No. 15-146

IN THE
Supreme Court of the United States

QUARTAVIOUS DAVIS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In this case, law enforcement sought and obtained historical records of petitioner's location for more than two months from his cellular telephone company under the Stored Communications Act (SCA), 18 U.S.C. § 2701 *et seq*. Section 2703 of the SCA provides that a court "shall issue" an order compelling a service provider to disclose historical cell site location information (CSLI) if the government "offers specific and articulable facts showing that there are reasonable grounds to believe that" such records "are relevant and material to an ongoing criminal investigation." *Id*., § 2703(d).

The majority of a divided U.S. Court of Appeals for the Eleventh Circuit, sitting *en banc*, concluded that this Court's decisions in *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979) foreclose any claim that the government's warrantless acquisition of 67 days of historical CSLI data under the SCA violates the Fourth Amendment's prohibition against unreasonable searches and seizures.

Amici write separately to address the following questions presented by this case:

1) Whether the government's compelled disclosure of historical CSLI data constitutes a search under the Fourth Amendment.

2) Whether the third party doctrine, as interpreted and applied by the majority of the Eleventh Circuit, below, is sufficiently protective of First Amendment activity.

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BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors dedicated to safeguarding the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has participated and provided guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

In its more than 40-year history, the Reporters Committee has participated as *amicus curiae* in cases before this Court involving significant free expression and freedom of information issues, including, *inter alia*, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1979), *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), and *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011).

This case is of particular importance to the Reporters Committee because journalists not only must utilize cellular telephones and similar

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least ten days prior to the due date of the Reporters Committee's intention to file this brief and have consented. Pursuant to this Court's Rule 37.6, the Reporters Committee states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the Reporters Committee, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

technology in connection with their work, they must also have the ability to conduct research and communicate and associate with sources privately and securely without the threat of warrantless monitoring by the government. Throughout our nation's history, the Fourth Amendment has provided essential breathing space for activities shielded by the First Amendment, including newsgathering. Because erosion of the protections afforded by the Fourth Amendment through flawed application of the third-party doctrine chills the exercise of First Amendment rights, the Reporters Committee urges this Court to grant *certiorari* and reverse the decision of the Eleventh Circuit.

SUMMARY OF ARGUMENT

This case presents an issue of compelling importance regarding whether the government's warrantless acquisition of cellular telephone data providing a comprehensive picture of an individual's location and movements for a more than two-month period violates the Fourth Amendment. Because the Fourth Amendment's prohibition against "unreasonable searches and seizures" by the government plays a vital role in protecting and fostering the exercise of First Amendment rights, this case has significant implications for the press and, indeed, all citizens. Absent meaningful Fourth Amendment protections for records like those at issue in this case, activities fortified by the First Amendment—including newsgathering, speech, expression, association, and the exercise of religion—will wither under the shadow of warrantless government intrusion.

As this Court has recognized, location data may reveal extraordinarily sensitive, private information about an individual, including "familial, professional, religious, and sexual associations." *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring). Historical location information can also reveal details about reporters' relationships and communications with their sources, as well as other aspects of the newsgathering process.

State and lower federal courts have struggled to reconcile evolving technology and the impact of government acquisition of cell site location information (CSLI) on First Amendment activity with this Court's decisions in *United States v. Miller*,

425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979). High courts in several states and two federal appellate courts have concluded that the Fourth Amendment requires that the government obtain a warrant to compel the disclosure of historical CSLI, based, in part, on the fact that such government information-gathering impacts speech and associational rights. Other courts, including the majority of the Eleventh Circuit, below, have reached the opposite conclusion.

Information that can be discerned from CSLI and other location data will frequently implicate activities protected by the First Amendment. The government's ability to acquire CSLI without satisfying Fourth Amendment requirements thus threatens the uninhibited exercise of First Amendment rights by subjecting expressive and associational activities to warrantless, and even routine, intrusion and monitoring by law enforcement. The need for uniformity and certainty as to what the Fourth Amendment mandates with respect to compelled disclosure of such data is, accordingly, paramount.

