No. 17-950

In The
Morris Tyler Moot Court of Appeals at Yale

ROSS WILLIAM ULBRICHT

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF FOR THE RESPONDENT

SAMIR H. DOSHI
HELEN E. WHITE
127 Wall Street
New Haven, CT 06511
(203) 432-4995

Counsel for Respondent

QUESTIONS PRESENTED

1) Petitioner Ross Ulbricht created an online marketplace that facilitated the sale of large quantities of narcotics. To operate that website, Petitioner repeatedly shared what is known as "internet routing information" with multiple third parties.

   The first question presented is whether the Government's use of a pen register to collect internet routing information—a type of information that ordinary citizens regularly disclose to others—constitutes a search for purposes of the Fourth Amendment?

2) The Sixth Amendment permits sentencing judges to find facts to guide their discretion in selecting a sentence within the range authorized by the jury verdict. Appellate courts review the resulting sentences under a highly deferential reasonableness standard. A jury convicted Petitioner of seven offenses, at least one of which carried a maximum penalty of life in prison.

   The second question presented is whether the district court's finding of facts while deciding to impose the maximum authorized sentence violated the Sixth Amendment?

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The court of appeals' opinion is reported at 858 F.3d 71. The district court opinion denying Petitioner's suppression motion is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on May 31, 2017. A petition for rehearing was denied on August 30, 2017. J.A. 3a. The petition for a writ of certiorari was filed on December 22, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Given the numerous constitutional and statutory provisions relevant to this case, an appendix reproducing each has been affixed.

STATEMENT OF FACTS

A. The Silk Road

Between 2011 and 2013, thousands of individuals across the word used a website named Silk Road to buy and sell "drugs, false identification documents, and computer hacking software." J.A. 4a-5a. In just two years' time, the Silk Road facilitated the sale of $180 million worth of illegal narcotics. J.A. 6a. Ross Ulbricht, the website's creator and operator, received a commission on every single one of these transactions. J.A. 6a.

In February 2015, a jury convicted Ross Ulbricht on seven counts stemming from his operation of Silk Road under the alias "Dread Pirate Roberts." J.A. 4a. The website, once a "massive anonymous criminal marketplace," was permanently shuttered in October 2013 after Ulbricht's arrest.

B. Investigation

The Government identified Ulbricht as the likely operator of Silk Road in September of 2013. J.A. 7a. Pursuant to a court order, the government received permission to request

Ulbricht's internet service provider to install five pen registers and five trap and trace devices on Ulbricht's wireless router. A pen register captures "dialing, routing, addressing, or signaling information" that a particular electronic device, like a phone or laptop, transmits outwards. A trap and trace device performs a similar function, except that it detects what was sent to, instead of from, the device in question. Compare 18 U.S.C. § 3127(3) (defining pen register) with id. § 3127(4) (defining trap and trace device). Crucially, neither the pen register nor the trap and trace device are able to reveal "the contents of any communication." Id. §§ 3127(3)-(4). Instead, the pen register and trap and trace device work in conjunction (as a "pen/trap device") to "identify the source and destination" of a particular electronic communication.

Once installed, a pen/trap device may record: "IP addresses, along with the dates, times, durations, ports of transmissions, and any Transmission Control Protocol (TCP) connection data associated with any electronic communication sent to or from" a particular device. J.A. 30a-31a. Together, these pieces of information can reveal where a particular electronic communication is going, and from where it came. An individual's Internet Protocol ("IP") address—a unique identifying number assigned to every device that connects to the Internet—is particularly helpful in this pursuit.

When one device wants to connect to a second device on the Internet, each device must share its IP address with the other so that both devices know from where the requested data will be sent, and to where it should be delivered. To facilitate this process, an internet service provider ("ISP") acts as an intermediary, collecting each device's IP address in order to broker a successful connection. Thus, just as a phone company matches a caller's phone number with that of that call's recipient so that each may talk to the other, an internet company matches two IP addresses so that one device may receive electronic information from the second. This ensures

that users are ultimately directed to the right websites, and that websites are directed only to those users who chose to see them. The Internet cannot function unless internet routing information like IP addresses are consistently broadcast.

C. The Verdict

After hearing evidence about the full scope of Silk Road's operations, including five murders Ulbricht commissioned to keep the site running, the jury returned a guilty verdict on all seven counts in the Indictment. J.A. 23a. This included a specific finding beyond a reasonable doubt that the Defendant had "distributed or aided and abetted the distribution [] by means of the internet" more than a kilogram of heroin, more than a kilogram of cocaine, more ten grams of LSD, and more than 500 grams of methamphetamine. Jury Verdict, *United States v. Ulbricht*, No. 1:14-cr-00068 (Feb. 5, 2015), ECF. No. 183. Each of these amounts reflect the statutorily enumerated quantity for the most serious grade of offense for distribution of controlled substances. 21 U.S.C. § 841(b)(1)(A). They each carry a statutory penalty of between ten years and life imprisonment. *Id.*

D. Sentencing

The Pre-Sentence Investigation Report ("PSR") prepared by the United States Probation Office described five murders that Ulbricht allegedly commissioned. J.A. 23a. In addition, it discussed six drug-related deaths that the government alleged were connected to drug use facilitated by Silk Road. Though the evidence supporting this connection varied, in one case, a Silk Road user was found dead of a heroin overdose next to a needle, a bag of heroin, and a "torn-open delivery package." J.A. 24a. Up on his web browser was a Silk Road chat with a vendor "describ[ing] the package of heroin that was due to arrive that day, including a tracking number that matched the open package." *Id.* The PSR described four other Silk Road customers

who died of drug-related injuries shortly after purchasing or using drugs purchased on the website. *Id.*

Ulbricht disagreed that these deaths could be connected to Silk Road. *Id.* He further argued that Silk Road made drug use safer by employing a physician that messaged customers with "guidance about illegal drug dosage and administration." *Id.* He also contended that Silk Road facilitated better quality control and that, by enabling anonymous use, Silk Road minimized the stigma from drug addiction, encouraging "more responsible forms of recreational drug use." *Id.* at 25. The sentencing judge rejected this interpretation, finding that Silk Road enabled, rather than reduced the harms of illegal drug use. J.A. 28a.

During the sentencing hearing, the Court calculated the offense level based on the Guidelines to be 50, which is then reduced to 43, the maximum level contemplated by the guidelines. J.A. 26a. The district court went on to explain that it was not imposing a guidelines sentence. S.T. 93:18-20. Instead, it explained each of the 3553(a) factors and had considered every piece of evidence, including testimony from experts proffered by the Defendant and letters written by his friends and family. S.T. 63-96. The court also explained the societal harms caused by illegal drug use and the powerful potential general deterrent effect of this case because of the publicity and the fact that it was the first of its kind internet drug sales platform. *Id.* After reviewing all of these factors, the court sentenced Ulbricht to life imprisonment. S.T. 94:23-24.

SUMMARY OF ARGUMENT

1. Ulbricht Has No Claim to Either a Fourth Amendment Right or Remedy.

First, Since *Smith*, the Court has recognized that there can exist no objectively reasonable expectation of privacy in information that is no longer private. As a consequence, when the Government obtains non-content information that one individual provides to another, such as a

phone number or a bank record, the strictures of the Fourth Amendment's warrant requirement do not apply. Standing alone, *Smith*'s rule—colloquially referred to as the "third-party doctrine"—resolves this case. Because Petitioner voluntarily shared his internet routing information with multiple third parties, the Government was entitled as a matter of law to acquire such information without a warrant. *See* 18 U.S.C. § 3122(b)(2).

The Court's more recent Fourth Amendment jurisprudence, including *Riley*, *Jones*, and *Kyllo*, is not to the contrary. Each of those cases expressly denied that they were in anyway foreshortening *Smith*'s applicability. Similarly, the pending *Carpenter* case does not implicate the issues at stake here. Internet routing information reveals no more information about an individual than did the phone numbers in *Smith*, and certainly much less information than the geolocation technology being considered in *Carpenter*.

Second, this case does not present an opportunity to upend the third-party doctrine which, for forty years, has been a staple of the Court's Fourth Amendment jurisprudence. The doctrine helps to preserve the balance between the Fourth Amendment's commitments to privacy and security, even in light of the technological change. The communication of substantive content falls outside the doctrine's ambit, thereby protecting much of what individuals say. Meanwhile, the routing information to which the doctrine applies is often critical in allowing the Government identify the source and destination of illicit transactions, thereby providing "valuable incriminating information about dangerous criminals." *Riley v. California*, 134 S. Ct. 2473, 2493 (2014).

