

PROTECTING THE VULNERABLE: KEEPING CHILDREN SAFE WITH THE KELSEY SMITH ACT

*Nicholas Johnson**

INTRODUCTION

Congress should pass a modified version of the Kelsey Smith Act, currently proposed before the Senate, to provide more safety measures for minors and aid in the search of abducted and runaway children by furthering the use of technological advancements.

Imagine being a parent of an average 16-year-old teenager. Now that she can drive, you've entrusted her with the keys to her own car and set a curfew of 11 P.M. They also have the newest smartphone, which they always keep nearby. On an ordinary day, she tells you she is going to the mall with some friends and will be home around five o'clock for dinner. As you go about your normal daily routine, you get a phone call from her, saying that she is leaving the mall and will be back shortly. Five o'clock comes and passes, and you start to get frustrated, wondering why she isn't home yet.

You call her cellphone, but there is no answer. Your mind starts jumping to conclusions about a horrific car accident. You and your spouse hop in your car to drive towards the mall to see if you see her car on the road nearby. You have no luck on the roads, so you head straight to the mall. As you pull up to the parking lot you see her car nearby. However, as you get closer, you realize two doors are left open, there are shopping bags thrown all around, and your child isn't there. You call the police and the search is on for your child. The police start their search for her and realize her cell phone is not in her car. The provider denies the request to ping your child's phone without a warrant. Within the next 48 hours, the police get the warrant to ping her location. Lo-and-behold, the ping registers just a few miles away from the mall. When the police arrive, it's too late.

Is there a solution which could help reunite kidnapped, trafficked, and endangered runaway children with their families? The Kelsey Smith Act,¹ if used exclusively for children, is a practical tool to provide safety for victimized children on a federal level. One of the concerns individual liberty advocates have with this act is the potential for it to be over-used

* Nicholas Johnson received his J.D. from Regent University School of Law in 2021.

¹ Kelsey Smith Act, S.273, 116th Cong. (2019) (proposed amendment to Communications Act of 1934).

and become a danger to Fourth Amendment rights.² With this valid concern in mind, this Note addresses the Kelsey Smith Act exclusively for minors (children).³ As Robin Hayes, former Congressman of North Carolina,⁴ put it, “[o]ur law enforcement must be given every tool available to protect children from predators. . .”⁵ and it is possible that there are more tools readily available if given the chance to use them, such as the Kelsey Smith Act.

Part I of this Note addresses the background information on the Kelsey Smith Act, such as how and why it was implemented, what it does, the issue of child abductions and trafficking, and support for the Kelsey Smith Act. Part II of this Note addresses the legal implications of the act, such as: the constitutionality of the act, the Electronic Communications Privacy Act of 1986, and the Stored Communications Act. Part III addresses why and how this act may be implemented on a federal level and the application of this Act exclusively for children on a federal level. Congress should pass a modified version of the Kelsey Smith Act, currently proposed before the Senate, that exclusively applies to minors to further use technological advances in order to make it easier to find abducted or endangered runaway children. Using the Kelsey Smith Act exclusively for minors will provide a more direct channel to find and protect children, therefore reuniting hurting families who once did not think it this was possible.

² See David Ruiz, *Undermining Mobile Phone Users' Privacy Won't Make Us Safer*, ELEC. FRONTIER FOUND. (July 17, 2018), <https://www.eff.org/deeplinks/2018/07/undermining-mobile-phone-users-privacy-wont-make-us-safer> (arguing Kelsey Smith Act's definition of “emergency” is too broad); see also Letter from Electronic Frontier Foundation on Kelsey Smith Act (May 21, 2016), https://www.eff.org/files/2016/05/21/kelsey_smith_vote_act_final_1.pdf (recommending amendment to Kelsey Smith Act due to Fourth Amendment concerns).

³ Whether this act is too “powerful” or concerning for all adults is a topic for another discussion. If the Kelsey Smith Act gets passed, as currently proposed, this will settle the debate until the Act is questioned in court. However, due to the former drafts of the bill being rejected, there is reason to believe that a rejection is the most likely outcome for the current bill, which applies to both adults and minors.

⁴ Rep. Robin Hayes, GOVTRACK, https://www.govtrack.us/congress/members/robin_hayes/400172 (last visited Sept. 19, 2020).

⁵ Robin Hayes, *Protecting Children Quotes*, AZ QUOTES, <https://www.azquotes.com/quotes/topics/protecting-children.html> (last visited Sept. 14, 2020).

I. BACKGROUND ON THE KELSEY SMITH ACT

A. *Why Was the Act Created?*

On June 2, 2007, Kelsey Smith was abducted from a department store parking lot in Kansas.⁶ Kelsey was taken from the parking lot to a wooded area, where she was raped and strangled to death.⁷ After Kelsey was reported missing, the police went to her cell phone provider, Verizon, to retrieve her cell phone location.⁸ However, Verizon did not comply with the request because the police came to them without a subpoena.⁹ The subpoena was granted four days later, at which time Verizon complied with police and pinged Kelsey's location.¹⁰ The police were able to find Kelsey's body within just forty-five minutes once the request was granted.¹¹ The police were able to determine that Kelsey was killed the same day that she was abducted.¹² It was believed that because of the short amount of time it took to find her body once the subpoena was granted, she likely could have been saved if the police did not have to go through the whole subpoena process.¹³

The tragedy that took place led Kelsey's parents to proposing the Act be implemented in the state of Kansas, which was signed into law on April 17, 2009.¹⁴ Today, versions of the law have been adopted by twenty-three additional states (dates included): New Jersey (2010), Nebraska (2010), Minnesota (2010), New Hampshire (2010), North Dakota (2011), Tennessee (2012), Hawaii (2012), Missouri (2012), Utah (2013), West Virginia (2013), Colorado (2013), Nevada (2013), Rhode Island (2013), Oregon (2013), Oregon (2014), Pennsylvania (2014), Arkansas (2015), Iowa (2015), Washington (2015), Louisiana (2015), Delaware (2015),

⁶ *About Us*, KELSEY'S ARMY: KELSEY SMITH FOUND., <https://kelseysarmy.org/#about-us> (last visited Sept. 13, 2020).

⁷ Diane Carroll et al., *From the Archives: Edwin Hall Guilty in Kelsey Smith Killing*, KAN. CITY STAR (Feb. 17, 2015), <https://www.kansascity.com/news/local/article10539872.html>.

⁸ Tara Seals, *Privacy Advocates Say Kelsey Smith Act Gives Police Too Much Power*, THREAT POST (July 19, 2018), <https://threatpost.com/privacy-advocates-say-kelsey-smith-act-gives-police-too-much-power/134142/>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *See id.*

¹⁴ *Kelsey Smith Act*, KELSEY'S ARMY: KELSEY SMITH FOUND., <https://kelseysarmy.org/#ks-act> (last visited Sept. 14, 2020) (Hereinafter known as KELSEY'S ARMY).

