection of this data may reveal the locations of individuals. *Id.* at 347, 348-49.

The concurrence in *Graham* wrote separately to emphasize "the erosion of privacy in this era of rapid technological development." *Id.* at 377 (Thacker, J., concurring). Judge Thacker admonished that "[t]he tension between the right to privacy and emerging technology, particularly as it relates to cell phones, impacts all Americans." *Id.* In the technological culture in which we live, "[i]t is particularly disturbing that any one of us can be tracked from afar regardless of whether or not we are actively using our phones. Even just sitting at home alone, your phone may be relaying data, including your location data." *Id.* at 378 (Thacker, J., concurring). Judge Thacker favored erring on the side of caution when considering whether to erode privacy rights: "As the march of technological progress continues to advance upon our zone of privacy, each step forward should be met with considered judgment that errs on the side of protecting privacy and accounts for the practical realities of modern life." *Id.*

In *United States v. Graham*, No. 12-4659 (4th Cir. May 31, 2016) (decision en banc) (for publication), the Fourth Circuit, en banc, reversed the original *Graham* panel. The Circuit held "that the Government's acquisition of historical [cell site location information] from Defendants' cell phone provider did not violate the Fourth

Amendment." *Graham*, No. 12-4659, slip op. at 4-5. The Circuit based its decision on the idea that people voluntarily turn over their cell-phone location data to their cell-service providers: the third-party doctrine. *Id.* at 5. The Circuit pointed out that "[a]ll of our sister circuits to have considered the question have held, as we do today, that the government does not violate the Fourth Amendment when it obtains historical [cell site location information] from a service provider without a warrant." *Id.*

The Circuit cabined its conclusions by distinguishing government tracking (supposedly not at issue in the case) from obtaining documents from third-party phone-service providers (supposedly the crux issue). *Id.* at 9. According to the Circuit, one does not have a reasonable expectation of privacy in cell-service location data because one turns that data over to third-party service providers. *Id.* at 11-12. One assumes the risk that the service provider will turn this data over to police. *Id.* at 12.

Other circuits have concurred with this reasoning articulated in the en banc *Graham* decision. In *United States v. Davis*, 785 F.3d 498, 505 (11th Cir. 2015), the Eleventh Circuit, en banc, considered historical cell-tower location information. The court reached the same conclusion as the Fourth Circuit in the en banc *Graham* decision. *Davis*, 785 F.3d at 500, 511. The *Davis* court explicitly excepted from its reasoning and conclusions GPS tracking, real-time data, and prospective cell-tower location information. *Id.* at 505, 509 n.10 (distinguishing precedent related to real-time tracking). A panel from the Fifth Circuit upheld the Stored Communications

Act and the compelled production of a cell-phone service provider's subscriber's historical cell site information in In re *United States*, 724 F.3d 600, 602 (5th Cir. 2013). The Fifth Circuit panel considered the same scenarios and arguments the *Skinner*, *Graham*, and *Davis* courts considered. The government in that case agreed to exclude any data related to phone locations obtained when the phones were "in an idle state." *United States*, 724 F.3d at 602 n.1.

The *Graham* decisions addressed data giving the cell-phone towers used at the start and end of each call made. *Id.* at 28. As with the other cases, *Graham* did not address real-time tracking data. *Cf. Rios*, No. 14-2495/2592, slip op. at 26 (officers obtained all subscriber information and real-time precision location information for Mr. Rios's cellular phone for two days). While the nature of the data does not change the invasion of privacy in either case, as articulated in the original *Graham* opinion, the data in Mr. Rios's case constituted far more intimate information. The en banc Fourth Circuit even suggested it would have decided *Graham* differently had the case involved real-time surveillance: "But Jones involved government surveillance of an individual, not an individual's voluntary disclosure of information to a third party. And determining when government surveillance infringes on an individual's reasonable expectation of privacy requires a very different analysis." *Graham*, No. 12-4659, slip op. at 30. The Fourth Circuit emphasized that the defendants in the case "ignored . . . critical facts, attempting to apply the same constitutional requirements for location information acquired directly through GPS tracking by the government to historical [cell site location information] disclosed to and maintained

by a third party." *Id.* at 32. Mr. Rios's case parallels government surveillance and GPS tracking, not disclosure of information to a third party. *Cf. id.* at 63-64 (Wynn, J., dissenting in part and concurring in part) (considering the evolution of more sophisticated technology like "the advent of smartphone 'pinging,' whereby location data can be generated almost continuously," which authorities used in Mr. Rios case and which defies the dated reasoning in the en banc majority opinion in *Graham*).