Alongside the third-party doctrine's ability to navigate the pressures of modern technology, the weighty principle of stare decisis should encourage this Court to keep in place a rule that has long served it well. Overturning a body of law that has proved durable and

adaptable is a step that this Court has never taken lightly. The third-party doctrine provides notice to citizens and criminals alike about the precise types of information that the Government can and cannot obtain. For that very reason, the doctrine should continue to occupy the vital role it has thus far maintained in this Court's Fourth Amendment jurisprudence.

Third, even if this Court holds that the Government must obtain a warrant before acquiring internet routing information, that information should not be excluded for purposes of setting aside Ulbricht's conviction. The Court has made clear that when law enforcement officials conduct a search in reliance on a subsequently invalidated congressional statute, the exclusionary rule is inapplicable so long as the Government did not deliberately, recklessly, or in a grossly negligent manner intrude on an individual's Fourth Amendment rights. Here, Congress expressly permitted the use of pen/trap devices to collect internet routing information *See* 18 U.S.C. § 3122. Neither party contests that the Government's use of pen/trap devices here carefully accorded to statutory text.

1. Ulbricht's Sentencing Was Consistent with the Sixth Amendment

First, Ulbricht's sentence is the product of a longstanding feature of sentencing law that permits judges to find facts to guide their discretion when selecting a sentence within a range authorized by a jury. The jury found Ulbricht guilty of crimes carrying a maximum penalty of life in prison. In striking down and making advisory the Federal Sentencing Guidelines in *Booker*, the Court permitted sentencing judges to impose any sentence within the statutory range, using the now-advisory Guidelines and Section 3553(a) factors as a guide. Since the judge was not forbidden by law from imposing a life sentence absent the showing of certain facts, the facts found did not trigger Sixth Amendment scrutiny.

Second, reasonableness review does not forbid judges from imposing any sentence within the statutory range absent a predicate finding of fact. Instead, it polices the use of sentencing judge's discretion by ensuring he or she provides the defendant with rational reasons. This malleable review does not limit the sentencing judge's *authority* to impose a certain sentence. Even so-called substantive reasonableness review functions as a procedural backstop, limiting the means why which judges may impose the full statutory range of sentences. Finally, since no one fact can make a sentence reasonable, then *all* judicial fact finding would be barred – a position this Court has consistently rejected in all of *Apprendi*'s progeny.

Third, the original understanding and animating principles of the Sixth Amendment counsel in favor of judicial fact finding to support the reasonableness of the sentence. The broad judicial sentencing discretion found in the first federal criminal law—passed in 1790—proves the Framers intended sentencing to be based, explicitly or implicitly, on judicial fact finding and discretion. Moreover, the sort of bait-and-switch used by prosecutors in *Blakely*, *Booker*, and *Apprendi*, simply isn't possible in the current federal scheme. Additionally, this indeterminacy prevents legislatures being able to game the system and reduce the jury role by creating broad statutory penalties and reserving critical facts for the sentencing phase.

Fourth, a complete prohibition on judicial fact finding is inconsistent with *Booker* and would lead to unjust and paradoxical results. Rather than preserving the jury role, such a rule would simply shift discretion from judges to prosecutors, which has been shown to increase the sorts of "unwarranted sentencing disparities." Judges would also either be required to turn a blind eye to relevant behavior at or after trial *or* let those facts guide their discretion but be constitutionally forbidden from disclosing that. The rule puts defendants in the impossible position of denying culpability for a crime while being forced to dispute the details of

commission. Lastly, the rule would paradoxically permit sentencing judges to rely on facts found by the Sentencing Commission but not the realities of the defendant in front of him.

ARGUMENT

I. THE GOVERNMENT'S ACQUISITION OF PETITIONER'S INTERNET ROUTING INFORMATION WAS NOT A FOURTH AMENDMENT SEARCH

This Court has long held that the "touchstone of Fourth Amendment analysis" is whether a government action intrudes upon an individual's "reasonable expectation of privacy," and is thus a "search" for which a warrant must generally be obtained. *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 346, 361 (1967) (Harlan, J., concurring). The Court has furthermore explained that an individual's privacy expectations are reasonable if, and only if, that individual expresses "a subjective expectation of privacy," *id.*, that society is prepared to accept as "objectively reasonable." *Florida v. Jardines,* 569 U.S. 1, 10 (2013). A privacy interest in certain information is no longer reasonable when, for example, an individual willingly decides to no longer keep that information private. *See Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."). This is true even if the individual's disclosures flow to just one entity (like a telephone company), so long as the information in question does not concern the substantive "content[] of [the] communication[]." *Id.* at 741.

The opinions of the district court and appellate court below each applied the foregoing precedents to make quick work of Ulbricht's Fourth Amendment challenge. In rejecting Ulbricht's initial suppression motion, Judge Forrest concluded that "there is truly no room for debate [] that the type of information gathered by the pen/trap orders at issue here was entirely appropriate." J.A. 41a. The court of appeals unanimously affirmed the district court's

determination, finding that the Government's pen/trap orders were "constitutionally indistinguishable" from those that this Court upheld in *Smith*. J.A. 34a.

The Second Circuit's disposition was far from an outlier. Every single circuit court to have considered this issue—that is, the Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits—has rejected challenges indistinguishable to the one Petitioner raises here. *See* J.A. 34a (collecting cases); *United States v. Caira*, 833 F.3d 803, 806-809 (7th Cir. 2016), *petition for cert. pending*, No. 16-6761 (filed Sept. 11, 2016); *United States v. Beckett*, 369 Fed. Appx. 52, 56 (11th Cir. 2010) (per curiam) (unpublished); *United States v. Perrine*, 518 F.3d 1196, 1204-1205 (10th Cir. 2008). As the unanimity of these dispositions reflect, this Court's prior decisions lead to but one conclusion. Petitioner's Fourth Amendment challenge is untenable, and should be rejected once again. *See California v. Greenwood*, 486 U.S. 35, 41 (1988) ("Our conclusion that society would not accept as reasonable [a] claim to an expectation of privacy . . . is reinforced by the unanimous rejection of similar claims by the Federal Courts of Appeals.").

A. Petitioner Cannot Claim A Reasonable Expectation Of Privacy In Information That He Repeatedly Disclosed to Multiple Third Parties

For the past half-century, this Court has consistently reiterated that an individual has no reasonable expectation of privacy in information that he volitionally provides to another. *See, e.g.*, *United States v. White*, 401 U.S. 745, 752 (1971); *Smith*, 442 U.S. at 743; *United States v. Miller*, 425 U.S. 435, 443 (1976). This rule, known as the "third-party doctrine," controls and resolves the matter here. Because Ulbricht repeatedly volunteered his incoming and outgoing internet routing information to others, his Fourth Amendment challenge to the Government's collection of that information must be rejected.

Under the third-party doctrine, "what a person knowingly exposes to the public is not a subject of Fourth Amendment protection." *Miller*, 425 U.S. at 442. An individual who shares information with a third party "takes the risk" that the third party might reveal the information to others—including, possibly, law enforcement. *Smith,* 442 U.S. at 744. Consequently, one who nonetheless divulges information in light of the risk of unwanted disclosure, as Petitioner did here, has "no legitimate expectation of privacy." *Id.* at 743. Neither "the assumption that [the information would] be used only for a limited purpose" nor the expectation that "confidence in the third party would not be betrayed" changes the constitutional calculus. *Id.* at 744; *see also Hoffa v. United States*, 385 U.S. 293, 302 (1966) (same). There can be no reasonable expectation of privacy in information that is not private.[1]

The Court has repeatedly employed the third-party doctrine broadly, applying it to telephone numbers (*Smith*, 442 U.S. at 7454-46), bank records (*Miller*, 425 U.S. at 442-44), and conversations that criminal suspects have with confidential informants (*White*, 401 U.S. 751-53). Petitioner's appeal presents a straightforward opportunity to employ the third-party doctrine once more.

1. IP Addresses Function Identically To Telephone Numbers, Which The Court Has Held May Be Obtained Without A Warrant

This Court has already confirmed the constitutionality of government action mirroring that which Petitioner contests here. In *Smith*, this Court approved of the use of a pen register—the exact same device that the Government employed in this case—to collect phone numbers that

[1] The Court has crafted but one exception to the third-party doctrine. The Government may not glean the substantive content of a particular communication, even if that content was shared with a third-party. *See, e.g.*, *Ex parte Jackson*, 96 U.S. 727, 733 (1878) (holding that postal workers must obtain a warrant before opening a package, but that the package's "outward form and weight"—including the names and mailing addresses of the sender and recipient—were not protected by the Fourth Amendment).

a criminal suspect had dialed. *Smith*, 442 U.S. at 744-46. In so doing, *Smith* recognized that an individual who dials a phone number "assume[s] the risk that the company would reveal to police the numbers he dialed." *Id.* at 744-45. The "voluntary convey[ance] of numerical information," the Court held, rendered obsolete any "legitimate expectation of privacy." *Id.* The facts of this case and the facts in *Smith* are "constitutionally indistinguishable." J.A. 34a. *Smith* should consequently determine the outcome here.