Indiana (2016), Alabama (2017), and Kentucky (2019 – named the *Leah Carter Act*).¹⁵

B. What Does the Act Do?

Naturally, the Kelsey Smith Act, being adopted in twenty-seven different states, would have similar but slightly different versions across the board, however this Note focuses specifically on the version of the act that is currently before Congress.¹⁶ The Kelsey Smith Act was reintroduced to the Senate by Senator Pat Roberts [R-KS] on January 30, 2019,¹⁷ along with cosponsors Senator Jerry Moran [R-KS], Senator Roy Blunt [R-MO] and Senator Deb Fischer [R-NE].¹⁸ Additionally, the Act also introduced to the House by Representative Ron Estes [R-KS] on March 18, 2019.¹⁹

Before the Kelsey Smith Act, law enforcement officials are required to get a warrant to obtain cell phone records from wireless providers.²⁰ The Kelsey Smith Act, however, requires that a telecommunications carrier and cell phone provider release the location information of their users in an emergency situation without a warrant.²¹ To establish this, the Kelsey Smith Act would be amending the Communications Act of 1934.²² Additionally, the Kelsey Smith Act also provides that “[n]o cause of action shall lie in any court . . . against a provider of a covered service . . . for providing location information or assistance” in regards to following the Act.²³ This is simply stating that the Act protects cell phone carriers and providers from being sued in any court for following providing the location requested by law enforcement officials.²⁴

¹⁵ *Id.* (Kentucky has adopted the Leah Carter Act after the Kelsey Smith Act was reintroduced to both the House and the Senate. As of this time, it is unclear as to whether other states are considering the Kelsey Smith Act.)

¹⁶ KELSEY’S ARMY, *supra* note 14 (last visited April 17, 2021).

¹⁷ *Id.* (More recently, the Act has been reintroduced to the Senate by Senators Moran, Blunt, and Fischer on February 25, 2021.)

¹⁸ *Senators Roberts & Moran Introduce the Kelsey Smith Act*, U.S. SENATOR DEB FISCHER FOR NEBRASKA (Jan. 31, 2019), <https://www.fischer.senate.gov/public/index.cfm/2019/1/senators-roberts-moran-introduce-the-kelsey-smith-act>.

¹⁹ KELSEY’S ARMY, *supra* note 14.

²⁰ *Carpenter v. United States*, No. 16-402 U.S. 1, 18 (2018).

²¹ Kelsey Smith Act, *supra* note 1.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

C. *Missing Children Across the United States*

In 2018, the Federal Bureau of Investigation (FBI) reported that there were 424,066 National Crime Information Center (NCIC) entries for missing children.²⁵ This number indicates the reports of missing children; this means that if a child runs away multiple times within the year, each instance would be counted separately.²⁶ This would also mean that any entry that is withdrawn and amended or updated would also be reflective of the yearly total.²⁷

In 2018, the National Center for Missing & Exploited Children (NCMEC) assisted law enforcement with over 25,000 cases of missing children.²⁸ As encouraging as that may be, the FBI has reported that many of the children on the FBI's "Kidnappings & Missing Persons" webpage have still been missing.²⁹ As equally disturbing, of the more than 23,500 endangered runaways reported to the NCMEC in 2018, there was a one in seven chance that the child was a victim of child sex trafficking.³⁰ That number- one in seven- is exclusively for sex trafficking, which therefore would not include the additional forms of trafficking that take place.³¹ Additionally, it is reported that every day in the United States, 46 children are taken and sold into child slavery.³² If we broaden the scope away from child trafficking, a child becomes missing or is abducted every forty seconds in the United States.³³ In total, approximately 1,435 children are kidnapped each year.³⁴

Contrary to popular belief, traffickers do not exclusively take endangered runaways; rather, they do not discriminate in who they

²⁵ *About NCMEC*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., <http://www.missingkids.com/footer/media/keyfacts> (last visited Sep. 20, 2020).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Gone Without a Trace? Misery, Mystery Linger in These Alabama Missing Child Cases*, ADVANCE LOCAL (Nov. 12, 2019), <https://www.al.com/news/birmingham/2019/11/gone-without-a-trace-misery-mystery-linger-in-these-alabama-missing-child-cases.html>.

²⁹ *National Missing Children's Day 2019*, FBI (May 24, 2019), <https://www.fbi.gov/news/stories/national-missing-childrens-day-052419>.

³⁰ *Commercial Sexual Exploitation of Children*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/programs/commercial-sexual-exploitation-children> (last visited Sept. 21, 2020).

³¹ *Child Trafficking*, ERASECHILD TRAFFICKING, <https://www.erasechildtrafficking.org/child-trafficking/> (last visited Oct. 2, 2020).

³² *Id.*

³³ Karin A. Bilich, *Child Abduction Statistics for Parents*, PARENTS (Oct. 3, 2005) <https://www.parents.com/kids/safety/stranger-safety/child-abduction-facts/>.

³⁴ George Filenko, *Child Abductions. Are We Prepared?*, PATCH (Apr. 22, 2019), <https://patch.com/illinois/grayslake/child-abductions-are-we-prepared>.

abduct.³⁵ The locations in which children get abducted and trafficked varies across the board.³⁶ Children can be snatched in both poor and rich neighborhoods, as well as either rural or urban areas.³⁷

There are primarily three categorical types of kidnappings that take place: kidnapping by a relative or “family kidnapping” (49 percent), kidnapping by an acquaintance (27 percent), and kidnapping by a stranger (24 percent).³⁸ Each category of kidnappers primarily focuses on different groups.³⁹ Family kidnappings, mainly done by parents, most frequently occurs in children who are under 6 years of age.⁴⁰ Acquaintance kidnappings are more likely to involve teenage girls and often come with other crimes, mainly sexual and physical assault.⁴¹ The last category, stranger kidnappings, does not discriminate, but has a tendency to focus on both school-age and teenage females.⁴²

Many people in the United States have become accustomed to seeing an alert by America’s Missing: Broadcast Emergency Response (AMBER) Alert for an abducted child.⁴³ AMBER Alert is a system that coordinates with local police to send out emergency signals to help local abducted children.⁴⁴ Obviously, there must be a framework of exact criteria that must be met in order to issue an AMBER Alert. The summary of what criteria is required is listed as follows: (1) law enforcement must reasonably believe that there has been an abduction;⁴⁵ (2) law enforcement reasonably believes the abducted child is in “imminent danger of serious bodily injury or death”;⁴⁶ (3) law enforcement has “enough descriptive information about the victim and the abduction” to aid in the recovery of the child;⁴⁷ (4) the abducted child is seventeen or

³⁵ *Child Trafficking*, *supra* note 31.

³⁶ *See id.*

³⁷ *Id.*

³⁸ Bilich, *supra* note 33.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See About AMBER Alert*, DEP’T OF JUST., <https://amberalert.ojp.gov/about> (last visited Oct. 3, 2020).

⁴⁴ *Id.*

⁴⁵ *Guidelines for Issuing AMBER Alerts*, DEP’T OF JUST., <https://amberalert.ojp.gov/about/guidelines-for-issuing-alerts> (last visited Oct. 3, 2020).