For all of these reasons, the Reporters Committee urges this Court to grant *certiorari* to provide lower courts with much-needed guidance concerning how the Fourth Amendment must be interpreted to adequately safeguard First Amendment rights.

REASONS FOR GRANTING THE PETITION

I. State and lower federal courts are divided regarding whether the compelled disclosure of CSLI is a "search" within the meaning of the Fourth Amendment.

1. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A "search" within the meaning of the Fourth Amendment occurs when the government "physically occup[ies] private property for the purpose of obtaining information." *United States v. Jones*, 132 S. Ct. 945, 949 (2012). In addition, this Court has long recognized that the Fourth Amendment also protects against a "search" that violates "a subjective expectation of privacy that society recognizes as reasonable," even in the absence of a physical intrusion. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). It is settled law that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment." *Id.* at 357.

This Court further addressed the scope of the Fourth Amendment's protections in *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979)—two cases frequently cited as the basis for what has come to be known in Fourth Amendment jurisprudence as the third-party doctrine. In *Miller*, this Court held that bank customers have no reasonable expectation of privacy in checks and deposit slips in the possession of their

banks. *See Miller*, 425 U.S. at 443 (stating that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities"). In *Smith* the Court applied similar reasoning to reject a petitioner's contention that he had a "legitimate expectation of privacy in the [telephone] numbers he dialed," which the government had obtained from the phone company using a subpoena. *Smith*, 442 U.S. at 742.

In two recent cases, this Court has recognized that now ubiquitous cell phone technology—and the location monitoring capabilities it provides—implicate privacy interests. *See Riley v. California*, 134 S. Ct. 2473 (2014) (requiring a warrant to search a cell phone seized incident to arrest); *Jones*, 132 S. Ct. 945 (requiring a warrant for long-term GPS monitoring). In *Jones*, the government had installed a GPS tracking device on the undercarriage of the defendant's car and tracked the defendant's location and movements for 28 days. This Court unanimously held that the use of that device constituted a search under the Fourth Amendment.

2. State and lower federal courts have struggled to reconcile this Court's decisions in *Smith* and *Miller* with the Court's more recent recognition that cell phone data and location tracking implicate significant privacy interests. In this case, the majority of the Eleventh Circuit, sitting *en banc*, concluded that it was bound by *Smith* and *Miller* to hold that the third-party doctrine applies to the records at issue and, accordingly, that cell phone users have no reasonable expectation of privacy in their historical CSLI. *See United States v.*

Quartavious Davis, 785 F.3d 498, 513 (11th Cir. 2015) ("Following controlling Supreme Court precedent most relevant to this case, we hold that the government's obtaining a § 2703(d) court order for production of MetroPCS's business records at issue did not constitute a search and did not violate the Fourth Amendment rights of Davis."). A three-judge panel of the Fifth Circuit has similarly held that the government's compelled disclosure of CSLI from a cell phone provider does not implicate the Fourth Amendment because "it is a third party, of its own accord and for its own purposes, recording the information." *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 610 (5th Cir. 2013).

Two other federal courts of appeal, however, have rejected a mechanical application of the third-party doctrine to historical CSLI. In 2010, the Third Circuit concluded that a magistrate judge may require a warrant for disclosure of historical CSLI because "[a] cell phone customer has not 'voluntarily' shared his location information with a cellular provider in any meaningful way." *In re Application of the 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). And, just a few weeks ago, a three-judge panel of the Fourth Circuit reached the same conclusion. *See United States v. Graham*, No. 12-4659, 2015 WL 4637931, at *8 (4th Cir. Aug. 5, 2015) ("[T]he government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical CSLI for an extended period of time."). The Massachusetts Supreme Judicial Court has reached the same result

on state constitutional grounds. *See Commonwealth v. Augustine*, 467 Mass. 230, 251 (Mass. 2014) (concluding that the application of the third-party doctrine to historical CSLI is "inappropriate").