One can thus distinguish *Graham*. One can also minimize the significance of the Sixth Circuit's approach in *Skinner*, which dismissed the concerns expressed by the original *Graham* panel and does not reflect the recent evolution of case law. The *Skinner* court considered government use of data from a "pay-as-you-go cell phone" to determine the phone's real-time location. *Skinner*, 690 F.3d at 774. By "tracking the cell phone, DEA agents located [the defendant] and his son at a rest stop near Abilene, Texas, with a motorhome filled with over 1,100 pounds of marijuana." *Id.* In the face of the defendant's challenge to use of the cellular-phone location data, the court found that the defendant had not had "a reasonable expectation of privacy in the data emanating from his cell phone that showed its location." *Id.* at 775. The *Skinner* opinion, however, came out in 2012, the same year this Honorable Court decided *United States v. Jones*, 132 S. Ct. 945 (2012). While the opinion refers to *Jones*, it does not account fully for that decision. *See Skinner*, 690 F.3d at 779-80. The *Skinner* court attempted to distinguish *Jones* by cabining the latter decision to the physical-intrusion aspect of the GPS tracker in that case: "The majority in *Jones*

based its decision on the fact that the police had to 'physically occup[y] private property for the purpose of obtaining information.'" *Id.* at 780.

This Sixth Circuit's conclusions leave out key aspects of the *Jones* reasoning. This Court came to its conclusions in *Jones* by considering the accompanying trespass. *Jones*, 132 S. Ct. at 954. But this Court explicitly considered the possibility that using electronic means to effect large-scale surveillance could intrude on Fourth Amendment rights, though the case did not present the opportunity to consider the issue: "It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question." *Id.* This Court recognized that it "may have to grapple with these 'vexing problems' in some future case where a classic trespassory search is not involved and resort must be had to *Katz v. United States*, 389 U.S. 347 (1967), analysis," but the circumstances in *Jones* did not provide a "reason for rushing forward to resolve them." *Id.*

Essentially, this Court left the door open for further analysis in the future. With technology evolving quickly, circumstances now require further analysis, and the Sixth Circuit simply ignored the question in *Skinner*. In *Skinner*, the Sixth Circuit looked to this Court's older decision in *United States v. Knotts*, 460 U.S. 276 (1983). *See Skinner*, 690 F.3d at 778-79. The *Knotts* decision, however, "does not foreclose the conclusion that GPS monitoring, in the absence of a physical intrusion, is a Fourth Amendment search." *Jones*, 132 S. Ct. at 956 n. (Sotomayor, J., concurring). The *Knotts* opinion reserved the question of whether different

constitutional principles may apply to invasive law-enforcement practices such as GPS tracking. *Id.* at 952 n.6 (Scalia, J., delivering majority opinion), 956 n. (Sotomayor, J., concurring). Even the en banc *Graham* decision recognized the limits of opinions dealing with technology current at the time: "We note that this case deals with only 2010- and 2011-era historical [cell site location information], generated by texts and phone calls made and received by a cell phone." *Graham*, No. 12-4659, slip op. at 22 n.11. This acknowledgment implies that jurisprudence on the issue may evolve with technology.

In *Jones*, Justices Sotomayor and Alito agreed that longer-term GPS monitoring presents Fourth Amendment concerns, regardless of whether physical trespass occurs. *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring), 964 (Alito, J., concurring). As Justice Sotomayor has written, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* at 955 (Sotomayor, J., concurring). Government surveillance "chills associational and expressive freedoms." *Id.* at 956 (Sotomayor, J., concurring). Unrestrained government power to assemble data that reveal private aspects of identity could be used abusively. *Id.* Justice Sotomayor said in *Jones* that she "would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." *Id.* She said she would "not regard