⁴⁶ *Id.*

⁴⁷ *Id.* (The description requirement for AMBER Alerts is keyed in on the description of the child, but it also includes providing as much descriptive information on the suspected abductor and their vehicle. This would be a critical difference between the use of AMBER Alerts and the Kelsey Smith Act. The Kelsey Smith Act would ultimately provide law enforcement another possibility of finding a child, even if the descriptive information hasn’t been met yet. This could lead to the potential overuse and abuse of the Kelsey Smith Act, which is why how the act is specifically worded could use work on

younger;⁴⁸ (5) “[t]he child’s name and other critical data elements, including the Child Abduction flag, have been entered into the National Crime Information (NCIC) system.”⁴⁹ Once it has been determined that a child has been abducted and the AMBER Alert criteria are met, law enforcement officials notify broadcasters and state transportation officials.⁵⁰ Upon notification, an alert interrupts regular programming on radio, television, Department of Transportation highway signs, etc.⁵¹

AMBER Alert plans are established in all fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.⁵² Additionally, in 2003, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act was signed into law.⁵³ This act rejuvenated law enforcement’s abilities to prevent, investigate, prosecute and punish violent crimes committed against children.⁵⁴ The use of AMBER Alert has played a significant role in reuniting families with their abducted child.⁵⁵ Unfortunately, AMBER Alerts are not issued for runaways, even if they are considered endangered runaways.⁵⁶

The enactment of AMBER Alert and its subsequent legislation shows the importance that has been placed on protecting children. Realizing the significance for the protection of children, it is apparent that the combined

clarifying some of the elements necessary. With that being said, it’s apparent that there is a need for furthering law enforcement and families the tools that can be used to find abducted or missing children.).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Frequently Asked Questions*, DEP’T OF JUST., <https://amberalert.ojp.gov/about/faqs> (last visited Oct. 4, 2020).

⁵¹ *Id.*

⁵² *AMBER Alert*, DEP’T OF JUST., <https://amberalert.ojp.gov/> (last visited Oct. 4, 2020) (Additionally, AMBER Alert is also present in thirty other countries.).

⁵³ PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).

⁵⁴ *Id.*

⁵⁵ See Chloe Bradford, *What Should you do if your Child goes Missing?*, CBS19 (Jan. 13, 2020), <https://www.cbs19.tv/article/news/local/what-should-you-do-if-your-child-goes-missing/501-c8d48e86-72af-43bc-b1fc-23fc198fbbf7> (As of September 2019, there have been 967 children rescued specifically because of AMBER Alert and 58 children have been rescued because of Wireless Emergency Alerts.); see also *Statistics*, DEP’T OF JUST., <https://amberalert.ojp.gov/statistics> (last visited Oct. 4, 2020) (As of September 2019, there are 86 AMBER Plans throughout the United States.).

⁵⁶ Chris Montaldo, *Guidelines for Issuing AMBER Alerts*, THOUGHTCO (Nov. 23, 2019), <https://www.thoughtco.com/guidelines-for-issuing-an-amber-alert-972593> (discussing how not all missing children will receive an AMBER Alert because runaways do not receive the same treatment as abducted children. This could serve as one of the primary reasons why law enforcement should have the ability to search for a missing child, whether abducted or runaway, with the use of a cell phone ping. Allowing the Kelsey Smith Act to come in and rectify the lack of assistance for endangered runaways could serve as a vital tool.).

use of AMBER Alert and the Kelsey Smith Act could further provide protection that proponents are searching for.

D. Support for the Kelsey Smith Act

With twenty-seven states adopting the Kelsey Smith Act, it is clear to see that there is legitimate support for the law.⁵⁷ In fact, three of the twenty-seven states (Kentucky, South Dakota, and Wyoming) that implemented the act have done so after the Act went up before the Senate in 2019.⁵⁸ With this support for the Act growing, it can bring one to pose the question, “When will other states follow suit?” One important question that those states and the federal government need to address on their own is, “What can this act provide?”

Senator Roberts, one of the co-sponsors of the Act, has pointed out, “The Kelsey Smith Act is common sense legislation that will help save countless children’s lives by making it easier for law enforcement to find children and loved ones who are abducted.”⁵⁹ Further, based on more of Roberts comments about the Act,⁶⁰ it pushes one to realize that this Act in its original form, while applicable to all, is primarily focused on one group in particular: children.⁶¹ Senator Moran has emphasized that this Act enables first responders the ability to use the necessary tools to find abducted children, resulting in more lives’ saved.⁶² Naturally, support for the Act also comes from the parents of Kelsey Smith, Greg and Missey Smith.⁶³ Missey Smith has even pointed out that the law does not require additional costs to implement.⁶⁴ One practical question that Kelsey Smith’s parents have presented is, “If your child was missing would you not want law enforcement to have every tool available to find your child?”⁶⁵ This simple, yet profound question is quite simply at the root of this Act.

⁵⁷ KELSEY’S ARMY, *supra* note 14.

⁵⁸ *Id.*

⁵⁹ *Senators Roberts & Moran Introduce the Kelsey Smith Act*, *supra* note 18.

⁶⁰ *Id.* (“I’ve worked with my colleagues and the Smith family for years to pass this legislation, which is already law in 23 states. Expediting the process of locating a cell phone could have helped save Kelsey’s life, and I hope we can pass this bill to save the lives of other innocent children who are abducted in the future.”).

⁶¹ *Id.*

⁶² *Id.* (“This legislation will make certain first responders have the tools they need to locate children who have been abducted, and I urge my colleagues to support this sensible bill to help save children’s lives.”).

⁶³ *Id.*

⁶⁴ Sarah Fruchtnicht, *Parents of Murdered Teen Push for Kelsey Smith Act, Cell Phone Carriers to Release Customer Location to Authorities*, OPPOSING VIEWS (Mar. 1, 2018), <https://www.opposingviews.com/category/parents-murdered-teen-push-kelsey-smith-act-cell-phone-carriers-release-customer>.

⁶⁵ *Senators Roberts & Moran Introduce the Kelsey Smith Act*, *supra* note 18

Law enforcement officials from states that have implemented the Act have expressed their support for the Act as well.⁶⁶ Officials have pointed out that with time being crucial in situations of missing persons, children or adults, the ability to use the tools the Act grants has been highly advantageous.⁶⁷ One officer, Major Scott Boden of Johnson County Sheriff's Office (NE) has called the Kelsey Smith Act "the single most important piece of legislation related to potentially saving lives of suicidal subjects, assisting endangered children and addressing life threats when cell phone location is necessary and seconds count."⁶⁸ This single statement alone should push proponents and opponents of the Act to stop and consider how this Act been effective as to date. Another officer has referred to their state having the Kelsey Smith Act in place as a privilege.⁶⁹ Furthermore, officers have pointed out that there have been success stories in the states that have already adopted the Act.⁷⁰

Additionally, there are other individuals and groups throughout the country that have expressed their support for the Act.⁷¹ John Walsh, the co-founder of the NCMEC has voiced his support in a letter to Senator Pat Roberts endorsing the Act.⁷² Walsh's support stems from his family's own experience with their son's abduction and murder.⁷³ In that letter, Walsh similarly emphasizes the importance of time and how this Act can be effective in saving children's lives.⁷⁴ John Ryan, CEO of NCMEC, told Fox News in an email expressing his support for the Act, that "[t]ime is of the essence when a child is missing" and that this Act could help prevent delays to reaching children.⁷⁵ Verizon Wireless has also made note that they support the Smith family's effort in getting the Act passed.⁷⁶ Beyond those already mentioned, more additional groups support this Act, such as: CTIA – The Wireless Association, Sprint, the National District Attorneys Association (NDAA), the Federal Law Enforcement Officers Association (FLEOA), the Sergeants Benevolent Association (SBA), the

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Letter from John E. Walsh, Co-founder of The Nat'l Ctr. for Missing & Exploited Child., to Sen. Pat Roberts (R-Kan.) (Jan. 2019) (on file with receiver).

⁷⁴ *Id.*

⁷⁵ Bryan Bentley, *The Kelsey Smith Story—A Story of Heartache & Hope*, PATCH (May 21, 2013), <https://patch.com/michigan/plymouth-mi/bp--the-kelsey-smith-story-a-story-of-heartache-hope>.