Although this case does not involve warrantless acquisition of *real-time* CSLI, lower courts have also struggled to apply this Court's prior precedent in that related context. In 2012, for example, the Sixth Circuit held that the government's acquisition of real-time CSLI was not a "search" within the meaning of the Fourth Amendment because the cell phone user "did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone." *United States v. Skinner*, 690 F.3d 772, 777 (6th Cir. 2012). The Florida Supreme Court, however, applying this Court's Fourth Amendment jurisprudence, reached the opposite result. *See Tracey v. State*, 152 So. 3d 504, 525 (Fla. 2014) ("[A] subjective expectation of privacy of location as signaled by one's cell phone—even on public roads—is an expectation of privacy that society is now prepared to recognize as objectively reasonable."); *see also State v. Earls*, 70 A.3d 630, 644 (N.J. 2013) (requiring the government to obtain a warrant to compel the disclosure of real-time CSLI on state constitutional grounds).

The divided opinion of the *en banc* Eleventh Circuit, below, reflects the uncertainty and lack of consensus among judges as to the proper application of the third-party doctrine when the government seeks to acquire location data like that at issue here. The majority opinion interpreted *Smith* and *Miller* as requiring it to conclude that the "controlling third-party doctrine" forecloses any Fourth Amendment

claim on the part of Petitioner. *Davis*, 785 F.3d at 515. In separate concurring opinions, however, two judges expressed significant concern about the viability of the third-party doctrine in the context of a changed technological landscape. While agreeing that the rule announced in *Smith* and *Miller* "inescapably governs" this case, the concurring opinions of Judge Rosenbaum and Judge William Pryor indicate a need for additional guidance from this Court. *Id.* at 532 (Rosenbaum, J., concurring); *see also id.* at 521 (Pryor, J., concurring) ("If the third-party doctrine results in an unacceptable slippery slope . . . the Supreme Court can tell us as much.") (internal citation omitted). In her dissenting opinion, Judge Martin, joined by Judge Jill Pryor, concluded that while the rule announced in *Smith* and *Miller* remains in place, "the third-party doctrine may not be as all-encompassing as the majority seems to believe" and "does not dictate the outcome of this case." *Id.* at 535; *see also id.* at 537 (describing the "slippery slope that would result from a wooden application of the third-party doctrine").

3. It is evident that state and lower federal courts need guidance from this Court to avoid a "mechanical interpretation" of the third-party doctrine that threatens to erode both Fourth and First Amendment protections. *Kyllo v. United States*, 533 U.S. 27, 35 (2001). As this Court acknowledged in *Riley*, cell phones can contain data that is "qualitatively different" from physical records; "[a]n Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns," mobile "apps" on a cell phone "offer a

range of tools for managing detailed information about all aspects of a person's life," and [d]ata on a cell phone can also reveal where a person has been." 134 S. Ct. at 2490 (noting that [h]istoric location information" is a "standard feature" on many cell phones and "can reconstruct someone's specific movements down to the minute"). In her separate concurrence in *Jones*, Justice Sotomayor correctly noted that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." 132 S. Ct. at 955 (Sotomayor, J., concurring).

In holding that the government's warrantless acquisition of historical CSLI is constitutionally permissible because a cell phone user can have no reasonable expectation of privacy in such location data, the Eleventh Circuit failed to take into account the qualitative differences that distinguish long-term location information from the billing records at issue in *Smith*, or the deposit slips at issue in *Miller*. By assuming that the government's compelled disclosure of such location data from a third party cannot violate the Fourth Amendment—regardless of the privacy or First Amendment interests at stake—the Eleventh Circuit erred.

As the Fourth Circuit explained only weeks ago: "In the current digital age, courts continue to accord Fourth Amendment protection to information entrusted to communications intermediaries but intended to remain private and free from inspection." *Graham*, 2015 WL 4637931 at *19. "The third-party doctrine is intended to delimit Fourth Amendment

protections where privacy claims are not reasonable—not to diminish Fourth Amendment protections where new technology provides new means for acquiring private information." *Id.* at *20.