as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques." *Id.*

When this Court decided *Jones*, "Congress and most States ha[d] not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes." *Jones*, 132 S. Ct. at 964 (Alito, J., concurring). The legal landscape has changed in the last few years. For example, in 2015, New Hampshire adopted a warrant requirement "to obtain electronic device location information" in House Bill 468-FN. Maine enacted a similar rule in 2013. *See* 16 M.R.S. § 642. Maine's default rule requires government authorities to provide notice to the individual whose information the government has obtained with a warrant. 16 M.R.S. § 643. Minnesota enacted its warrant requirement for location data in 2014. M.S. § 626A.42(2). Montana enacted its warrant requirement for the data in 2013 in House Bill 0603. House Bill 128 led to Utah's warrant requirement in 2014; like Maine, Utah has a notice requirement. 2015's Senate Bill 178 gave California its warrant requirement. As of 2014, under Public Act 098-1104, Illinois requires a court order based on probable cause to obtain current or future location information. House Enrolled Act 1009, of 2014, created a similar requirement for real-time tracking data in Indiana.

This proliferation of legislation addressing these issues reflects a sense of concern regarding cellular phones, tracking technology, and privacy concerns. This legislation reflects the views of the citizenry and warrants consideration. *See Riley v. California*, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring). Even the dissent in

Graham recognized the value of turning to legislators for solutions, *see Graham*, 796 F.3d at 388 (Motz, J., dissenting in part and concurring in part), as did the en banc Fourth Circuit. *Graham*, No. 12-4659, slip op. at 34 ("The legislative branch is far better positioned to respond to changes in technology than are the courts."); *see also Kyllo*, 533 U.S. at 51 (Stevens, J., dissenting) ("It would be far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints."); *Davis*, 785 F.3d at 512 (suggesting Congress and state legislatures, rather than courts, should grapple with the issues).

The citizenry has expressed its views in surveys and polls. According to a Pew Research Center survey, 82% of adults believe that details of their physical location, revealed by cellular-phone GPS tracking, are at least "somewhat sensitive." *Graham*, 796 F.3d at 348 n.5. Half of the adults surveyed considered the information "very sensitive." *Id.* A number of state and federal district courts have recognized a reasonable expectation of privacy in this location information. *Id.* at 348-49. According to one poll, almost three-quarters of smart-phone users report that they are within five feet of their phones most of the time, and 12% of these users admit that they even use their phones in the shower. *Riley*, 134 S. Ct. at 2490.

The concurrence in *Skinner* recognized these privacy concerns. The concurring judge did not agree that the defendant "lacked a reasonable expectation of privacy in the GPS data emitted from his cellular phone." *Skinner*, 690 F.3d at 784 (Donald, J., concurring). In Judge Donald's view, "acquisition of this information constitutes a

search within the meaning of the Fourth Amendment, and, consequently, the officers were required to either obtain a warrant supported by probable cause or establish the applicability of an exception to the warrant requirement." *Id.* She concurred only "because the officers had probable cause to effect the search in th[e] case and because the purposes of the exclusionary rule would not be served by suppression"; she believed "some extension of the good faith exception" applied. *Id.*

In *Riley v. California*, 134 S. Ct. 2473 (2014), this Honorable Court underscored the privacy interests people have in their cellular-phone data. In *Riley*, this Court considered whether police may search a person's cellular phone, without a warrant, incident to arrest. *Riley*, 134 S. Ct. at 2480. In framing the issue, this Court stated: "These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which 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." *Id.* at 2485. Smart phones were "unheard of ten years ago," but "a significant majority of American adults now own such phones." *Id.* These "phones are based on technology nearly inconceivable just a few decades ago," when earlier precedent shaped law in this area. *Id.*

This Court held that "officers must generally secure a warrant before conducting such a search" of an arrestee's cellular phone. *Id.* at 2485. In coming to this decision, this Court considered the unique nature of cellular-phone data, both in quantity and quality. *Id.* at 2490. The Court considered that "[d]ata on a cell phone can also reveal where a person has been." *Id.* Historic location information

constitutes a standard feature on many smart phones, and a reviewer of this data could reconstruct the phone user's "specific movements down to the minute, not only around town but also within a particular building." *Id.* The Court cited Justice Sotomayor's concurrence in *Jones* to underscore its findings in this regard. *Id.*

The *Riley* holding continues the trajectory of precedent like *Kyllo v. United States*, 533 U.S. 27 (2001). In *Kyllo*, this Court reminded authorities that police technology should not erode privacy guarantees secured by the Fourth Amendment. *Kyllo*, 533 U.S. at 34. Under *Kyllo*, "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' . . . constitutes a search — at least where (as here) the technology in question is not in general public use." *Id.* (citation omitted). This stance "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Id.* Real-time phone tracking enhances police capabilities in the same way the thermal imager in *Kyllo* did.