The telephonic routing information at issue in *Smith* and the internet routing information at issue here are identical in form and function. For example, both phone numbers and IP addresses are expressed as strings of digits (a phone number is typically 10 digits long, while an IP address may contain up to twelve digits). Moreover, each serves the simple and limited role of electronically connecting one party to another. IP addresses are incapable of disclosing the content of "any communication," a fact that *Smith* found vital in affirming the constitutionality of a pen register as applied to telephones. J.A. 7a. This is because, on the Internet, content and routing information are transmitted separately—just as the acts of dialing a phone number and having a phone conversation occur distinctly. *See What is a Packet?*, INDIANA U. (last visited Mar. 28, 8:44PM), https://kb.iu.edu/d/anyq. The court below recognized these striking similarities, holding that IP addresses "are precisely analogous to the capture of telephone numbers at issue in *Smith*." J.A. 33a. If the pen registers used in *Smith* did not transgress Fourth Amendment—and that Court made clear that they do not—than neither can the pen registers that the Government employed here.

2. A Privacy Interest In Information Voluntarily Revealed To Others Is Not Objectively Reasonable

Even if Petitioner could distinguish IP addresses from telephone numbers, his claim that he had a "reasonable expectation of privacy" in his internet routing information does not

withstand closer scrutiny. *Smith* was not an aberration; the entire body of this Court's third-party doctrine jurisprudence points in the same direction. Because "one contemplating illegal activities must realize and risk" that any actors on whose assistance he relies "may be reporting to the police," the Fourth Amendment does not protect non-content information disclosed to others. *White*, 401 U.S. at 752 (plurality opinion). This principle has been long-settled, and is itself sufficient to vitiate Petitioner's challenge.

IP addresses fall well within the categories of information to which this Court has applied the third-party doctrine. For example, in *White* this Court held that the Fourth Amendment did not require the Government to obtain a warrant before collecting information that a criminal suspect shared with a confidential informant who was "wired for sound." *White*, 401 U.S. at 752. The suspect's disclosures to the third party informant erased any privacy interest that he otherwise may have maintained. *Id.* Likewise in *Miller*, the Court found that "no Fourth Amendment interests . . . [were] implicated" when the government issued a subpoena to obtain information contained within bank records that the government itself mandated banks keep. *Miller*, 425 U.S. at 442-43. The Court justified *Miller*'s holding in precisely the same terms as it did *White*'s: an individual cannot maintain a reasonable expectation of privacy in "information voluntarily conveyed" to others. *Id.*

Together, *Miller* and *White* illustrate the inadequacies in Petitioner's Fourth Amendment challenge. Like the criminal defendant in *White*, Ulbricht must have "realize[d] and risk[ed]" that the third party on which he relied to facilitate his international narcotics ring—that is, his internet service provider—might reveal his wrongdoing to law enforcement. *White*, 401 U.S. at 752. That is, after all, exactly what happened. *See* Trial Tr. 1267-68 (discussing Google and Comcast's participation in the Government's efforts to identify Dread Pirate Roberts). Similarly, as was the

case with the bank records in *Miller*, internet protocol addresses are not "confidential communications." *Miller*, 425 U.S. at 442. Instead, the distribution of IP addresses occurs in the "ordinary course of [an ISP's] business." *Id.* 442.

The information Petitioner disclosed here is in fact far more public than that which was at issue in either *White* or *Miller*. Those cases stressed that individuals surrender a reasonable expectation of privacy when they disclose information to merely one other party. *See White*, 401 U.S. 751-53; *Miller*, 425 U.S. at 442. Internet routing information, on the other hand, is frequently distributed to not one, but *several* third parties.

Petitioner's IP address, as is the case for any IP address, was "sent automatically with every request" he made to connect to any other device on the Internet. BRIAN W. KERNIGHAN, UNDERSTANDING THE DIGITAL WORLD 188 (2017). While Ulbricht claims to have had a subjective expectation of privacy in his internet routing information, he voluntarily conveyed that information to at least three other parties. *See* Trial Tr. 1269-75 (cataloguing that Comcast, Google, and a private VPN company were all able to provide law enforcement with Ulbricht's IP address); J.A. 113a. (same). Over the two-year period in which Petitioner operated Silk Road, a variety of third parties accessed, with Petitioner's approval and *aid*, the precise information that he now claims is private.

Given his technological sophistication, Ulbricht knew full well that navigating the Internet required the dissemination of his routing information. The Tor Browser that Petitioner employed to mask his IP address mandated that Petitioner to disclose to Tor both his IP address and the IP address of the websites he wanted to visit. *See* Trial Tr. 1269-75. Ironically, even Ulbricht's attempts to hide his internet routing information required that he first reveal that information to a third party.

To be sure, even if Ulbricht hoped his incoming and outgoing internet routing information would be private, an "expectation of privacy does not give rise to Fourth Amendment protection [] unless society is prepared that expectation as objectively reasonable." *California v. Greenwood*, 486 U.S. 35, 40 (1988); *see also Ciraolo*, 476 U.S. at 209-10, 215 (finding that a property owner's extensive attempts to shield his property from view did not automatically create an objectively reasonable privacy interest); *Oliver v. United States*, 466 U.S. 170, 182-84 (1984) (holding that a "No Trespassing" sign did not create a legitimate privacy interest in the contents of an open field). And though Petitioner claims that society is indeed so prepared, society has decided otherwise. The overwhelming majority of everyday civilians do not assiduously attempt to mask each and every electronic communication that they conduct over the Internet. For example, only one tenth of one percent of U.S. internet users use the Tor Browser that Petitioner employed. *Compare* Andrew Perrin & Jingjing Jiang, *About a Quarter of U.S. Adults Say They Are "Almost Constantly" Online*, PEW RES. CTR. (last visited Mar. 29, 2018 5:26PM), http://www.pewresearch.org/fact-tank/2018/03/14/about-a-quarter-of-americans-report-going-online-almost-constantly (finding that 77% of Americans—roughly 250 hundred million people—use the Internet every day), *with* Tor Metrics, *Users*, THE TOR PROJECT (last visited Mar. 29, 2018 5:18PM), https://metrics.torproject.org/userstats-relay-table.html (cataloguing an average of 472,806 daily users on the Tor network in the United States). The uninhibited dissemination of IP addresses is, for all but one out of every thousand Americans, the default.

The distribution of an individual's internet routing information is—or at least should be—"common knowledge." *Greenwood*, 486 U.S. at 40. All ISPs must collect, rely on, and use incoming and outgoing IP addresses to connect users to websites. Likewise, many websites

themselves utilize individuals' IP addresses. To take one example, Netflix uses IP addresses to curate the content to which a subscriber has access. *See Privacy Statement,* NETFLIX (last visited Mar. 29, 2018 12:44PM), https://help.netflix.com/legal/privacy (noting that IP addresses are "collect[ed] automatically"). Facebook, meanwhile, identifies and retains IP addresses to ensure that the individuals it bans for violating the website's hate speech policy cannot repeat their transgressions by merely creating new accounts. *See Data Policy*, FACEBOOK (last visited Mar. 29, 2018 12:48PM), https://www.facebook.com/privacy/explanation. Netflix and Facebook, like countless other websites ordinary citizens frequently visit, require that individuals expressly assent to these privacy policies. While individuals may not understand the "esoteric functions" of an IP address, they nonetheless appreciate that their internet routing information is necessarily available to those entities whose responsibility it is to route internet information (ISPs and websites). *Smith*, 442 U.S. at 742.

IP addresses are obtainable not just by the corporations who own websites or provide internet service. Rather, it is a trivial matter for "any member of the public" to determine another's IP address, a factor that this Court has stressed is the hallmark of when a search has *not* taken place. *Florida v. Riley*, 488 U.S. 445, 451 (1989). For example, registration information for IP addresses, which identify the company or person who controls a given IP address, are often available with a click of a button. *See, e.g.*, *WhoIs IP Lookup Tool*, Neustar (last visited Apr. 6, 3:31PM), https://www.ultratools.com/tools/ipWhoisLookup. In addition, when an individual shares with others web links for pictures, videos, or news stories, that individual can embed in the link an IP tracker; the recipient will be none the wiser. *See, e.g.*, IP LOGGER (last visited Mar. 29, 2018 7:11PM), https://iplogger.org. While such IP tracking might seem unduly surreptitious,

it is no more intrusive an activity than is rummaging through another person's garbage—an act that this Court held does not raise Fourth Amendment concerns. *See Greenwood*, 486 U.S. at 40.