When courts "mechanically apply the rule used in the predigital era" to modern-day searches, *Riley*, 134 S. Ct. at 2496 (Alito, J., concurring), they threaten to erode the protections historically afforded by the Fourth Amendment. In addition, by failing to keep step with evolving technology and expectations of privacy in a digital world, Fourth Amendment standards developed for a predigital era may fail to adequately protect expression, association, and other First Amendment activities that depend on robust Fourth Amendment safeguards. Guidance from this Court is needed to resolve the conflict among state and lower federal courts as to the application of the third-party doctrine to location data, like CSLI, which implicates important Fourth and First Amendment rights.

II. This Court should grant *certiorari* to clarify that Fourth Amendment requirements must be applied with rigor when First Amendment rights are at stake.

1. The roots of the Fourth Amendment are inextricably intertwined with the First Amendment's guarantees of free speech and a free press. The Fourth Amendment's prohibition on unreasonable searches of "papers" arose from a long list of abusive practices in the colonial era, many of which targeted printers and publishers of dissenting papers. Indeed, as this Court has stated, the history of the Fourth Amendment is "largely a history of conflict

between the Crown and the press." *Stanford v. Texas*, 379 U.S. 476, 482 (1965).

The pre-revolutionary practice of issuing "general warrants," which allowed law enforcement to search "private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel," was particularly odious to the press, as well as to the founders. *Boyd v. United States*, 116 U.S. 616, 626 (1886); *see also Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967) (characterizing the Fourth Amendment as "a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies"). Two landmark cases from the colonial era that help to form the basis for our understanding of the history and purpose of the Fourth Amendment—*Entick v. Carrington* and *Wilkes v. Wood*—both involved the press.

In *Entick*, the British Secretary of State issued a general warrant for Entick, a writer for a dissenting publication, and his papers; the King's messengers ransacked Entick's house to find seditious material that was to be brought before the secretary of state. 19 How. St. Tr. 1029 (1765). Lord Camden decried the general warrant, writing of Entick: "His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." *Id.* at 1064. Lord Camden dismissed the contention that "this power is essential to government, and the only means of quieting clamors and sedition." *Id.* He reviewed the long history of the Star Chamber's

persecution of the press and the dangers that general warrants continued to pose and concluded that the general warrant could not stand. *Id.* Similarly, in *Wilkes*, Lord Camden again dismissed a general warrant that targeted a dissenting printer. 19 How. St. Tr. 1153 (1763). In doing so, he concluded that the "discretionary power given to messengers to search wherever their suspicions may chance to fall" was "totally subversive of the liberty of the subject." *Id.* at 1167.

In short, as this Court has observed, "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression," *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961), and for undermining freedom of the press.

2. Consistent with the historic relationship between the First and Fourth Amendments, this Court has found that where materials to be searched or seized "may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1979). Indeed, *Zurcher* expressly calls for the "consideration of First Amendment values in issuing search warrants." *Id.* at 565.

In *Zurcher*, this Court considered the constitutionality of a search warrant authorizing the search of a newspaper's office for evidence of a crime. *Id.* at 563. The district court had held that a subpoena *duces tecum* was the appropriate vehicle for law enforcement to obtain authorization to

conduct a search of a newspaper's office, reasoning that a warrant would "seriously threaten the ability of the press to gather, analyze, and disseminate news." *Id.* The Ninth Circuit agreed. *Id.* This Court, however, rejected that reasoning, concluding instead that the Fourth Amendment's warrant requirements were sufficiently protective of First Amendment rights. *Id.* at 567. Specifically, this Court stated that "[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." *Id.* at 565.[2]

Here, however, unlike in *Zurcher*, the form of process at issue does not require probable cause, specificity with respect to the scope of the search, or reasonableness. Rather, Section 2703 of the SCA requires only a showing of "specific and articulable facts" demonstrating that the material sought is

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[2] In 1980, Congress responded to the ruling in *Zurcher* by passing the Privacy Protection Act ("PPA"), 42 U.S.C. § 2000aa, which made it unlawful for law enforcement to "search for or seize" work product and documentary materials "possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." Under the PPA, it is permissible to conduct such searches when "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate." *Id.* Because the PPA, by its own terms, only proscribes certain "search[es] and seiz[ures]," it presumably would not apply to government information-gathering activity that is not deemed a "search" within the meaning of the Fourth Amendment.