Clear rules regarding the need to obtain a warrant to get cell-phone location data make police work far more manageable. In *Riley*, this Court emphasized a preference for categorical rules and clear guidance for law enforcement. *Riley*, 134 S. Ct. at 2491-92. In a similar vein, commentators have pointed out that, if new technologies permit government access to information that it previously could not access without a warrant, using techniques not regulated under preexisting rules that predate that technology will effectively erode Fourth Amendment protections.

See Graham, 796 F.3d at 360 (citing law-review article). Clear rules addressing new technologies thus benefit law enforcement and constitutional protections.

This tracking data does not involve information a user voluntarily discloses to a third party, namely the cellular-service provider. As the dissent in the en banc *Graham* decision pointed out, cellular site location information "is also generated when a phone simply receives a call, even if the user does not answer." *Graham*, No. 12-4659, slip op. at 57 (Wynn, J., dissenting in part and concurring in part). In such circumstances, the location information "is automatically generated by the service provider's network, without any user participation at all." *Id.*

With real-time tracking data, disclosure of the information does not require even an incoming call. GPS technology in phones simply works to provide a phone's location at any given time. The *Davis* court's exemption of GPS and real-time tracking from its decision is telling. *See Davis*, 785 F.3d at 503, 505, 513-15 (explicitly distinguishing the real-time tracking in *Jones*), 517. One can download various phone-tracking "apps" to track one's phone if it gets lost or stolen. Certain Google programs come installed on Android phones by default and allow phone tracking. A user does not have to do anything to enable them. One need only connect the device to one's Google account before using the program, a connection that need not be done for any reason related to location tracking.

Obviously, someone possessing a phone might not even want to disclose the location data to a service provider. For example, a person who steals a phone would not voluntarily disclose the location information for the phone. The phone, however,

can emit that information without the phone user's consent or action. With today's technology, one cannot say that a phone user voluntarily discloses location information. The en banc *Graham* court thus failed to account for the realities of today's technology when it relied on the third-party doctrine to find no Fourth Amendment violation when police obtained the cellular location data without a warrant. *Graham*, No. 12-4659, slip op. at 5; *see also id.* at 54 (Wynn, J., dissenting in part and concurring in part) (this location information "is not 'voluntarily conveyed' by a cell phone user, and therefore is not subject to the third-party doctrine.").

Concurring in *Davis*, Judge Jordan expressed concern regarding this failure to account for developing technology in general and the development of real-time tracking technology specifically. *Davis*, 785 F.3d at 521 (Jordan, J., concurring). Judge Jordan quickly distinguished the *Davis* holding from "passive tracking based on [the defendant's] mere possession of a cellphone" and did not see the *Davis* "opinion as addressing such a situation." *Id.* at 524 (Jordan, J., concurring). The Fifth Circuit panel in *United States* based its decision, in part, on service providers' privacy policies "expressly stat[ing] that a provider uses a subscriber's location information to route his cell phone calls." *United States*, 724 F.3d at 613. The court relied on an idea of active use of the phone, as opposed to passive "pinging" of a phone to obtain location data. The panel carefully exempted from its conclusions "location information for the duration of the calls" and information obtained from an "idle" phone, as well as other data. *Id.* at 615.

This Court has said that it expects "that the gulf between physical practicability and digital capacity will only continue to widen in the future." *Riley*, 134 S. Ct. at 2489. Technology continues to increase at an unprecedented rate. The law can hardly keep up with this increase, but it must try to. This Court underscored this need in *Kyllo*: "While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 36. At the same time, this Court has recognized the need to remain true to constitutional rights and protections. Our Founding Fathers "did not fight a revolution to gain the right to government agency protocols." *Riley*, 134 S. Ct. at 2491. "Privacy comes at a cost." *Id.* at 2493. Warrants constitute an important "working part" of the "machinery of government." *Id.* They are not "merely" inconveniences to be balanced against claims of police efficiency. *Id.* And the same technological advances giving rise to the privacy concerns at issue have "made the process of obtaining a warrant itself more efficient." *Id.* The Constitution demands a warrant to obtain cellular-phone location information. Mr. Rios asks this Court to grant his Petition for a Writ of Certiorari and clarify this requirement.