Simply put, the interconnected nature of the Internet depends on publically available IP addresses to function. *See, e.g.*, KERNIGHAN, *supra*, at 150 (describing an IP address as "absolutely fundamental" to "govern[ing] how two parties interact with each other" on the Internet). An IP address that was wholly private would defeat the very purpose of the address: to ensure that data on the Internet is sent to those who request it from the places that they request. *Cf. Greenwood*, 486 U.S. at 40 (finding no reasonable privacy interest in information generated "for the express purpose of convey[ance] to a third party").

Petitioner has encouraged this Court to find an objectively reasonable expectation of privacy over information that is amongst the commonly shared pieces of data on the Internet. That invitation should be declined.

B. Petitioner's Challenge Supplies No Basis To Depart From Well-Settled Fourth Amendment Principles

"There is no need for the Court to craft a new rule to decide [a] case," when, as has occurred here, "it is controlled by established principles from [the Court's] Fourth Amendment jurisprudence." *Kyllo v. United States*, 533 U.S. 27, 41-42 (2001) (Stevens J., joined by Rehnquist, C.J., O'Connor, and Kennedy, JJ., dissenting). Despite the third-party doctrine's clear applicability to the matter here, Petitioner has nevertheless labored to explain why the third-party doctrine does not resolve this case. His arguments lack merit and should accordingly be rejected.

1. Petitioner's Attempts To Evade The Third-Party Doctrine Are Unavailing

In light of the controlling precedent in *Smith*, Petitioner is left with the claim that modern technology compels the Court to limit *Smith* to its facts, largely because using the Internet (and thus disclosing internet routing information) has become part of everyday life. J.A. 33a. Of

course, the Court was given an opportunity in *Smith* to do just that, having been asked to disavow the third-party doctrine as it applied to a technology that constituted a "personal or professional necessity" which individuals had "no realistic alternative" in using—that is, the telephone. *Smith*, 442 U.S. at 750 (Marshall, J., dissenting). The Court declined to do so. Instead, the Court extended *White* and *Miller*, going to lengths to explain that the third-party doctrine was, and would remain, a well-settled tenet of the Court's Fourth Amendment jurisprudence. *See Smith*, 442 U.S. at 743-44. Petitioner's argument, bottomed on the idea that technology in frequent use falls outside the third-party doctrine's scripture, has thus been litigated—and defeated—before.

Justice Sotomayor's concurrence in *United States v. Jones* should not persuade this Court to suddenly change course and embrace the arguments that *Smith* emphatically rejected. 565 U.S. 400, 413-14 (2012). Indeed, that concurrence—joined by no other member of this Court—did not attempt to limit *Smith*, but instead questioned whether the Court should abandon the third-party doctrine altogether. *Id.* at 414 (Sotomayor, J., concurring). Phrased differently, even Justice Sotomayor's concurring opinion recognized that, under current law, Petitioner's claims are untenable.

For its own part, the majority decision in *Jones* also has little bearing on the issue now before the Court. The *Jones* court found that affixing a "GPS tracking device on the undercarriage" of a vehicle was a Fourth Amendment search because the "Government physically occupied private property for the purpose of obtaining information." *Id.* at 402, 404. At no point in this litigation has Petitioner claimed that the use of a pen register constitutes a physical trespass, nor is there any evidence in the record to support such a claim.

Reliance on *Kyllo v. United States*, 533 U.S. 27 (2001), which invalidated the government's warrantless use of thermal imagining technology to ascertain heat signatures emanating from a home, is similarly unavailing. For one, Petitioner frequently used his laptop in areas outside the home—such as at the public library in which he was arrested, and at the public internet cafe from which he occasionally conducted business. *See* Trial Tr. 315-23. To be sure, even if Ulbricht had operated Silk Road solely from the confines of his home, *Smith* rejected the argument that a Fourth Amendment violation occurs merely because the information the Government acquires first originated within the home. *Smith*, 442 U.S. at 743 ("[T]he site of the call is immaterial."). Like the phone numbers in *Smith*, Petitioner here would have "had to convey" his IP address to an ISP "in precisely the same way" "regardless of his location." *Id.*

Searching still for precedent to support this Fourth Amendment challenge, Petitioner must argue that the Court's decision in *Riley* renders the third-party doctrine inapplicable to this case. *Riley v. California*, 134 S. Ct. 2473 (2014). But *Riley* did nothing of the sort. That case applied a different body of Fourth Amendment law—the search-incident-to-arrest exception—to an entirely different technology—cellphones. On its own terms, *Riley* itself admitted that *Smith* and the third-party doctrine were unrelated to the question before the Court. *Riley* 134 S. Ct. at 2492-93 (["*Smith*] concluded that the use of a pen register was not a "search" at all under the Fourth Amendment. There is no dispute here that the officers engaged in a search . . . .") (internal citations omitted).

Riley's broader principles are similarly not implicated in this case. For one, internet routing information does not contain any substantive content, unlike the cell phones considered in *Riley* which were capable of possessing "millions of pages of text, thousands of pictures, or hundreds of videos." *Id.* at 2489. For another, internet routing information cannot, by definition,

reveal the "sum of an individual's private life," for the simple reason that IP addresses identify electronic devices, not actual people. While IP addresses may occasionally be used to determine from what website a given electronic device has requested information, that incursion on privacy is no more serious than that which occurred in *Smith*: phone numbers are tied to identifiable entities too, after all. *See Smith*, 442 U.S. at 748. *Smith* made clear that there exists a meaningful constitutional difference between the routing information at issue here, and the content information at issue in *Riley*. The third-party doctrine only protects the latter, not, as this Court has repeatedly held, the former.

2. The Court Should Continue To Reject Challenges To The Third-Party Doctrine

Because of the weighty precedent militating against his Fourth Amendment challenge, Petitioner cannot prevail unless this Court "re-evaluat[es] the third-party disclosure doctrine established by *Smith*." J.A. 33a. That invitation, which would upset forty years of settled law, should be declined.

The third-party doctrine has well-served the rule-of-law values that this Court has previously emphasized are especially critical when crafting constitutional doctrine. *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids."). The doctrine provides lower courts and individuals alike clear guidance on what the Fourth Amendment does and does not protect. It is no surprise that every single appellate court—spanning nine circuits in total—to have considered the constitutionality of the Government's use of pen/trap devices has reached the exact same conclusion: acquiring internet routing information without a warrant is permissible under the Fourth Amendment.

In addition, the third party rule effectively balances the Fourth Amendment's competing aims—privacy and security—even in a world of rapidly changing technology. On the one hand, modern technology allows individuals "to convey far more than previously possible." *Riley*, 134 S. Ct. at 2489. The third-party doctrine consequently implicates a greater swath of information now than it did in the pre-Internet age. On the other hand, technology "present[s] new and difficult law enforcement problems" given its ability to shroud conduct that would otherwise have been quite public. *Id.* at 2497 (Alito, J., concurring). As criminal activity burrows into areas further secluded from the public eye—for example, on a hard-to-track online network like Tor—government efforts to combat crime are commensurately hamstrung.

The third-party doctrine has stood the test of time precisely because it can withstand pressures like these, which may only exacerbate as technology changes. By preventing the Government from discerning a communication's substantive content even when it has been revealed to others, the doctrine protects much of what individuals disclose. Simultaneously, by permitting the Government to discover where information is flowing, the third-party doctrine helps law enforcement develop the leads necessary to gain probable cause, and therefore a warrant. Indeed, eliminating the third-party doctrine outright may very well threaten a variety of otherwise quotidian law enforcement techniques—like obtaining bank records or lists of dialed phone numbers. Thus, the fact that technology can "provide valuable incriminating information about dangerous criminals," *Riley*, 134 S. Ct. at 2493, while also making "it easier and easier for [the] government . . . to amass a wealth of information about the lives of ordinary Americans," *id.* at 2497 (Alito, J. concurring), justifies keeping, not abandoning, the third-party doctrine.

None of this is to assert that "the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo*, 533 U.S. 33-34.

Rather, to the extent some novel technologies may jeopardize the third-party doctrine's applicability—a question not yet resolved, *see, e.g.*, *United States v. Carpenter*, No. 16-402 (decision pending)—they are not implicated here. IP addresses are no more revealing than are telephone numbers or bank records, both of which may be obtained without a warrant, *see Smith*, 442 U.S. at 744-45; *Miller*, 425 U.S. at 442, and certainly far less intrusive than the worries of geographical tracking that the technologies at issue in *Carpenter* and *Jones* raised.