⁷⁶ Cristina Corbin, *Mother of Murdered Teen Pushes for Law Forcing Cellphone Carriers to Release Life-Saving Information*, FOX NEWS (Dec. 20, 2015), <https://www.foxnews.com/politics/mother-of-murdered-teen-pushes-for-law-forcing-cellphone-carriers-to-release-life-saving-information>.

International Association of Chiefs of Police (IACP), the Major County Sheriffs of America (MCSA), the National Association of Police Organizers (NAPO), the Fraternal Order of Police (FOP), and the National Sheriffs' Association (NSA).⁷⁷ One important component to point out of the group of supporters mentioned above is that there are multiple groups that deal with law enforcement and the protection of others who support this Act.⁷⁸ Those groups are the ones who would directly be using this Act.

E. Opposition to the Kelsey Smith Act

Naturally, as it is with any Act brought up in Congress in this day and age, there will be some pushback. Arguably, the most recognized group to the Act is the American Civil Liberties Union (ACLU).⁷⁹ The ACLU has urged the House of Representatives to vote “NO” on the Kelsey Smith Act on multiple occasions.⁸⁰ The ACLU noted that the way the Act was introduced in 2016 to the House “exclude[d] key protections contained in a prior version of the bill and in other state emergency location disclosure laws.”⁸¹ Additionally, the ACLU stated more concerns with the 2016 version, such as: “If providers must turn over records any time law enforcement asserts an emergency there is a real danger of significant oversharing stemming from law enforcement’s incorrect use of the emergency exception.”⁸² The ACLU has also made aware of their concern that the bill would not actually improve emergency response times, but rather would weaken the privacy rights of all.⁸³ Quite frankly, this issue

⁷⁷ *Senators Roberts & Moran Introduce the Kelsey Smith Act*, *supra* note 18.

⁷⁸ *See id.*

⁷⁹ Letter from Laura W. Murphy, Dir. of the Washington Legis. Off. for ACLU, & Christopher R. Calabrese, Legis. Couns. for ACLU, to Congressman Fred Upton (R-Mich.) & Henry A. Waxman (D-Cal.) (July 29, 2014) (on file with author) (addressing how the ACLU was against the adoption of the bill in 2014. While the ACLU has given their statements on past iterations of the bill, there has not been a statement addressing the current proposal of the Kelsey Smith Act.).

⁸⁰ *See id.*; *see also* Letter from Karin Johanson, Dir. of Washington Legis. Off. for the ACLU, & Neema Signh Guliani, Legis. Couns. for the ACLU, to the House of Reps. (May 23, 2016) (on file with author) (addressing how the ACLU was against the 2016 proposed drafting of the Kelsey Smith Act. Again, this does not clearly establish what the ACLU has as its official stance for the 2019 version of the Kelsey Smith Act that has been brought up again.).

⁸¹ *See* Johanson, *supra* note 80 (differing now that there are in fact different provisions listed in the bill that is currently being presented).

⁸² Justin Wingenter, *Liberals & Libertarians Sunk Kelsey Smith Act in the U.S. House*, THE TOPEKA CAPITAL-JOURNAL (May 28,

2016), <https://www.cjonline.com/article/20160528/NEWS/305289765> (discussing the surprising collectivity between liberal and libertarian groups sharing a common goal of defeating the 2016 version of the Kelsey Smith Act in the House of Representatives).

⁸³ Jeremy Snow, *Privacy Concerns Threaten Emergency Response Bill*, FEDSCOOP (July 20, 2016), <https://www.fedscoop.com/despite-a-7-year-fight-privacy-questions-still-hold-back-emergency-response-bill/>.

for the ACLU comes down to the Fourth Amendment protections each American is guaranteed.⁸⁴

Another notable opponent to the bill is the Electronic Frontier Foundation (EFF).⁸⁵ The EFF is one of the leading groups in the United States in regards to promoting the limiting of digital censorship and government surveillance.⁸⁶ One writer and policy analyst for EFF, David Ruiz, has stated that the bill is not unreasonable on its face, but maintains that there is no protection for someone if the police make a mistake or abuse their power under the bill.⁸⁷ Possibly the biggest concern would be the definition of “emergency” under the bill’s language.⁸⁸ The EFF makes note that the 48 hour phone call to the police window is the possibly the most glaring issue in terms of what is categorized as an emergency.⁸⁹ The EFF’s other primary concern is that the bill would “effectively bar providers from protecting their users.”⁹⁰ Notably, the EFF does give recognition where it is due with the bill, that is has a commendable purpose.⁹¹

When the bill was introduced to the House of Representatives in 2016, a mixture of both liberal and conservative members voted against the bill.⁹² An “ultra-conservative” group of conservatives, from the House Freedom Caucus cast twenty-six nays (the group consists of forty-one members).⁹³ Similarly, the House Liberty Caucus, a libertarian-leaning group of Republicans, had the majority of their members vote in opposition to the bill (only ten of its thirty-five members voted in favor of the bill).⁹⁴ A libertarian think-tank, the R Street Institute, referred to the Kelsey Smith Act as “another expansion of government surveillance power” in

⁸⁴ *Id.*

⁸⁵ *See* Ruiz, *supra* note 2.

⁸⁶ *See A History of Protecting Freedom Where Law & Technology Collide*, ELEC. FRONTIER FOUND., <https://www.eff.org/about/history> (last visited Oct. 29, 2020) (stating how the EFF has played a vital role in protecting individual rights from over-censorship and government surveillance. The EFF was founded in July of 1990 with the mission to protect free speech. The EFF started out because of the E911 document, which comes from a raid by the United States Secret Service tracking distribution of illegally copied documents).

⁸⁷ *See* Seals, *supra* note 8. (“On its face, [the point of the bill is] not unreasonable,” said EFF’s David Ruiz, in a posting this week. ‘But if the police make a mistake—or abuse their power—the bill offers almost no legal recourse for someone whose location privacy was wrongfully invaded.’”).

⁸⁸ Ruiz, *supra* note 2.

⁸⁹ *Id.*

⁹⁰ *Id.* (Providing that the bill mandates the phone provider to handover the cell phone location).

⁹¹ *Id.*

⁹² *See* Wingerter, *supra* note 82.

⁹³ *Id.*

⁹⁴ *Id.*

their attempt to dissuade House members for voting for the bill.⁹⁵ Additionally, the House Progressive Caucus, the most liberal group in the House, also had the majority of their members vote against the bill (fifty-one out of their fifty-nine members voted against it).⁹⁶ Keeping these differing views on the Kelsey Smith Act and its various proposed drafts, there appears to be much more room for debate on how to implement the act or a similar type of law.

II. CELL PHONE TECHNOLOGY RELEVANT TO THE KELSEY SMITH ACT

How a cell phone “tracks” or “monitors” an individual is an important component to analyzing the Kelsey Smith Act.⁹⁷ Cell phones are supported through cell towers which are able to relay messages from one user to another.⁹⁸ In the traditional sense, there are two ways in which cell phones can identify one’s location: (1) global positioning system (GPS) and assisted global positioning system (AGPS); and (2) cell-site location information (CSLI).⁹⁹

A. *Global Positioning System and Assisted Global Positioning System*

The Global Position System is a constellation of twenty-eight Earth-orbiting satellites that was originally designed for military purposes.¹⁰⁰ In regards to cell phone usage, GPS technology uses four or more satellites to triangulate signals of a cell phone’s location.¹⁰¹ The GPS uses radio waves between the satellites and your phone; your phone actually receives data from the satellites that are orbiting to find your geolocation.¹⁰² However, GPS has limitations, such as: (1) being slower than new

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Kelsey Smith Act, *supra* note 1 (realizing that the simple fact that law enforcement will be going to the cell phone provider of a missing individual is what gets at the heart of the bill.).