THE COURT SHOULD ALSO GRANT CERTIORARI IN ORDER TO RESOLVE THE CIRCUIT SPLIT OVER WHETHER COURTS MUST INSTRUCT JURIES ON THE REQUIRED UNANIMITY REGARDING THE SPECIFIC CATEGORIES OF ACTS IN RICO CONSPIRACY CASES. THIS CASE ALSO GIVES THE COURT THE OPPORTUNITY TO CLARIFY THAT THE COURT'S CONCLUSIONS IN *RICHARDSON V. UNITED STATES* APPLY TO RICO CASES.

A circuit split exists on the issue of unanimity instructions in RICO conspiracy cases. *See* R. S. Ct. 10(a). In a related vein, the federal courts of appeals have failed

to follow the Court's reasoning in *Richardson v. United States*, 526 U.S. 813 (1999), in instructing juries in RICO cases under 18 U.S.C. § 1962. Mr. Rios asks the Court to grant certiorari in this case to clarify the unanimity requirements.

On appeal, Mr. Rios asked the Sixth Circuit panel to consider the district court's refusal to charge the jury with a unanimity instruction. *Rios*, No. 14-2495, slip op. at 30. The trial court had denied Mr. Rios's request for a unanimity instruction. *Id.* Mr. Rios had requested such an instruction on the specific acts or categories for the RICO conspiracy charge. *Id.* at 34. The Sixth Circuit upheld the denial of the unanimity instruction. *Id.*

Generally, federal appellate courts, including the Sixth Circuit, review jury instructions as a whole to determine whether the instructions adequately inform the jury of the relevant considerations and provide a legal basis for aiding the jury in reaching its decision. *See United States v. Damra*, 621 F.3d 474, 498 (6th Cir. 2010). On the issue of unanimity regarding the specific categories of acts involved in a RICO conspiracy, however, the circuits have split. Multiple federal courts of appeals have agreed that "for a RICO conspiracy charge the jury need only be unanimous as to the types of racketeering acts that the defendants agreed to commit." *United States v. Cornell*, 780 F.3d 616, 625 (4th Cir. 2015) (discussing conclusion and citing cases). The Seventh Circuit, however, has concluded that "[s]pecific unanimity instructions," as distinct from a general instruction that the jury must unanimously find a defendant guilty beyond a reasonable doubt, "are necessary only when there is significant risk that the jury would return a guilty verdict even if there were less than

unanimity with regard to one or more elements of the crime." *United States v. Schiro*, 679 F.3d 521, 533 (7th Cir. 2012). In *Schiro*, the Seventh Circuit recognized that its decision split from other circuits. *See id.* at 533-34. The *Schiro* court expressed "doubts" that a district court must instruct a jury on unanimous agreement regarding the types of racketeering activity the conspirators agreed to commit. *Id.* To the *Schiro* court, "it ought to be enough that the jury was unanimous that you agreed that you would commit whatever crimes within th[e] range you were assigned." *Id.* at 534. The "scope" of the conspiracy determines the "type" of racketeering activity. *Id.*

The Sixth Circuit looked to *Schiro* in Mr. Rios's case, but ultimately punted on the issue. *Rios*, No. 14-2495, slip op. at 34-35. The Sixth Circuit panel concluded that the jury's finding on cocaine quantity obviated a need for a unanimity instruction. *Id.* This conclusion, however, fails to account for the requirement of at least two acts of racketeering activity to constitute a "pattern" of racketeering activity. *See* 18 U.S.C. § 1961(5).

Augmented unanimity instructions provide important guidance to juries when evidence is "exceptionally complex" or alternative specifications contradict or only marginally relate to each other, or the indictment and proofs at trial vary, or a tangible indication of jury confusion exists (for example, the jury has asked questions or the trial court has given regular or supplementary instructions that create a significant risk of non-unanimity). *Damra*, 621 F.3d at 504-05. The Committee Commentary to the Sixth Circuit Pattern Jury Instructions recognizes the intrinsic

link between unanimity and reasonable doubt. In the commentary to Sixth Circuit Pattern Criminal Instruction 8.03 (unanimous verdict), the Committee has written, "Given the importance of the reasonable doubt requirement, the Committee believes that the jurors should be specifically instructed on the relationship between proof beyond a reasonable doubt and the unanimity requirement."