Finally, this Court has cautioned that overturning its prior decisions is the exception, not the rule. *United States v. Davis*, 564 U.S. 229, 247 (2011) ("Decisions overruling this Court's Fourth Amendment precedents are rare."); *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015) ("Overruling precedent is never a small matter."). This Court should therefore do as it has always done, and refrain from "an avulsive change [that] cause[s] the current of the law thereafter to flow between new banks." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 764 (1995) (Kennedy, J., concurring) (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Co.*, 392 U.S. 481, 499 (1968)). The third-party doctrine has well-served the Court's Fourth Amendment jurisprudence. It matters like this one, there is no reason that it cannot continue to do just that.

II. THE INTERNET ROUTING INFORMATION THAT THE GOVERNMENT GATHERED SHOULD NOT BE SUPPRESSED

The exclusionary rule is a "bitter pill" that this Court has imposed "only as a last resort." *Davis v. United States*, 564 U.S. 229, 237 (2011). Because the Constitution "says nothing about suppressing evidence obtained in violation" of the Fourth Amendment, exclusion "is not a personal constitutional right." *Id.* Instead, the exclusionary rule functions as a "prudential doctrine," in which the Court evaluates the benefits of suppression against the "heavy toll" it places "on both the judicial system and society at large." *Id.* at 239. The Court has therefore

made clear that suppression is warranted only if the government exhibits "deliberate, "reckless, or grossly negligent disregard for Fourth Amendment rights." *Id.* at 238. When, on the other hand, the government acts "with an objectively reasonable good-faith belief that [its] conduct is lawful," the rationale for exclusion "loses much of its force." *Id.* at 238-39.

Throughout the entirety of the investigation into Ulbricht's internet routing information, the Government acted precisely with the type of good-faith that *Davis* requires. The use of pen/registers to collect internet routing information is expressly permitted by the Electronic Communications Privacy Act, a statute that not a single appeals court has yet found unconstitutional. Consequently, under this Court's well-settled exclusionary rule jurisprudence Ulbricht has no claim to "the harsh sanction of exclusion." *Id.* at 239.

A. The Government Relied on a Duly Enacted Congressional Statute That Nine Different Circuit Courts Have Unambiguously Upheld As Constitutional

When the Government conducts a search "in reasonable reliance on subsequently invalidated statutes" the "good-faith exception" to the exclusionary rule applies. *Davis*, 564 U.S. at 238; *see also Illinois v. Krull*, 480 U.S. 340 (1987) (same). Consequently, so long as the Government "adhere[s] to governing law" in conducting a search, *Davis*, 564 U.S. at 238, suppression is warranted only if the statutory scheme that authorized the Government's search was created by a legislature who had "wholly abandoned its responsibility to enact constitutional laws." *Krull*, 480 U.S. at 355. Absent a finding that the United States Congress had forsworn its basic responsibility in creating the Electronic Communications Privacy Act, "the harsh sanction of exclusion" cannot be imposed. *See Davis*, 564 U.S. at 241 (holding that suppression is warranted only when government's malfeasance is "deliberate enough . . . to be "worth the price paid by the justice system").

Even if this Court concludes that the warrantless use of pen/trap devices to gather internet routing information qualifies as a search for purposes of the Fourth Amendment, the Government's prior belief to the contrary was not unreasonable. For one, this Court has reiterated that congressional statutes are presumed to be constitutional. *See Turner Broad. Sys., Inc. v. F.C.C.*, 507 U.S. 1301, 1301 (1993) ("The [] Act, like all Acts of Congress, is presumptively constitutional."); *see also* THE FEDERALIST NO. 78, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that unconstitutional laws must be at "irreconcilable variance" with the Constitution). Here, the Government operated on exactly the presumption that this Court itself utilizes when evaluating the constitutionality of congressional action.

In addition to the presumption of statutory constitutionality, the jurisdiction in which the information that the Government obtained was transmitted (California) had squarely held that a warrantless seizure of internet routing information was permissible. *See United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) ("[E]-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit . . . ."). The disposition of the California court is emblematic of decisions reached in eight other circuits. Indeed, since 1986—the year the statute authorizing pen/trap devices was created—no appellate court in the country has struck down the acquisition of internet routing information is constitutionally infirm. *See* 18 U.S.C. § 3122, *et seq.*

If following the word of Congress in a manner deemed constitutional by nine Article III appellate courts does not constitute good-faith—the position that Ulbricht urges—it is difficult to contemplate what would. *Cf. Riley*, 134 S. Ct. at 2491 (making clear the Court's "general preference to provide clear guidance to law enforcement through categorical rules"). To discard evidence obtained in good faith reliance on both statutory law and the overwhelming tide of

judicial precedent would turn this Court's exclusionary rule jurisprudence on its head; far from being the "last resort," suppression would metastasize into a first impulse. *Davis*, 564 U.S. at 237. The Court has never adopted that approach, and it should not here. *Cf. Terry v. Ohio*, 392 U.S. 1, 15 (1968) ("[A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.").

III. ULBRICHT'S SENTENCING WAS PERMISSIBLE UNDER THE SIXTH AMENDMENT.

A. The Jury Authorized a Life Sentence, Which the Judge Used Discretion to Impose.

The Sixth Amendment, read together with the Due Process Clause requires that "any fact," other than a prior criminal conviction, "that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). This Court has recognized that binding sentencing ranges also run afoul of this prohibition because they do not require the jury to "f[ind] all facts which the law makes essential to punishment." *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (internal quotation omitted); *see United States v. Booker*, 543 U.S. 220, 234 (2005) ("Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws.").

However, this Court has "repeatedly affirmed the proposition that judges can find facts that help guide their discretion *within* the sentencing range that is authorized by the facts found by the jury or admitted by the defendant." *Rita v. United States*, 551 U.S. 338, 373 (2007) (Scalia, J., concurring) (emphasis in original) (citing *Booker*, 543 U.S. at 233; *Apprendi*, 530 U.S. at 481). Indeed, the Court has also recognized that when district judges impose

"discretionary sentences, which are reviewed under normal appellate principles by courts of appeals, such a sentencing scheme will ordinarily raise no Sixth Amendment concern." *Id.* at 354 (majority opinion). In this case, the jury authorized a sentencing range of ten years to life and the court judge found facts only to guide her discretion within that range.

1. The Sentencing Judge Found Facts to Guide Her Discretion Within the Statutory Range, Which is Clearly Permitted by the Sixth Amendment.

The jury authorized a maximum sentence of life imprisonment. The "relevant inquiry" is whether "the required [judicial fact] finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). In *Apprendi*, the New Jersey statute in question prohibited the court from sentencing the defendant to more than ten years in prison absent a showing of racial animus. *Id.* In Mr. Ulbricht's case, the statutes in question require the sentencing judge to impose a sentence between ten years in prison and life imprisonment. 21 U.S.C. § 841(b)(1)(A). The sentencing judge need not find *any* additional facts to impose the maximum statutory sentence. Therefore, the sentence imposed on Mr. Ulbricht reflects, rather than usurps, the jury's prerogative.

This Court has been clear that a jury's role is encroached upon only where sentencing ranges are either "forbidden" or "authorized" *solely* on the basis of judicial fact-finding. *Booker*, 543 U.S. at 235. That fact alone distinguishes this case from *Booker* and *Blakely*, in which sentencing guidelines with the "force of law" prohibited judges from imposing statutory maximums "without any additional factual findings." *Blakely*, 542 U.S. at 304; *Rita*, 551 U.S. at 352 ("The Sixth Amendment question . . . is whether the law *forbids* a judge to increase a defendants sentence *unless* the judge finds facts the jury did not find."). Under the current sentencing scheme, sentencing judges must calculate and consider the guidelines range, but must *also* consider at least ten statutory factors. 18 U.S.C. § 3553(a). These factors are subjective and

include, for example, the "nature and circumstances of the offense and the history and characteristics of the defendant," the "need to avoid unwarranted sentence disparities," and the need for the sentence in "reflect the seriousness of the offense" and "afford adequate deterrence to criminal conduct." *Id.* Thus, there is no definite legal cap, aside from the statute, to the sentence a judge could impose. The Sixth Amendment is therefore not implicated.

Judges possess the authority to issue sentences across the entire statutory range authorized by the verdict. *Rita*, 551 U.S. at 353. In *Rita*, the defendant argued that a presumption of reasonableness for guidelines sentences would encourage such sentences, violating the Sixth Amendment. *Id.* at 352. The Court rejected this argument because the presumption neither "*requires*" nor "*permits*" judges impose certain sentences or stay within ranges other than the statutory maximum. *Id.* at 353 (emphasis added). Indeed, "[a]s far as the law is concerned, the judges could disregard the Guidelines and apply the same sentence . . . *in the absence of the special facts*" that generate a higher Guidelines range. *Id.* (emphasis added). The Court also noted where, as here, sentencing courts find facts to assist in exercising this discretion, subject to "review[] under normal appellate principles," the sentencing scheme "does not violate the Sixth Amendment." *Id.* at 354. Thus, sentencing judges are authorized to impose sentences across the statutory range and relevant facts in that decision do not implicate the Sixth Amendment.