⁹⁸ Hussain Kanchwala, *What are Cell Towers & How do They Work?*, SCIENCEABC, <https://www.scienceabc.com/innovation/cell-tower-work.html>, (last updated Oct. 16, 2019).

⁹⁹ Jerry Hildenbrand, *How does GPS Work on My Phone: Before Space Force, There was NAVSTAR*, MOBILE NATIONS (Aug. 24, 2018), <https://www.androidcentral.com/how-does-gps-work-my-phone#:~:targetText=GPS%20is%20a%20radio%20navigation,that%20needs%20to%20use%20it.&targetText=Your%20phone's%20GPS%20receiver%20uses,and%20what%20time%20it%20is>; Eric Lode, *Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under Fourth Amendment*, 92 A.L.R. Fed. 2d § 1.

¹⁰⁰ See Hildenbrand, *supra* note 99.

¹⁰¹ *Id.*

¹⁰² *Id.*

technology; (2) uses a lot of power on the receiver end (your cell phone); and (3) require an unobstructed view, which regularly becomes a problem because of the high rise buildings in many cities.¹⁰³

However, the Assisted Global Positioning System goes a step further than the standard GPS by adding cellular location data to assist the geolocation.¹⁰⁴ The AGPS combines the standard GPS location with the use of a phone company's phone "pings" through cell towers.¹⁰⁵ AGPS uses "pinging" by sending out data from your phone in conjunction with receiving data the GPS satellites.¹⁰⁶

B. Cell-Site Location Information

Cell-site location information (CSLI) is the information that is collected as a cell phone identifies its location to nearby cell towers.¹⁰⁷ When a phone is turned on, it shares its location, every seven seconds, on a continual basis with the nearby cell towers.¹⁰⁸ A cell phone can be located within about 200 feet by use of a single cell tower in an urban area.¹⁰⁹ However, one's location can be pinpointed even more precisely by "triangulating" the information from multiple cell towers.¹¹⁰ To be able to locate a cell phone at a precise moment in time, the phone provider may "ping" that phone by calling and hanging up.¹¹¹ This is the "usual" way that law enforcement would be able to track an individual with the help of the phone provider.¹¹² There are two ways to look at CSLI: (1) historical CSLI, which refers to cell phone data that is used to track past most movements; and (2) real time, or prospective, CSLI which allows someone to track in real time.¹¹³

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (Cell phone "pings" will be analyzed more fully under cell-site location information where it is most used and the primary way in which it will be used with the Kelsey Smith Act).

¹⁰⁶ *Id.*

¹⁰⁷ Eric Lode, *Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under Fourth Amendment*, 92 A.L.R. Fed. 2d § 1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Stephanie Lacambra, *Cell Phone Location Tracking or CSLI: A Guide for Crim. Def. Att'y*, ELEC. FRONTIER FOUND., https://www.eff.org/files/2017/10/30/cell_phone_location_information_one_page_0.pdf (last visited Nov. 6, 2020).

III. CONSTITUTIONALITY OF THE KELSEY SMITH ACT

A. *Fourth Amendment – Basic Framework*

The Fourth Amendment of the United States Constitution protects against “unreasonable searches and seizures” and further states that “probable cause” is needed for warrants to be issued.¹¹⁴ The Supreme Court has emphasized that the text of the Constitution makes clear that, “the ultimate touchstone of the Fourth Amendment is reasonableness.”¹¹⁵ “Reasonableness” under the Fourth Amendment is “predominantly an objective inquiry.”¹¹⁶ The Court lays out that when law enforcement officials conduct a search of criminal wrongdoing, “[R]easonableness generally requires the obtaining of a judicial warrant.”¹¹⁷ Furthermore, the Court has stated that “warrantless searches are typically unreasonable where ‘a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.’”¹¹⁸ The rationale behind the necessity in most cases for obtaining a warrant is to guarantee that the inferences used to support a search are “drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”¹¹⁹ As will be discussed later in this section, a warrantless search is only reasonable if it falls within a few of the categorical exceptions.¹²⁰

Normally, a Fourth Amendment claim arises when a defendant in a criminal case claims that the police violated his/her constitutional rights.¹²¹ This usually happens by way of an unreasonable search or

¹¹⁴ U.S. CONST. amend. IV.

¹¹⁵ *Riley v. California*, 73 U.S. 373, 381 (2014).

¹¹⁶ *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011).

¹¹⁷ *Riley*, *supra* note 115, at 382.

¹¹⁸ *Carpenter*, *supra* note 20 at 2221 (This comment by the Court is significant when considering that the use of the Kelsey Smith Act isn’t to discover evidence of criminal wrongdoing. Rather, the act is aimed at protecting and preventing the continuance of a heinous wrongdoing on a victim. It’s important to note that there’s the potential implication that when this act may be used, the missing or abducted person (in the context of this note, children) are in the middle of a criminal activity when they are found. This will be discussed later in this note, under the section titled “Part IV. The Federal Application of the Kelsey Smith Act Exclusively for Children.”).

¹¹⁹ *Riley*, *supra* note 115, at 382.

¹²⁰ *Id.*

¹²¹ Lee Arbetman & Michelle Perry, *Search and Seizure: The Meaning of the Fourth Amendment Today*, <http://www.socialstudies.org/sites/default/files/publications/se/6105/610507.html#:~:targetText=The%20typical%20Fourth%20Amendment%20case,his%20or%20her%20constitutiona%20rights.&targetText=If%20the%20evidence%20is%20deemed,Exclusionary%20Rule%20comes%20into%20play> (last visited Oct. 28, 2020).

seizure of evidence by the police.¹²² With that in mind, there is something drastically different between those typical cases and the Kelsey Smith Act: a defendant in a case involving the Kelsey Smith Act would not have any grounds to sue on Fourth Amendment claims because it would not be a search of their own possessions.¹²³ The idea that someone, who has kidnapped another person (in this case a child), would rely upon the Fourth Amendment for “protection” of that other person’s possession is blatantly ignorant.

B. *Electronics Communications Privacy Act of 1986*

The Electronics Communications Privacy Act of 1986 (ECPA) was designed to update the Federal Wiretap Act of 1968, which provided protection for communications over “hard” telephone lines, but did not apply to any other subsequent forms of communication via technology.¹²⁴ The ECPA however further regulates the interceptions of other forms of communication via technology.¹²⁵ The ECPA, in its amended form, provides protection for wire, oral, and electronic communications while those communications are “being made, are in transit, and when they are stored on computers.”¹²⁶ The ECPA provides this protection to email, telephone conversations, and electronically stored data.¹²⁷

¹²² *Id.*

¹²³ *Minnesota v. Carter*, 525 U.S. 83, 92 (1998) (J. Scalia, Concurring) (“The Fourth Amendment protects ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .’ U. S. Const., Amdt. 4 (emphasis added). It must be acknowledged that the phrase ‘their . . . houses’ in this provision is, in isolation, ambiguous. It could mean ‘their respective houses,’ so that the protection extends to each person only in his own house. But it could also mean ‘their respective and each other’s houses,’ so that each person would be protected even when visiting the house of someone else. As today’s opinion for the Court suggests, however, ante, at 473, it is not linguistically possible to give the provision the latter, expansive interpretation with respect to ‘houses’ without giving it the same interpretation with respect to the nouns that are parallel to ‘houses’ – ‘persons, . . . papers, and effects’ – which would give me a constitutional right not to have your person unreasonably searched. This is so absurd that it has to my knowledge never been contemplated. The obvious meaning of the provision is that each person has the right to be secure against unreasonable searches and seizures in his own person, house, papers, and effects.”).