As with many RICO cases, the factual and legal allegations in this case were extensive. The indictment in this case spanned 87 pages, alleging 28 counts and 129 overt acts. (R. 480: Fourth Superseding Indictment, Page ID #2,138-2,224.) The case presented extremely complex issues, covered a span of almost twenty years (including events from the 1990's), and involved numerous acts of which Mr. Rios had no awareness and in which he did not participate. (*See,e.g.*, Appellate R. 17, Page ID #60.) The government's proofs at trial varied from the indictment, including presentation of evidence related to alleged conduct committed by Mr. Rios in the 1990's, which the indictment did not mention. (Appellate R. 17, Page ID #60.)

The case provides an excellent example of the need for a unanimity instruction. This Court has said that juries must agree unanimously about the specific violations that make up a continuing criminal enterprise. In *Richardson v. United States*, 526 U.S. 813, 815 (1999), the Court concluded that "a jury has to agree unanimously about which specific violations make the 'continuing series of violations' to sustain a conviction for engaging in a continuing criminal enterprise," a violation of 21 U.S.C. § 848(a). A jury must agree unanimously "not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of

the individual 'violations' necessary to make up that 'continuing series.'" *Richardson*, 526 U.S. at 815. The law requires unanimity regarding each individual violation. *Id.* at 816.

In considering the issue, this Court has said that "[t]he cases are not federal but state, where this Court has not held that the Constitution imposes a jury unanimity requirement." *Id.* at 821. And these exceptions represent just that: exceptions. *Id.* These exceptions "do not represent a general tradition or a rule." *Id.* at 821-22. A factfinder must find the underlying offenses. *Id.* at 822. The jury in Mr. Rios's case acquitted Mr. Rios of the marijuana-distribution conspiracy and the special sentencing allegations regarding assault with the intent to commit murder. *Rios*, No. 14-2495, slip op. at 3. Given these acquittals, the jury did not perceive Mr. Rios as responsible for all of the conduct the government argued occurred. Had the jury been required to reach a clear unanimous decision on the particular racketeering acts or the categories of acts involved in the conspiracy, it may have acquitted Mr. Rios of other conduct. This case gives this Court the opportunity to resolve the circuit split on this issue and clarify the application of the *Richardson* holding to RICO cases.

THE COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE THE CONFLICTS OVER THE DEFINITION OF REASONABLE DOUBT AND THE STANDARD OF PROOF NECESSARY TO SUSTAIN A CRIMINAL CONVICTION.

Courts have delivered conflicting opinions on the issue of reasonable-doubt jury instructions and the definition of reasonable doubt. Conflicts exists between federal and state courts, and involve important questions of federal law that this Court should settle. *See* R. S. Ct. 10(a), (b), & (c). Mr. Rios's case provides an excellent

example of the consequences of such conflict. In his case, the District Court varied from the pattern instruction on reasonable doubt. *Rios*, No. 14-2495, slip op. at 31. The Sixth Circuit considered Mr. Rios's arguments and emphasized its repeated approval of the pattern instruction on reasonable doubt and admonished that varying from the pattern instruction tends "only to muddy the waters." *Id.* at 33. Ultimately, though, the Sixth Circuit panel allowed the modification of the reasonable-doubt instruction; it did, however, stress the potential for prejudice to the defendant and the potential for creating unnecessary appeals. *Id.* at 33.

Courts generally support pattern jury instructions. *Id.*; *see also* Committee Commentary 1.03 to Sixth Circuit Pattern Criminal Jury Instructions. The Sixth Circuit Committee has recognized this strong favoring of jury instructions on the presumption of innocence and proof beyond a reasonable doubt. Committee Commentary 1.03 to Sixth Circuit Pattern Criminal Jury Instructions. The Committee has gone so far as to intimate such instructions are part of a person's fundamental rights. *Id.* Of course, the Committee has acknowledged that this Honorable Court has not mandated any specific language for these instructions, but it seems logical and in the best interests of justice to support a pattern instruction on the reasonable-doubt standard "to reduce the risk of an erroneous conviction." *Id.*

This Court has long suggested that attempts to explain the concept of reasonable doubt are not likely to clarify things for a jury. *See Holland v. United States*, 348 U.S. 121, 140 (1954). While various approaches to the issue may exist, and while this Court has allowed varying definitions of reasonable doubt, the crux of

the matter lies in the fact that the federal district and appellate courts have pattern jury instructions on the issue and no need exists warranting various modifications of the reasonable-doubt standard.