Booker's switch from mandatory guidelines to broad sentencing discretion fundamentally changed the relationship between that fact-finding and the Sixth Amendment jury trial guarantees. "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Alleyne v. United States*, 570 U.S. 99, 117 (2013). Indeed, this Court has affirmed the right of judges to "find facts that help guide their discretion *within* the sentencing range" authorized by the jury."

Rita v. United States, 551 U.S. 338, 373 (2007) (Scalia, J., concurring); *Alleyne*, 570 U.S. at 117. This is allowed even though "such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts," because "the Sixth Amendment does not govern that element of sentencing." *Id.* Thus, under the mixed scheme of advisory Guidelines and Section 3553(a) factors, a judge is bound only be the statutory maximum. *Booker*, 543 U.S. at 234.

The Court should not revisit its decision in *Booker*, in which it explicitly refused to require all facts related to sentencing to be submitted to a jury. *Booker*, 543 U.S. at 246. Indeed, this Court took the extraordinary step of issuing a separate, *remedial* opinion, rejecting Petitioner's precise position, excising only the portion of the statute that made the guidelines mandatory, and changing the appellate standard of review to "reasonableness". *Id*. at 246, 261-62. All nine Justices "agree[d] that the constitutional issues presented by [mandatory sentencing guidelines] would have been avoided entirely if Congress had omitted from [the statute] the provisions that make the Guidelines binding on district judges." *Booker*, 543 U.S. at 233. They held so even though the advisory Guidelines scheme would "recommend[] . . . the selection of particular sentences *in response to differing sets of facts*." *Id.* at 233 (emphasis in original). Judicial fact finding was not only contemplated, but encouraged as part of the *remedy* for the constitutional threat posed by the mandatory Guidelines.

Two years later, in *Rita*, the Court explicitly allowed judicial fact-finding to support the reasonableness of a sentence when it upheld a presumption of reasonableness for guidelines sentences. *Rita*, 551 U.S. at 350, 352 ("[E]ven if [the presumption] increases the likelihood that the judge, not the jury, will find "sentencing facts," [it] does not violate the Sixth Amendment."); *see also Gall v. United States*, 552 U.S. 38, 50-51 (2007). Moreover, correctly calculating

Guidelines ranges inherently requires fact finding, a task this Court has recognized sentencing judges to be uniquely situated to perform. *Id.* at 50-51. Therefore, this Court has affirmed judicial fact finding that guides discretion within the statutory range even after the creation of reasonableness review.

The Court has further limited the *Apprendi* rule only to instances in which higher sentences were unavailable *but for* factual findings, not where they may be justified by discretionarily balanced factors. In *Cunningham*, the Court struck down California's determinate sentencing law. *Cunningham v. California*, 549 U.S. 270, 279 (2007). Under the law, judges were required to impose the middle of three specific sentences absent a judicial finding "circumstances in aggravation or mitigation," which caused the higher or lower sentence become available. *Id.* These sentences were then reviewed for reasonableness. *Id.* Justice Alito, in dissent, argued there was not an *Apprendi* problem because a circumstance in aggravation didn't need to be a fact at all, it could be a policy judgement or a judge's "subjective belief" about the proper sentence. *Id*. at 307-08.

Notably, the *Cunningham* majority did not argue that *Apprendi* applied even if the higher sentence was made reasonable by facts, subjective factors, or a mix of the two. *Id.* at 279. Instead, the majority combed the California statute for evidence that facts and *only* facts constitute "circumstances in aggravation." *Id.* Thus, the constitutional inquiry turned on whether *facts* are the *only* mechanism by which a sentence can be increased. Under the federal scheme, judges provide reasons for their sentences through fact finding and by weighing subjective factors about what constitutes a serious offense, the role of prisons in rehabilitation, and even policy disagreements with the advisory guidelines. *See Kimbrough v. United States*, 552 U.S. 85,

109 (2007). Therefore, under *Cunningham*, the federal sentencing scheme does not run afoul of the Sixth Amendment.

2. Reasonableness Review Doesn't Transform the Nature of this Fact-Finding.

Reasonableness review does not impose the kind of legal constraints that would diminish judicial authority to impose a sentence within the statutory range for four reasons. First, sentencing judges are authorized to consider so many competing factors that fact finding alone does not make available any new sentencing ranges. Second, the unlike the schemes struck down in *Booker* and *Blakely*, the current sentencing scheme does not draw direct relationships between certain facts and certain sentences. Third, substantive reasonableness review itself focuses on requiring there be some relationship between the reasons given and the sentences imposed, not whether the district court had or did not have the authority to issue a particular within the statutory range. Finally, because under reasonableness review as currently practiced, no one fact can make a sentence reasonable, *all* judicial fact finding in sentencing would implicate the Sixth Amendment, a rule this Court has consistently rejected.[2]

First, no sentence is "off the table" absent some judge-found under reasonableness review's highly deferential evaluation of a district court's use of a multifactor balancing test. "The Sixth Amendment question . . . is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find." *Rita*, 551 U.S. at 352; *Cunningham*, 549 U.S. at 290. Sentencing judges consider all sorts of factors when they decide

[2] Respondents request that if the Court finds a constitutional error in the sentencing procedure, it remand for new sentencing by the district judge rather than evaluating the reasonableness of the sentence based on the current sentencing transcript. Because reasonableness review depends so heavily on the reasons given by the sentencing judge, it cannot properly be done without a new sentencing hearing limited to constitutionally permissible facts and weighing Section 3553(a) factors in light of those facts alone.

on a sentence, including, but not only facts they find themselves. Other subjective, values-based judgements, such as "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the rule of law, and to provide just punishment for the offense" must be considered by the judge in determining the sentence. 18 U.S.C. § 3553(a). Indeed, the Court has recognized that judges may sometimes reasonably depart from the Guidelines due to *policy* disagreements, having nothing to do with the individual characteristics of the defendant they are sentencing. *Spears v. United States*, 555 U.S. 261, 265-66 (2009) ("[D]istrict courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines."). Thus, the range of available sentences is neither the sole product of facts found nor abridged by a totality of the circumstances review.

Second, even when judges find facts, the implications for sentencing and subsequent appellate review are not straightforward. Even in this case, the sentencing judge and the defendant drew very different conclusions from the *same fact*. Mr. Ulbricht argued that he reduced harm associated with illegal drug use by employing a doctor to counsel customers about safe dosages for the drugs sold on Silk Road. J.A. 24a. On the basis of this conceded fact, however, the judge found that this *enabled* illicit drug usage, justifying harsher punishment to promote respect for the rule of law. *Id.* Under the new advisory guidelines and multi-factor balancing, no factual finding makes permissible a sentence previously "forbidden" by the jury verdict. *Rita*, 551 U.S. at 352. Thus, judicial fact finding, even if it contributes to the reasonableness of the sentence, does not implicate the Sixth Amendment. *Id.*

Third, that sentences are reviewed for "abuse of *discretion*" or reasonableness further underscores that the judicial fact finding at issue in this case is an exercise of discretion within already prescribed limits. In *Booker*, the Court explicitly severed *de novo* review of sentences

because it "ma[d]e the Guidelines sentencing even more mandatory than it had been." *Id.* If facts upon which these sentences were based changed the *legal authority* of the sentence, appellate courts would review the sentence *de novo*. *See Highmark, Inc. v. Allcare Health Management Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) ("Traditionally, decisions on questions of law are reviewable *de novo* . . . and decisions on matters of discretion are reviewable for abuse of discretion."). Appellate courts may thus remand for new sentencing where a sentencing judge relied on a clearly erroneous fact or made a legal error about the nature or seriousness of a prior conviction. But, since the appellate court may not "substitute its judgment for that of the sentencing court as to the appropriateness of the sentence," the source of the disputed impropriety is use of discretion, not lack of authority flowing from the jury's verdict. *Rita*, 551 U.S. at 363-64.