"relevant and material" to an investigation. This lower standard permits law enforcement to obtain comprehensive location data under the SCA, without a warrant, and thus without the safeguards that the Court in *Zurcher* found to be sufficiently protective of First Amendment rights.[3]

The Fourth Amendment's requirements reflect the Framers' recognition that government searches and seizures can stifle expression and dissent. Thus, as this Court has stated in discussing the Fourth Amendment's probable cause requirement for a warrant: "No less a standard could be faithful to First Amendment freedoms." *Stanford v. State of Tex.*, 379 U.S. 476, 485 (1965).

III. The government's warrantless acquisition of location information like that at issue in this case impacts the exercise of core First Amendment rights.

1. As this Court has recognized, communications technology can be crucial to the exercise of free

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[3] It is undisputed that the standard articulated in Section 2703 of the SCA is "less than the probable cause standard for a search warrant." *Davis*, 785 F.3d at 505. Indeed, as the majority opinion, below, explained, SCA orders are used to search and seize large quantities of historical location data in order to "help" the government "*build probable cause* against the guilty," *id.* at 518 (emphasis added). For this reason, the majority of the Eleventh Circuit, below, credited SCA orders with being used to "deflect suspicion from the innocent." *Id.* However, the fact that a warrantless search conducted by the government may be effective at identifying the innocent does not mean that it comports with Fourth Amendment requirements, or that it is sufficiently protective of the First Amendment rights of the innocent.

expression and association. Cell phones, in particular, have become "so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification." *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010). And, as Justice Sotomayor observed in *Jones*, "Awareness that the Government may be watching chills associational and expressive freedoms." 132 S. Ct. at 956 (Sotomayor, J., concurring).

Courts have recognized the importance of these associational and expressive rights in considering constitutional issues akin to those presented in this case. As the D.C. Circuit stated when it considered the constitutionality of warrantless GPS monitoring, "A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts." *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010) *aff'd in part sub nom. United States v. Jones,* 132 S. Ct. 945. Similarly, in considering the constitutionality of warrantless acquisition of real-time CSLI, the New Jersey Supreme Court noted that cell phones can reveal "not only where individuals are located at a point in time but also which shops, doctors, religious services, and political events they go to, and with whom they choose to associate." *Earls*, 70 A.3d at 632 (N.J. 2013).

In short, as Judge Rosenbaum stated in her concurring opinion, below, anonymous reading,

writing, and research is "critical to First Amendment rights. . . . [T]he expectation of privacy in reading and researching what we want, free from government surveillance without a warrant, has not changed just because the mechanism we use for engaging in this conduct has evolved." *Davis*, 785 F.3d at 529 (Rosenbaum, J., concurring).

First Amendment freedoms are protected not only from "frontal attack" but also from "being stifled by more subtle governmental interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). Warrantless acquisition of location records is precisely the type of "subtle interference" that can chill the full-throated exercise of First Amendment rights.

2. Location information implicates uniquely strong First Amendment concerns. As this Court has recognized, historic location information is "qualitatively different" from other forms of business records because it "can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." *Riley*, 134 S.Ct at 2490.

Location data can reveal political, religious, and professional relationships, the disclosure of which may result in specific First Amendment harms. Private relationships with individuals and organizations are crucial to the free exercise of First Amendment rights. In *NAACP v. Alabama ex rel. Patterson*, this Court found that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." 357 U.S. 449, 462 (1958).

A list of the locations that individuals visit over the course of sixty-seven days—the number of days of the historical CSLI at issue here—is likely to disclose their involvement in political advocacy, religious worship, and professional life, regardless of the steps that they may have taken to keep these relationships out of public view.