¹²⁴ Electronic Communications Privacy Act of 1986, JUSTICE INFORMATION SHARING, <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1285>.

¹²⁵ 18 U.S.C. §§ 2510–2522, 2701–2712, 3121–3127 (2006).

¹²⁶ 18 U.S.C. §§ 2511.

¹²⁷ See *Electronic Communications Privacy Act of 1986*, *supra* note 124.

C. *Stored Communications Act*

The Stored Communications Act (SCA) is a federal statute that regulates historical cell site information cases.¹²⁸ The most relevant section to the Kelsey Smith Act is Section 2702(c)(4), which provides:

A provider . . . may divulge a record or other information pertaining to a subscriber . . . (not including the contents of communications covered by [other subsections]) –

. . .

(4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death of serious physical injury to any person requires disclosure without delay of information relating to the emergency.¹²⁹

An important case in which the Court analyzed the SCA is *United States v. Gilliam*.¹³⁰ The two primary questions that the court asked in this case were: (1) what is the meaning of “other information” in subsection 2702(c)(4)¹³¹ and (2) whether the circumstances constituted “an emergency involving danger of . . . serious physical injury to any person.”¹³² This is a basic analytical framework for which to process the SCA with the Kelsey Smith Act and the types of cases that it would be applied to.

D. *Warrant and Warrantless Searches Under the Fourth Amendment Relating to Cell Phones*

As stated above, the general principle is that a search warrant is required for a search, unless it falls within one of the categorical exceptions.¹³³ One exception to a warrantless search is consent given by the individual or a third party who possesses “common authority” over the

¹²⁸ 18 U.S.C. § 2702.

¹²⁹ *United States v. Gilliam*, 842 F.3d 801, 803 (2016) (quoting Stored Communications Act, 18 U.S.C. § 2702(c)(4)).

¹³⁰ *Id.*

¹³¹ *Id.* (addressing how the court pointed to other cases to analyze what the “other information” meant. The court found that “other information” was intended to be information about the customer’s use of the service, which would include the location the user’s cell phone).

¹³² *Id.*

¹³³ See *Riley*, *supra* note 115 at 382.

premise.¹³⁴ A second exception to a warrantless search is a search incident to a lawful arrest; specifically only a search pertaining to the person arrested and the surrounding area within his immediate control.¹³⁵ A third exception is the “plain-view” doctrine.¹³⁶ A fourth exception is the “stop and frisk” exception.¹³⁷ A fifth exception is the automobile exception.¹³⁸ A sixth exception is the “hot pursuit” exception.¹³⁹

The primary warrantless search exception that would be applicable in situations requiring the use of the Kelsey Smith Act would be under the exceptions of exigent circumstances.¹⁴⁰ One recent case that sheds light on this situation is *Carpenter v. United States*.¹⁴¹ In *Carpenter*, the defendant, Timothy Carpenter, was convicted of robbing charges after police had gathered cell phone location data after receiving a warrant.¹⁴² The Court in this case spent a lengthy discussion on a “search” under the

¹³⁴ *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (This exception, specifically about a third party who has “common authority” will be discussed later within Part IV pertaining to parental consent of a minor’s cell phone. This exception, while not listed as the primary exception pertaining to the Kelsey Smith Act is a close second in terms of the importance and significance it plays within the realm of not requiring a warrant for a situation in which the Kelsey Smith Act is necessary.).

¹³⁵ *Arizona v. Gant*, 556 U.S. 332, 338–39 (2009) (The primary purpose for this type of warrantless search is to provide safety for the arresting officer(s)).

¹³⁶ *United States v. Rumley*, 588 F.3d 202, 205 (4th Cir. 2009) (“Pursuant to this plain-view doctrine, an officer may, without a warrant, seize ‘incriminating evidence when (1) the officer is lawfully in a place from which the object may be plainly viewed; (2) the officer has a lawful right of access to the object itself; and (3) the object’s incriminating character is immediately apparent.” (quoting *United States v. Jackson*, 131 F.3d 1105, 1109 (4th Cir. 1997)).

¹³⁷ *See Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (“If a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy....”); *see also Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (establishing that a police officer does not need to ignore contraband that is found).

¹³⁸ *Collins v. Virginia*, 138 S.Ct. 1663, 1669–70 (2018) (Discussing the two justifications for permitting this type of warrantless search. One reason is because a vehicle can be moved quickly out of the area before a warrant is obtained. The second justification is the regulation of vehicles on public highways. When these justifications are present, an officer may search a vehicle without a warrant if they have probable cause to do so.).

¹³⁹ *United States v. Bass*, 315 F.3d 561, 564 (6th Cir. 2002) (Stating that a warrantless entry of a home is justified when the police are in a hot pursuit of a fleeing felon.).

¹⁴⁰ *Carpenter*, *supra* note 20 at 2222 (2018) (“One well-recognized exception applies when “the exigencies of the situation” make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” *Kentucky v. King*, 563 U.S. 452, 460 (2011)).

¹⁴¹ *Id.*

¹⁴² *Id.* at 2212.

third party consent doctrine.¹⁴³ In the Court's final ruling, the Court stated that regardless of whether the government is using its own technology or using the technology of a wireless carrier, "an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through cell-site location."¹⁴⁴ However, two of the most significant differences between *Carpenter* and the application of the Kelsey Smith Act are: (1) the "search" would be a search of the victim of a crime, not the suspect; and (2) the time-frame of which the "search" would be taking place during.¹⁴⁵ Additionally, the Court further analyzed that because the use of the cell phone information constituted a search, there was the possibility that the search could have been protected by one of the exceptions for a required warrant.¹⁴⁶

Examples of exigencies include "the need to pursue a fleeing suspect, *protect individuals who are threatened with imminent harm*, or prevent the imminent destruction of evidence."¹⁴⁷ The Supreme Court has further established that contrary to incidences that require a search warrant for an arrest, "the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case."¹⁴⁸

The *Gilliam* case also closely analogizes the substance of the Kelsey Smith Act, although not necessarily its use in practice.¹⁴⁹ In *Gilliam*, the

¹⁴³ *Id.* at 2262-2264. (The third party consent doctrine is addressed under Part IV, when analyzing how parental consent may be used within the realms of the third party consent doctrine.)

¹⁴⁴ *Id.* at 2216.

¹⁴⁵ *Id.* at 2226 (analyzing how the police gathered data on Carpenter's location for over 100 days, that would not be the case with the Kelsey Smith Act. The Kelsey Smith Act would be limited in its use because it becomes applicable when someone has been identified as missing or 9-1-1 was called within the last 48 hours. This contrasts significantly from the 100 days used in *Carpenter*. Note, however, the Kelsey Smith Act as currently written doesn't expressly state how far back the police can use the cell phone data, which is something that should be addressed before any form of this bill is passed. If this portion remains unchecked, it could lead to the potential misuse and control that the opponents to the bill are so desperately trying to avoid).

¹⁴⁶ *Id.* at 2221 (The Court addressed the idea that the exceptions for a warrantless search would still hold true for a search by use of a cell phone. Again, this is highly significant because it leads way to the suggestion that the exceptions will hold true for cell phone tracking by the government).