Reasonableness review, as devised in *Booker*, merely requires "judges give reasons" for the sentences select rather than abridging their authority to order certain sentences. *Booker*, 543 U.S. at 261 (deriving reasonableness review from a prior statutory review of "the reasons for the imposition of the particular sentence, as stated by the district court" and the factors considered under Section 3553(a)). In *Rita*, the Court explained that "articulating reasons, even if brief" "assures reviewing courts (and the public) that the sentencing process is a reasoned *process*" and preserves "the public's trust in the judicial institution." *Rita*, 551 U.S. at 357. Thus, reasonableness review is about ensuring there is a "reasoned basis" for the judge's "exercise of his [or her] own legal decision making authority," not about whether the judge has found sufficient facts that permit the imposition of the chosen sentence. *Id.* The Court has explicitly contemplated judges finding facts as a part of this reason-giving process. *Gall*, 552 U.S. at 51 ("The sentencing judge is in a superior position to *find facts* and judge their import under § 3553

in the individual case."). Therefore, may judges constitutionally include, among other factors, judicially found facts as part of the reasons given to support the reasonableness of their sentencing choices.

The Court has made clear reasonableness review serves the simple function of correcting "mistakes" rather than imposing a cap on sentences that can be given absent some showing. *Rita*, 551 U.S. at 355. Indeed, Justice Stevens defended reasonableness's substantive component because it protects against the consideration of improper or arbitrary factors in sentencing. *Id.* at 365 (Stevens, J., concurring) ("After all, a district court judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable."). Even Justice Scalia agreed this sort of backstop does not limit the sentencing judge's authority to select a sentence within the applicable range, but rather limits the *kinds of reasons* that may be considered. *See id*. at 383 n.6 (admitting that his constitutionally permissible vision of procedural reasonableness review includes "limiting of sentencing factors to permissible ones" and suggesting that the Yankees/Red Sox hypothetical would flunk such a test). Thus, there is little, if any, daylight between the current scheme and the one Justice Scalia proposes, aside from the "chameleon-like" distinction between "substant[ive]" and "procedur[al]" review. Indeed, this Court has *never* struck down a sentence for substantive reasonableness that passed procedural muster.[3]

[3] If this Court finds so-called substantive reasonableness review to violate the Sixth Amendment in some cases, Respondent requests the Court limit reasonableness review to a review of procedures only as proposed by Justice Scalia. *See Rita*, 551 U.S. at 381 (Scalia, J., concurring) (describing his preferred remedy if the Court finds substantive reasonableness review to violate the Sixth Amendment to be procedural review only). Other options, such as requiring all facts be submitted to the jury were rejected by this Court in *Booker* and lead to the unjust and absurd results detailed in Part III.A.4.

Finally, Petitioner can point to no one fact that moved his sentence from "reasonable" to "unreasonable." This is not a function of Petitioner's case, but rather of the malleable and undefined nature of the reasonableness inquiry. *Gall*, 552 U.S. at 51 ("When conducting [reasonableness] review, the [appellate] court will, of course, take into account the totality of the circumstances . . . ."). If no one fact contributes to unreasonableness, then *all* judge-found facts used to guide the sentencing judge's exercise of discretion within the statutory range would be violate the Sixth Amendment. *See Rita*, 551 U.S. at 378 (Scalia, J., concurring). The Court has consistently rejected this rule. *Alleyne*, 570 U.S. at 116-17 ("We have long recognized that broad sentencing discretion, *informed by judicial fact finding*, does not violate the Sixth Amendment.") (emphasis added); *see also Rita*, 551 U.S. at 352; *id.*, 551 U.S. at 373 (Scalia, J., concurring); *Booker*, 543 U.S. at 233. Petitioner cannot square his position with this maxim of this Court's Sixth Amendment precedent. Thus, to maintain the bedrock constitutional principles of sentencing, this Court should affirm Second Circuit.

B. Judicial Fact Finding Comports with The Original Meaning, Underlying Principles, and Policy Goals of the Sixth Amendment.

1. Judicial Fact Finding in Sentencing is Consistent with the Original Understanding and Fundamental Principles of the Sixth Amendment.

A bar on judicial fact finding in sentencing is inconsistent with both the original understanding of the Sixth Amendment and the principles that have animated its application over more than two hundred years. Early federal criminal laws gave judges sentencing discretion for the majority of offenses. Moreover, the Sixth Amendment's animating principles require defendants be given sufficient notice (via facts to be proved by a jury) of their potential penalties and that judicial fact finding maintain the jury's role as a bulwark against arbitrary punishment.

Both the principles and original understanding of the Sixth Amendment are upheld by rejecting Petitioner's novel and drastic interpretation of the Amendment's scope.

Broad judicial discretion, and thus explicit or implicit fact finding to guide that discretion, has been a feature of the criminal justice system since the Founding. In 1790, Congress passed the first federal criminal statute. *See* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112 (1790). Of the dozens of crimes that statute enumerated, only six carried determinate sentences. *Id.* The majority of the crimes carried statutory maximum sentences and fines. *Id.* Judges were to impose sentences and fines within that range "at the discretion of the court." *Id.* The Framers thus understood that the judicial role encompassed broad discretion in sentencing. Indeed, given the Framers' concern over "arbitrary punishments," it is hard to believe they would give judges discretion yet require them to base their decisions on willful blindness. THE FEDERALIST NO. 83, at 615 (Alexander Hamilton) (John C. Hamilton ed., 1873). Thus, Petitioner's position, that the Sixth Amendment *requires* every relevant fact be found by a jury, is inconsistent with the Framers delineation of the judicial role in sentencing in early criminal statutes.

Sixth Amendment principles are further upheld because the defendant is on notice of the full statutory range of sentences he risks when he commits a given crime. In *Blakely* the Court distinguished the constitutional implications of determinate and indeterminate sentencing. "In a system that says the judge may punish burglary with 10 to 40 years [indeterminate sentencing], every burglar knows he is risking 40 years in jail." *Id.* However, in a determinate system with fact-dependent gradations, such as one where burglary is punished "with a 10 year sentence, with another 30 years added for the use of a gun," an unarmed burglar "is *entitled* to no more than a 10 year sentence." *Id.* Thus, under the Sixth Amendment, "facts bearing on that entitlement must

be found by a jury." *Id.* In this case, Ulbricht, by distributing more than 1 kilogram of heroin risked life in prison, even if that sentence is neither required nor the norm for such a crime. Therefore, since Ulbricht was not *entitled* to a lesser sentence, facts used to justify a harsher, rather than a more lenient sentence need not be found by the jury.

Reasonableness review simply isn't determinate enough to generate these sorts of reliance interests in defendants. This is in stark contrast with the sentencing schemes struck down in *Apprendi*, *Blakely*, and *Booker*. In each of those cases, the defendant on the basis of the facts included in the indictment could evaluate the likely length of his sentence. *Booker*, 543 U.S. 236; *Blakely*, 542 U.S. at 491; *Apprendi*, 530 U.S. at 491. Take, for example, Mr. Blakely, who *pled down* from first- to second-degree kidnaping to avoid the lengthier potential sentence. *Blakely*, 542 U.S. at 491. Instead, he was ambushed during sentencing with a mandatory sentencing enhancement for "deliberate cruelty," proved only by a preponderance of evidence to a judge, and given a sentence equal to that of first-degree kidnaping. *Id.* It is this sort of governmental abuse—punishment above and beyond expected or noticed levels—that the Sixth Amendment seeks to protect. Such manipulation of sentencing law simply isn't possible here, and so no Sixth Amendment issue is raised.

When a defendant pleads guilty to a set of facts under the current sentencing scheme, the only range of sentences he can reasonably expect to be imposed are those set forth in the statute. The face of the indictment cannot plausibly give the defendant sufficient information to predict how the judge will apply the advisory guidelines and statutory sentencing factors, nor what conclusions might be drawn from facts he admits. *See, e.g.*, S.T. 83:20-23 (finding Silk Road's doctor to enable drug use, rather than reduce harm associate with drug use). Thus, the range of sentences noticed in an indictment is the *statutory* range, not a statutory minimum capped by an

appellate court's reasonableness review. Therefore, the facts found are not necessary to impose a sentence, such that the defendant must have notice. Instead, they merely guide judicial discretion within the range of noticed sentences.

Moreover, reasonableness review does not implicate the jury role because neither prosecutors, nor judges, nor Congress can game the system to reduce the role of the jury by reserving critical facts for judicial review in any sort of predictable fashion. This was, of course, the central concern in *Blakely* and *Booker*, where the legislature could set a wide statutory range for a crime—to be proved to a jury—then delineate specific sentences within that range based on facts that need only be proved to a judge. *Blakely*, 542 U.S. at 306. In such a system "[t]he jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong," and then it is left to a judge to find "the facts of the crime the State actually seeks to punish." *Id.* at 306-07. Thus, the central Sixth Amendment concern is whether the sentencing scheme enables other players in the judicial process to bypass the jury en route to their desired punishment.