Warrantless acquisition of location information by the government is particularly damaging to press freedom. In part because location data can be so revelatory, journalists frequently go to great lengths to ensure that the locations where they meet their sources are kept private, and that their communications are confidential.

Safeguarding the identities of confidential sources is a core journalistic practice, and a necessary feature of investigative journalism. *The New York Times* used confidential sources to report that the National Security Agency had an illegal wiretapping program that monitored phone calls and e-mail messages involving suspected terrorist operatives without the approval of federal courts. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), http://nyti.ms/neIMIB. The *Times* also used confidential sources to report on the harsh interrogations that terrorism suspects in U.S. custody have faced. *See, e.g.*, Scott Shane, David Johnston, James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times (Oct. 4, 2007), http://nyti.ms/1dkyMgF. *The Washington Post* relied on confidential government sources, among others, to break the story of the Central Intelligence Agency's use of "black sites," a network of secret prisons for

terrorism suspects. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post (Nov. 2, 2005), http://wapo.st/Ud8UD.

As the Court in *Riley* recognized, cell phones now also serve as "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers"—all tools that are integral to the journalistic profession. *Riley*, 134 S. Ct. at 2489. Journalists use cell phones to send and answer email to and from sources and editors, write pitches, stories and articles, record interviews, conduct research, and to accomplish many of the other myriad tasks inherent to the newsgathering process. Awareness of the scope of warrantless requests for cell phone subscriber data has already pushed journalists to limit their use of these important tools and resulted in an impermissible chill on newsgathering.

3. The government's acquisition of phone company business records in connection with criminal investigations has had a demonstrable impact on the press both directly and indirectly, even when those records do not involve location information. In 2013, the Associated Press learned that the Justice Department had seized records from twenty Associated Press telephone lines. See Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, Associated Press (May 13, 2013), http://bit.ly/11zhUOg. These records, from phone lines used by more than 100 AP reporters and editors, contained metadata—i.e. the numbers, timing and duration of calls. *See id*.

The revelation that metadata from AP phone lines had been subpoenaed has concretely affected the newsgathering process. AP President and CEO Gary Pruitt said in a speech at the National Press Club that the seizure has made sources less willing to talk to reporters at his news outlet: "Some of our longtime trusted sources have become nervous and anxious about talking to us, even on stories that aren't about national security." Jeff Zalesin, *AP Chief Points to Chilling Effect After Justice Investigation*, The Reporters Comm. for Freedom of the Press (June 19, 2013), http://rcfp.org/x?CSPl. The chilling effect, Pruitt said, is not limited to the AP: "Journalists at other news organizations have personally told me it has intimidated sources from speaking to them." *Id.*

It is unsurprising that awareness of warrantless location tracking—which enables the government to watch a person's movements—would chill reporter-source relationships and impede newsgathering. Indeed, in *Smith v. Maryland*, Justice Marshall presciently wrote that "[p]ermitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society." 442 U.S. at 751 (Marshall, J., dissenting). Widespread government acquisition of private information, including location histories, has the effect of diminishing newsgathering and interfering with reporter-source relationships. The chill felt by AP reporters after their telephone records were subpoenaed is evidence of this effect. *See* Lindy Royce-Bartlett, *Leak Probe Has Chilled Sources, AP Exec Says*, CNN (June 19,

2013), http://bit.ly/11NGbOH ("In some cases, government employees that we once checked in with regularly will no longer speak to us by phone and some are reluctant to meet in person.").

As this Court has previously recognized, magistrates play a crucial role in assuring that "the requirements of specificity and reasonableness are properly applied, policed, and observed." *Zurcher*, 436 U.S. at 566. When law enforcement may procure location data from communications service providers without a warrant, that valuable check disappears. *Amicus* urge this Court to address the vital question of how Fourth Amendment requirements must be interpreted to safeguard First Amendment rights.

CONCLUSION

For the foregoing reasons, the Reporters Committee respectfully urges this Court to grant the petition for writ of certiorari.

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