¹⁴⁷ *Id.* (emphasis added).

¹⁴⁸ *Riley*, *supra* note 148, at 402. (This case, a "double case," was to determine whether or not police officers could search an individual's cell phone after they had been arrested without a warrant. While the Court ultimately held that in both cases the warrantless search was not permissive, the Court laid out some framework in which we can use to help guide our discussion. While the cases are not necessarily similar in a factual sense to this discussion, the application of the law and how to assess warrantless searches is conducive to this discussion on the Kelsey Smith Act.)

¹⁴⁹ *See Gilliam*, *supra* note 129, at 801.

defendant was appealing his conviction involving sex trafficking a minor, in which the authorities used the GPS of the Gilliam's phone to track him down.¹⁵⁰ During the investigation, the officer who contacted Gilliam's cell provider (Sprint) requested the GPS location because he was "investigating a missing child who [was] . . . being prostituted" and that this was "an exigent situation involving . . . immediate danger of death or serious bodily injury to a person."¹⁵¹

The court ruled that the District Court was correct that exigent circumstances justified GPS tracking of Gilliam's cell phone.¹⁵² The court found that the sexual exploitation of a minor has "often been found to pose a significant risk of serious bodily injury."¹⁵³ The court also turned to the Ninth Circuit's analysis that "prostitution of a child involves 'the risk of assault or physical abuse by the pimp's customers or by the pimp himself.'"¹⁵⁴

The significance of the Second Circuit's rationale is that it gets at the very heart of what the Kelsey Smith Act is designed to do- protect individuals, especially children. While the Act does not exclusively apply to sex trafficked children,¹⁵⁵ the *Gilliam* case sheds light on the fact that exigent circumstances show a warrant is not required, and should not be required, in certain situations.¹⁵⁶

Even though this note is aimed at the federal level, there is a state court case that points towards "pinging" a victim's cell phone.¹⁵⁷ The relevant facts from this case are: (1) the defendant was a suspect for murder, (2) the police discovered that the cell phone of the victim was no longer on his person, and (3) the police had pinged the victim's cell phone to find the defendant without a warrant.¹⁵⁸ The court reasoned that the

¹⁵⁰ *Id.* at 802.

¹⁵¹ *Id.* (It can also be noted that the abducted minor, Jasmin, called her mother while she was at Gilliam's apartment, however, it is unclear whose phone Jasmin was using when she made the call. While this is not the equivalent of calling 9-1-1 for which the Kelsey Smith Act has as an option, it could further lead to a parent being able to give evidence to the authorities that their minor child has been abducted.).

¹⁵² *Id.* at 804.

¹⁵³ *Id.* (citing *United States v. Daye*, 571 F.3d 225, 234 (2d Cir. 2009), abrogated on other grounds by *Johnson v. United States*, --- U.S. ---, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015); *United States v. Curtis* 481 F.3d 836, 838–39 (D.C. Cir. 2007)).

¹⁵⁴ *Id.*

¹⁵⁵ See Kelsey Smith Act, *supra* note 1.

¹⁵⁶ See Gilliam, *supra* note 129 at 804 (rationalizing that if a search warrant were required in all situations, there would be countless emergencies that the authorities would not be able to handle. Taking Jasmin's situation in *United States v. Gilliam*, if police were required to get a warrant to ping the phone, Gilliam may have moved Jasmin by the time the warrant was received. Additionally, looking towards the tragedy of Kelsey Smith's disappearance and murder, if no warrant was required by the police to have the phone provider ping her phone, there is the possibility that she could have been saved.).

¹⁵⁷ *People v. Valcarcel*, No. 02361, slip op. (App. Div. 3rd Dept. April 5, 2018).

¹⁵⁸ *Id.* at 1034–35.

defendant did not have a right to privacy based on the victim's phone, even though it was in the defendant's possession.¹⁵⁹ Additionally, the court noted that exigent circumstances existed that would allow police to "ping and track the victim's cell phone without a warrant."¹⁶⁰ The relevancy of this case is to point towards Justice Scalia's concurrence in *Minnesota v. Carter*, emphasizing the point that a defendant would only have an expectation to their *own* possessions.¹⁶¹ Keeping that rationale in mind, it is a way to further provide that someone who would be the suspect in a case involving the Kelsey Smith Act would not be able to use the Fourth Amendment claim when it relates to another's cell phone.

In the case of using the Kelsey Smith Act, it should be blatantly obvious that it would be used to protect individuals who are threatened with imminent harm and ensuring that law enforcement is able to do their job to the fullest extent to help the community.

IV. THE FEDERAL APPLICATION OF THE KELSEY SMITH ACT EXCLUSIVELY FOR CHILDREN

The proposal of this Note is that Congress should adopt the Kelsey Smith Act exclusively for children. If Congress were to adopt the Kelsey Smith Act exclusively for children, there could potentially be more agreement on the potential implementation of the act.¹⁶² This leads to multiple questions, such as: who is considered a minor? Or what fourth amendment rights do minors have? Or can a parent(s) or guardian(s) give consent on behalf of a minor for Fourth Amendment purposes? The answer to these questions is important when addressing the Kelsey Smith Act being applied exclusively to minors.

¹⁵⁹ *Id.* at 1038.

¹⁶⁰ *Id.*

¹⁶¹ See *Carter*, *supra* note 123 at 92 (Following the lead of Justice Scalia's wisdom, the possible use of Fourth Amendment claims by a defendant for an "illegal search" of cell phone that is not in fact theirs should not be given consideration to be a viable defense. In *Minnesota v. Carter*, the phone that was pinged was in fact the murder victim's cell phone. If the victim was not in fact murdered, but rather kidnapped and recovered, and in turn sues for an illegal search, it is possible that they would have a legitimate claim. However, the likelihood of something that extreme does not appear to be a likely course of action by a victim.)

¹⁶² As discussed in Part I D and Part I E, arguably the primary disconnect between the proponents and opponents of the Kelsey Smith Act is the invasion of privacy and giving too much power to the authorities. This section of the note will be analyzing those concerns in terms of applying the act to minors only. While it is not entirely clear what each of the differing views would think of this proposal, it is something they could consider as a middle ground at the time being. This may in fact not be the most desired outcome by either side, but it could serve as a trial run for each side to see how the Kelsey Smith Act actually works on a federal level.

A. *Who is Considered a Minor?*

When analyzing who is federally considered a minor, there can sometimes be confusion due to the various age requirement laws.¹⁶³ The potential confusion most likely stems from the fact that the national drinking age is twenty-one years old,¹⁶⁴ while under labor law and child pornography, anyone under the age of eighteen is considered a minor.¹⁶⁵ Keeping consistent with who actually gets the label of a “minor,” it would therefore fall in line that the Kelsey Smith Act, if being applied exclusively to minors would be applied to those who are under the age of eighteen years old.¹⁶⁶

B. *Can a Parent(s) or Guardian(s) Give Consent on Behalf of a Minor for Fourth Amendment Purposes?*

The question then turns to whether a parent or guardian is able to give consent on behalf of their minor children. While there have been no Supreme Court cases directly on point, there are other Supreme Court consent cases along with other federal court decisions on the issue. federal courts dealing with issues that are similar in nature.¹⁶⁷ There have even been cases arising in which a parent is able to consent to a search for their adult children who live on the property under certain circumstances.¹⁶⁸

¹⁶³ See 23 U.S.C. § 158 (establishing that the minimum drinking age is twenty-one years of age in the United States.); see also 29 U.S.C. § 203 (establishing that the age of a minor for working is considered someone under the age of eighteen years of age in the United States.); see also 18 U.S.C. § 2256 (establishing that under federal law, when dealing with sexual exploitation of a child, a minor is someone who is younger than eighteen years old in the United States); (Keeping when weighing these different age groups, it seems to be apparent that even though the drinking age in the United States is twenty-one years, the general definition of someone who is a minor is someone under the age of eighteen years old).

¹⁶⁴ See 23 U.S.C.S. § 158.

¹⁶⁵ See 29 U.S.C. § 203; compare 18 U.S.C. § 2256.

¹⁶⁶ Turning the Kelsey Smith Act to be applied exclusively to minors would severely limit who the act is applicable to. This in turn would most likely not be the preferred course of action for the advocates of the act. However, as previously noted, this could be the stepping stone to see how it works on a federal level.

¹⁶⁷ See *Georgia v. Randolph*, 547 U.S. 103, 113–14 (2006) (discussing third party consent doctrine in relation to a husband and wife); see also *Thomas v. Nationwide Children’s Hospital*, 882 F.3d 608, 615 (6th Cir. 2018) (dealing with parental consent on behalf of a minor child while at a hospital and reiterating that a parent may give consent on behalf of their “non-adult children”).

¹⁶⁸ See *United States v. Rith*, 164 F.3d 1323, 1326–27, 1329–30 (10th Cir. 1999) (establishing that parent(s) may consent to a police search of adult child’s bedroom if the room is under the control of the parents. In this case, the defendant, Rith, who was eighteen years old, lived in his parents’ house and was not paying rent. The police came to search his room due to the believe that he was storing illegal firearms in his room. Upon

One test that needs clarification is the third party consent doctrine, also known as the “common authority” consent doctrine, established by *United States v. Matlock*.¹⁶⁹ The defendant in *Matlock* wanted evidence suppressed due to it being obtained after consent of a third party, his wife, who lived on the premises with him.¹⁷⁰ The defendant and the third party (his wife) who gave consent shared a bedroom and portion of the house they were leasing.¹⁷¹ The Supreme Court found that voluntary consent of one who possesses a “common authority” of the property is able to give consent and such evidence would be admissible in the trial.¹⁷² The significance of *Matlock* in relation to the Kelsey Smith Act being applied exclusively to children is that the parental consent would be linked with the “common authority” or third party consent doctrine.

C. *What Happens if the Minor is Found Doing an Illegal Act?*

While the Kelsey Smith Act can be used to help find missing children, there is the possibility that those missing kids could be doing something illegal when they are found. One of the problems with this, particularly for sex-trafficked children, is that they can still be charged with a crime on a state level.¹⁷³ While progress has been made on these laws, the reality that children can still be prosecuted for sex crimes when they themselves were victims is something that should be changed.¹⁷⁴ It is worth noting that there have been cases that have pointed towards justice

arrival, the police received consent from his parents to search his bedroom. It was apparent by the surrounding facts that his parents had the authority to give consent under the third party consent doctrine, or common authority. The court stated there was no rational way to find that his parents didn't have access and authority over his room.); see also *United States v. DiPrima*, 472 F.2d 550, 551 (1st Cir. 1973) (establishing that a parent can give consent on behalf of their twenty-two year old son, who was paying \$10 a week for board and lodging, when the parent had full access to the bedroom. The court also found that the defendant did not give an objection to the search of the bedroom when he was within “earshot” distance.).

¹⁶⁹ *United States v. Matlock*, 415 U.S. 164, 169-71 (1974) (reiterating that a party may give consent on behalf of another if the third party possessed “common authority over or other sufficient relationship to the premises or effects sought to be inspected.”).

¹⁷⁰ *Id.* at 166.

¹⁷¹ *Id.*

¹⁷² *Id.* at 170-71, 176-78.

¹⁷³ Sarah Bendtsen, *Progress Without Protection: How State Laws Are Punishing Child Sex Trafficking Victims*, SHARED HOPE INTERNATIONAL, June 2018, <https://sharedhope.org/2018/06/13/progress-without-protection-how-state-laws-are-punishing-child-sex-trafficking-victims/> (last visited Oct. 28, 2020).

¹⁷⁴ *Id.*

and would not allow a child to be charged with sex related offences.¹⁷⁵ The hope would be that there could be further protection granted for victims who are prosecuted, through updated state laws¹⁷⁶ or the furtherance of the victim acts that President Trump has been pushing for.¹⁷⁷

There are other crimes that children could be charged with besides solely sex related crimes.¹⁷⁸ Keeping these all in mind, it should be noted that these are potential areas that the law could move forward and be considered with when promoting the Kelsey Smith Act. A proposed solution is that minors who are located using the Kelsey Smith Act who are “caught” doing something illegal could be granted immunity depending on the charge.

CONCLUSION

As of 2018, 89 to 95% of teenagers have a cell phone or access to one.¹⁷⁹ With these numbers in mind, it is logical to assume that many, if not most, would have their cell phone on them when they were abducted or ran away. This makes it rational to conclude that the enactment of the bill would be very successful.

Upon reviewing the Kelsey Smith Act alongside the Fourth Amendment, the ECPA, and the SCA, it does not appear as if the act would be unconstitutional or barred by other statutes. Additionally, the courts have considered emergency situations as an exception to requiring a warrant to conduct a search under the Fourth Amendment. No matter where one falls on the political spectrum (conservative, libertarian, liberal, etc.), it should be apparent that a missing child, whether abducted or an endangered runaway, should be considered an emergency.

There is arguably tension between the Kelsey Smith Act and federalism. Infringing on state’s rights is by no means a small concern. In fact, it is a rather significant concern that many could have (even though most of those opposed to the Kelsey Smith Act have focused exclusively on

¹⁷⁵ *In re B.W.*, 313 S.W.3d 818, 820–22 (Tex. 2010) (involving a case in which a thirteen-year old child was being prosecuted for “delinquent conduct” for prostitution. The Supreme Court of Texas came down with the ruling that a child under the age of fourteen-years old is not able to consent to sexual conduct and therefore should be punished for such an act.).

¹⁷⁶ See Bendsten, *supra* note 173.

¹⁷⁷ *President Donald J. Trump is Fighting to Eradicate Human Trafficking*, WHITEHOUSE.GOV (Jan. 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-fighting-eradicate-human-trafficking/> (last visited Oct. 28, 2020).

¹⁷⁸ These other potential crimes could be theft, burglary, assault, battery, drug related offences and numerous other punishable criminal acts.

¹⁷⁹ AMERICAN COLLEGE OF PEDIATRICIANS (May 2020), <https://acpeds.org/position-statements/media-use-and-screen-time-its-impact-on-children-adolescents-and-families>.

the Fourth Amendment). However, due to the power that Congress has, almost anything goes now for passing legislation.

This is an Act that should be adopted to further protect children. Applying the Act exclusively to minors is a practical way to alleviate the fear of the Act being abused (and overused) by law enforcement. On the other hand, the unfortunate part of limiting the scope of the Act's scope to strictly minors is that it limits the positive impact the Act could have. The fact that more and more states continue to adopt the Act since its inaugural adoption in Kansas shows that it Act as a valuable tool for law enforcement to better protect the community. Whether it is the current draft, this proposed idea of exclusive use for minors, or some other variation, the Kelsey Smith Act is something that can and should be used to keep more people safe and reunite loved ones with their families.