No. 15-146

IN THE

Supreme Court of the United States

QUARTAVIOUS DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

Steven R. Shapiro
Nathan Freed Wessler
Jameel Jaffer
Ben Wizner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Nancy Abudu
ACLU FOUNDATION OF FLORIDA, INC.
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137

Benjamin James Stevenson
ACLU FOUNDATION OF FLORIDA, INC.
P.O. Box 12723
Pensacola, FL 32591-2723

David Oscar Markus
Counsel of Record
MARKUS/MOSS PLLC
40 N.W. 3rd Street, Penthouse One
Miami, FL 33128
(305) 379-6667
dmarkus@markuslaw.com

Jacqueline E. Shapiro
40 N.W. 3rd Street, Penthouse One
Miami, FL 33128

Attorneys for Petitioner

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8, Petitioner Quartavius Davis respectfully submits this supplemental brief to call the Court's attention to a recent decision by the Fourth Circuit, issued after the filing of the Petition in this case, that squarely conflicts with the Eleventh Circuit's decision below, thus widening the circuit split and providing a further compelling reason for this Court to grant certiorari. A copy of the Fourth Circuit's decision in *United States v. Graham*, No. 12-4825, __ F.3d __, 2015 WL 4637931 (4th Cir. Aug. 5, 2015), is set out in the attached Supplemental Appendix 1a–117a.

In *Graham*, as here, law enforcement officials engaged in a criminal investigation obtained historical cell site location information ("CSLI") from cellular service providers pursuant to an order under the Stored Communications Act, 18 U.S.C. § 2703(d), rather than a probable cause warrant. *Id.* at 15a–16a. The government in *Graham* obtained two sets of CSLI pursuant to successive 2703(d) orders, one covering 14 days and the other 221 days (approximately seven months). *Id.* at 16a. In this case, the government obtained 67 days of Petitioner's CSLI. Pet. App 7a–8a.

Presented with the same legal question, the Fourth Circuit's decision in *Graham* conflicts with the Eleventh Circuit's holding in this case on two critical issues: first, whether law enforcement's acquisition of a person's historical CSLI from his or her cellular service provider is a Fourth Amendment search, and second, if it is a search, whether that search requires a warrant.

1. By holding that "the government engages in a Fourth Amendment search when it seeks to examine historical CSLI pertaining to an extended time period like 14 or 221 days," Supp. App. 29a, the Fourth Circuit's ruling in *Graham* conflicts with the holdings of the Eleventh Circuit in this case and the Fifth Circuit in *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013), and *United States v. Guerrero*, 768 F.3d 351 (5th Cir. 2014).

In reaching its conclusion, the Fourth Circuit first explained that government acquisition of historical CSLI impinges on expectations of privacy because, "[m]uch like long-term GPS monitoring, long-term location information disclosed in cell phone records can reveal both a comprehensive view and specific details of the individual's daily life." Supp. App. 25a; *see also id.* at 26a ("[E]xamination of historical CSLI can permit the government to track a person's movements between public and private spaces, impacting at once her interests in both the privacy of her movements and the privacy of her home."). The Eleventh Circuit reached a different conclusion, opining both that "[h]istorical cell site location data does not paint [an] 'intimate portrait of personal, social, religious, medical, and other activities and interactions,'" and that the expectation of privacy in CSLI "do[es] not turn on the quantity" or duration of records collected. Pet. App. 36a.

The Fourth Circuit went on to hold that this expectation of privacy is not vitiated merely because the CSLI records are held in trust by a service provider: "We decline to apply the third-party doctrine in the present case because a cell phone user

does not 'convey' CSLI to her service provider at all—voluntarily or otherwise—and therefore does not assume any risk of disclosure to law enforcement." Supp. App. 38a. "We conclude, in agreement with the analysis of the Third Circuit in In re Application (Third Circuit) and that of several state supreme courts, that the third-party doctrine of Smith and Miller does not apply to CSLI generated by cell phone service providers." *Id.* at 40a (citing *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't*, 620 F.3d 304, 317 (3d Cir. 2010); *Commonwealth v. Augustine*, 4 N.E.3d 846, 862–63 (Mass. 2014); *Tracey v. State*, 152 So. 3d 504, 525 (Fla. 2014); *State v. Earls*, 70 A.3d 630, 641–42 (N.J. 2013)). The Fourth Circuit explicitly detailed its disagreement with the Fifth and Eleventh Circuits on this point, explaining that "[p]eople cannot be deemed to have volunteered to forfeit expectations of privacy by simply seeking active participation in society through use of their cell phones." *Id.* at 42a. The Fourth Circuit's opinion in *Graham* thus sharpens the circuit splits previously identified by Petitioner. *See* Pet. 22–28.

2. The Fourth Circuit also split with the Eleventh Circuit's novel conclusion that even if "government acquisition of CSLI through use of a 2703(d) order is a Fourth Amendment search, such a search would be reasonable under the Fourth Amendment and not require a warrant." Supp. App. 18a n.2 (citing *United States v. Davis*, 785 F. 3d 498, 516–18 (11th Cir. 2015) (en banc)). As the Fourth Circuit held,

> Section 2703(d) orders, as previously noted, do not require a showing of probable cause and do not fit within any of the "well delineated exceptions" to the general rule that a search requires a warrant based on probable cause. [*City of Ontario, Cal. v.*] *Quon*, 560 U.S. [746,] 760 [(2010)]. We decline here to create a new exception to a rule so well established in the context of criminal investigations.

Id. As explained in the petition, the Eleventh Circuit's holding on this point is at odds with the precedents of numerous courts, including this one. *See* Pet. 28, 34–35.

3. The Fourth Circuit is not the only federal court to have held since filing of the petition in this case that a warrant is required for law enforcement access to historical CSLI. On July 29, 2015, Judge Lucy H. Koh of the U.S. District Court for the Northern District of California decided *In re Application for Telephone Information Needed for a Criminal Investigation*, No. 15-XR-90304, 2015 WL 4594558 (N.D. Cal. July 29, 2015) (public redacted version). Supp. App. 118a–182a. Like the Fourth Circuit, that court held that historical CSLI receives the full protection of the Fourth Amendment, and disagreed with the Eleventh Circuit's reasoning in *Davis*.

4. The issues in this case have been fully aired by lower courts, and are ripe for this Court's decision. Indeed, as both the majority and dissenting opinions in *Graham* recognize, the questions presented require resolution by this Court. Writing for the

Fourth Circuit majority, Judge Davis noted that "[i]f the Twenty–First Century Fourth Amendment is to be a shrunken one, as the dissent proposes, we should leave that solemn task to our superiors in the majestic building on First Street and not presume to complete the task ourselves." Supp. App. 53a. In dissent, Judge Motz suggested that, though she felt bound by her interpretation of this Court's third-party records cases, it may be time for this Court to revisit those opinions and clarify the state of the law. *Id.* 117a. Because the issues in this case are of national importance, and because the circuits are split, this Court should accept the case for review.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully Submitted,

David Oscar Markus
Counsel of Record
MARKUS/MOSS PLLC
40 N.W. 3rd Street,
Penthouse One
Miami, FL 33128
(305) 379-6667
dmarkus@markuslaw.com

Jacqueline E. Shapiro
40 N.W. 3rd Street,
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Nancy Abudu
ACLU FOUNDATION OF
FLORIDA, INC.
4500 Biscayne Blvd.,
Ste. 340
Miami, FL 33137

Benjamin James Stevenson
ACLU FOUNDATION OF
FLORIDA, INC.
P.O. Box 12723
Pensacola, FL 32591-2723

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