The cases the Sixth Circuit panel cited to support its finding that the district court did not err in delivering the reasonable-doubt instruction it chose in Mr. Rios's case all came out more than a half century ago. *See Rios*, No. 14-2495, slip op. at 32-33. Far more recent cases exist addressing some of the issues involved in modifying a reasonable-doubt instruction. *See, e.g.*, *Baker v. Corcoran*, 220 F.3d 276, 292 (4th Cir. 2000). These cases, however, do not simply condone reasonable-doubt instructions like the one given in Mr. Rios's case. In *Baker*, the Fourth Circuit stressed criticism of "willing-to-act" instructions. *Baker*, 220 F.3d at 292-93. While the issue of willing-to-act language stands distinct from the form of the lowering of the reasonable-doubt standard in Mr. Rios's case, the overall conclusion shines the same: courts have pattern instructions that have been formulated, tested, and reviewed; no need to modify these instructions on such standard concepts as reasonable doubt exist.

As the Sixth Circuit pointed out in upholding use of the pattern instruction on deliberate ignorance in *United States v. Geisen*, 612 F.3d 471, 486 (6th Cir. 2010), "[i]n giving the instruction to the jury, the district court was very careful to use Pattern Jury Instruction 2.09. The court also gave a limiting instruction. We have held that Pattern Jury Instruction 2.09 is an accurate statement of the law." Modifying the standard instructions without reason creates unnecessary jurisprudential conflict,

subjects defendants to unjustified disparities in standards, and uses judicial resources unnecessarily. And ultimately, if the instruction is modified as it was in Mr. Rios's case, that modification lowers the standard of proof, tainting trials and prejudicing defendants, and even implicating due-process concerns. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (due process mandates the beyond-a-reasonable-doubt standard).

In *Victor*, this Court traced the development of "pattern" formulations of the reasonable-doubt standard and jury instructions. *Id.* at 8-9. The Court cited Chief Justice Shaw's definition of the standard for the Massachusetts's Supreme Judicial Court in 1850. *Id.* at 8. The Court then went on to trace the California Supreme Court's adoption of that standard in the mid-to-late nineteenth century, and the California Supreme Court's strong admonition against using any other formulation of the standard. *Id.* at 9. The California legislature adopted the standard in 1927. *Id.* At the urging of a California Supreme Court Justice, Justice Mosk, the California Assembly and Senate reviewed the instruction in the mid-1980s, ultimately rejecting modification. *Id.*

The Court then traced the development of that standard's words and phrases, noting the evolution of language over the nineteenth and twentieth centuries. *Id.* at 13-14. It expressed some reservation over use of the phrase "moral certainty," but ultimately upheld the instruction. *Id.* at 17. The Court then made a similar review of the Nebraska reasonable-doubt instruction, which a Nebraska court rule dictated should be used for trials. *Id.* at 19. Ultimately, the Court upheld the challenged

model reasonable-doubt instruction. *Id.* at 21-22. The Court's tracking of the development of these model/pattern instructions demonstrates the time-tested nature of such instructions and the jurisprudential thought that goes into them. Of course, as this Court pointed out, such instructions may carry flaws, but developing and using pattern instructions obviates unnecessary litigation and error. Pattern instructions may not fit every circumstance, but without a clear reason to do so, a trial court should not vary from a pattern reasonable-doubt standard, especially if the proposed variance may be construed to lower the standard of proof.

In this case, as an example, the jury acquitted Mr. Rios of the marijuana-distribution conspiracy and the special sentencing allegations regarding assault with the intent to commit murder. *Rios*, No. 14-2495, slip op. at 3. Given these acquittals, the jury did not see Mr. Rios as responsible for all of the conduct the government argued occurred. Had the jury been given the pattern reasonable-doubt instruction, it may have acquitted Mr. Rios of other conduct. Because "a reasonable juror could have interpreted the [modified reasonable-doubt] instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause," this case exemplifies the problems with such modifications and provides this Court with an opportunity to address the wide range of articulations of the reasonable-doubt standard of proof. *See Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam).

CONCLUSION

For these reasons, Mr. Rios asks this Honorable Court to grant this Petition for a Writ of Certiorari and reverse the Judgment of the Sixth Circuit Court of Appeals.

Dated: December 21, 2016

Respectfully Submitted,
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