Of course, reasonableness review's indeterminacy vitiates this concern. The lack of certainty about the value judgments (fact-dependent or not) a judge may make in administering Section 3553(a) prevents Congress or prosecutors from selectively reserving facts with the expectation of any particular sentence. Indeed, the mere fact that a judge may depart from the guidelines, without showing "extraordinary circumstances," *Gall*, 552 U.S. at 47, or incurring a presumption of unreasonableness, *Rita*, 551 U.S. at 355-56, demonstrates that the current system lacks the sort of determinacy that enables minimization of the jury's role. Indeed, finding such malleable and indeterminate judicial review to abridge the jury's authorization of punishment equally usurps the jury's role as a stand-in for societal condemnation of the defendant's actions.

More importantly, no actor in the system may "bank on" facts shown at sentencing to order judicial decision-making within a wide discretionary range in any sort of predictable fashion. Thus, the jury still serves as the bulwark between a defendant and the range of sentences to which he is exposed.

2. A Complete Prohibition on Judicial Fact Finding Would Lead to Absurd Results.

No member of this Court has ever found the Sixth Amendment to require what Petitioner proposes: a complete ban on judicial fact-finding in sentencing. *Rita*, 551 U.S. at 373 (Scalia, J., concurring) ("To be clear, I am not suggesting that the Sixth Amendment prohibits judges from ever finding any facts."); *id*. at 354 (majority opinion); *Alleyne*, 570 U.S. at 113 n.2 ("While . . . findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing."). And with good reason. Members of this Court have cautioned against a "wooden, unyielding insistence on expanding the *Apprendi* doctrine," because of the "collateral widespread harm to the criminal justice system" that results. *Cunningham*, 549 U.S. at 295 (Kennedy, J., dissenting). Judicial fact-finding reduces unwarranted sentencing disparities by usurping the power of the *prosecutor* not the jury. It also permits consideration of facts in sentencing that would either be prejudicial or impossible to charge or impossible for a defendant to dispute without implicating himself in the crime at issue. Finally, it is even more nonsensical to impose willful ignorance upon sentencing judges while permitting them nonetheless to use facts found by the Sentencing Commission in selecting a sentence.

First, instead of preserving jury role, the Petitioner's position would simply shift discretion away from Article III judges and into the hands of prosecutors, who must neither "give reasons" for their charging decisions nor are subject to any sort of review of those decisions.

Indeed, prosecutorial discretion is a primary source of the sort of "unwarranted sentencing disparities" that Congress and this Court have sought to minimize. *See generally* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 Yale L.J. 2 (2013) (finding that racial disparities in sentencing are driven by lack of judicial sentencing discretion because prosecutors will then differentially charge white and black defendants for the same conduct). Since reasonableness review does not abridge judicial authority to impose the entire range of statutory sentences, requiring jury fact finding would serve only to allow prosecutors to artificially limit the reasons judges could give to support certain sentences, resulting in unwarranted disparities. This jury role—as prosecutors' vehicle to impose blinders on judicial discretion—could not possibly be what the Framers sought to preserve in drafting and ratifying the Sixth Amendment.

Second, the absurd results of revisiting the road-not-taken in *Booker* are manifest. Most obviously, if a defendant obstructs the trial or perjures himself, a judge may wish to impose a higher sentence than he or she otherwise would but would be barred from doing so in such a system. *Blakely*, 542 U.S. at 319 (O'Connor, J., dissenting). Perhaps that individual defendant is simply lucky. But the injustice becomes clear when you consider the plight of a similarly situated who behaves and is truthful at trial. Under Petitioners view, the judge has two constitutionally permissible options: give the same sentence or treat them differently but provide no reasons. *Blakely*, 542 U.S. at 304-05 (describing cases upholding sentencing schemes in which judges could have "sentenced [the defendant] to death giving no reason at all."). Surely the constitutionality of the federal sentencing is not undermined by the fact that judges are transparent about the factors that guide their sentences. Such a constitutional test is neither principled nor does it lead to a better criminal justice system. *Rita*, 551 U.S. at 367 (Stevens, J.,

concurring) ("If the defendant is convinced that justice has been done in his case—that society has dealt with him fairly—the likelihood of his successful rehabilitation will surely be enhanced.").

Moreover, prohibiting judicial fact finding at sentencing puts the defendant in the untenable position of arguing "'I did not sell drugs, and if I did, I did not sell more than 500 grams.'" *Blakely*, 542 U.S. at 334-35 (Breyer, J., dissenting). The *Blakely* majority's retort that defendants could waive their Sixth Amendment right and have these facts found after trial by a sentencing judge fails to address the bulk of cases in which defendants plead guilty. *Id.* Prosecutors could simply require defendants to admit to all the relevant facts in the plea or "proceed with a (likely prejudicial) trial" on all those facts. *Id*. The sanctity of the jury trial is hardly preserved if its role becomes presiding over a patently unfair proceeding.

Petitioner's position is made even more inconsistent by the fact that this Court has already authorized sentencing courts to consider at least some set of facts not found by the jury in reaching sentencing decisions. The Court has said its Sixth Amendment cases do not "prohibit the sentencing judge from taking account of the *Sentencing Commission*'s factual findings." *Rita v. United States*, 551 U.S. 338, 352 (2007) (emphasis added). Moreover, the Court has repeatedly noted, in justifying non-Guidelines sentences, the comparative advantage of district court judges in finding facts that enable it to craft sentences that are individualized to the defendant before it. *Gall*, 55s U.S. at 51. It makes little sense to permit the judge to rely on factual findings by the Sentencing Commission while turning a blind eye to available facts about the defendant sitting in his or her courtroom whose trial he or she presided over. Such a system is arbitrary and unjust and cannot be constitutionally required.

***

Letting judges find facts to help them craft individualized and fair sentences within the maximum and minimum generated by the verdict serves important constitutional and policy interests. These interests are neither undermined nor is the jury's role usurped because an appellate court may review a sentencing judge's decision for things like reliance on clearly erroneous facts or failing to sufficiently explain to the defendant why he will spend a significant portion, if not all, of his remaining years behind bars. The Sixth Amendment, designed to protect against arbitrary punishment surely doesn't demand it be doled out by willfully ignorant judges.

CONCLUSION

For the foregoing reasons, the opinion of the court of appeals should be affirmed.

Respectfully submitted,

Samir H. Doshi
Helen E. White
127 Wall Street
New Haven, CT 06511
(203) 432-4992

Counsel for Respondents

APPENDIX

Constitutional Provisions

The Fourth Amendment to the United States Constitution provides in full:

> 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.

The Fifth Amendment to the United States Constitution provides in full:

> 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.

The Sixth Amendment to the United States Constitution provides in full:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
>
> U.S. CONST. amend. VI.

Statutory Provisions

18 U.S.C. § 3553(a) provides in full:

> (a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such

amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

21 U.S.C. § 841(b)(1)(A) provides in relevant part:

(b) Penalties Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . .

18 U.S.C § 3127 provides in full:

As used in this chapter—

(1) the terms "wire communication", "electronic communication", "electronic communication service", and "contents" have the meanings set forth for such terms in section 2510 of this title;

(2) the term "court of competent jurisdiction" means—

(A) any district court of the United States (including a magistrate judge of such a court) or any United States court of appeals that—

(B)

(i) has jurisdiction over the offense being investigated;

(ii) is in or for a district in which the provider of a wire or electronic communication service is located;

(iii) is in or for a district in which a landlord, custodian, or other person subject to subsections (a) or (b) of section 3124 of this title is located; or

(iv) is acting on a request for foreign assistance pursuant to section 3512 of this title; or

(B) a court of general criminal jurisdiction of a State authorized by the law of that State to enter orders authorizing the use of a pen register or a trap and trace device;

(3) the term "pen register" means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business;

(4) the term "trap and trace device" means a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication;

(5) the term "attorney for the Government" has the meaning given such term for the purposes of the Federal Rules of Criminal Procedure; and

(6) the term "State" means a State, the District of Columbia, Puerto Rico, and any other possession or territory of the United States.

18 U.S.C § 3122 provides in full:

(a)Application.—

(1) An attorney for the Government may make application for an order or an extension of an order under section 3123 of this title authorizing or approving the installation and use of a pen register or a trap and trace device under this chapter, in writing under oath or equivalent affirmation, to a court of competent jurisdiction.

(2) Unless prohibited by State law, a State investigative or law enforcement officer may make application for an order or an extension of an order under section 3123 of this title authorizing or approving the installation and use of a pen register or a trap and trace device under this chapter, in writing under oath or equivalent affirmation, to a court of competent jurisdiction of such State.

(b)Contents of Application.—An application under subsection (a) of this section shall include—

(1) the identity of the attorney for the Government or the State law enforcement or investigative officer making the application and the identity of the law enforcement agency conducting the investigation; and

(2) a certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency.