No. 12-4659

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AARON GRAHAM and ERIC JORDAN,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland, Northern Division
Case No. 1:11-cr-00094-RDB-1

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTs-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Fourth Circuit Rules of Appellate Procedure, the Reporters Committee for Freedom of the Press discloses that it is an unincorporated association of reporters and editors with no parent corporation and no stock.

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and Freedom of Information Act litigation since 1970.

INTRODUCTION

Pursuant to 18 U.S.C. § 2703(d), prosecutors may request historical cell site location information (CSLI) in criminal investigations using a court order. In the case of Defendant-Appellant Graham, the government obtained CSLI for 221 days. The Reporters Committee for Freedom of the Press (the "Reporters Committee") submits this brief to emphasize that this Court should consider the First Amendment interests that warrantless acquisition of communications information implicates when it resolves the Fourth Amendment questions presented by Graham's appeal. The Fourth Amendment was intended in part to protect an independent press from government interference. As a result, Fourth Amendment protections must be applied with particular rigor when First Amendment rights are

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *amicus* states that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or any other person, other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief. Pursuant to Rule 29(c)(4), Defendant-Appellant has consented to, and Plaintiff-Appellee does not oppose, the filing of this brief.

at stake. Telephonic communications (like other types of communications facilitated by third-party providers) play a necessary role in newsgathering. CSLI can reveal the frequency, time, and duration of reporters' investigative trips, meetings with sources and those sources' identities, and other facts and evidence related to newsgathering. Knowledge that the government may acquire a historical record of one's whereabouts without, at a minimum, the judicial oversight required to obtain a warrant, impinges upon newsgathering and reporting and the full-throated exercise of First Amendment rights more generally. For all these reasons, searches of CSLI require the enhanced safeguards that the Fourth Amendment's warrant requirement provides.

ARGUMENT

I. THE FOURTH AMENDMENT WAS INTENDED TO PROTECT A FREE PRESS FROM INTRUSION BY THE GOVERNMENT.

a. The Fourth Amendment is rooted in concerns about safeguarding the press from general warrants.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const, amend. IV. This 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 publications. As a result, the Fourth Amendment's roots are intertwined with the

First Amendment guarantees of free speech and a free press. Indeed, 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 and to the Framers. *Boyd v. United States*, 116 U.S. 616, 626 (1886). The two colonial-era landmark cases that inform our understanding of the history and purpose of the Fourth Amendment—*Entick v. Carrington* and *Wilkes v. Wood*—both involve the press.

In *Entick v. Carrington*, 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 v. Wood*, Lord Camden also dismissed a general warrant issued against a dissenting printer, concluding 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." 19 How. St. Tr. 1153, 1167 (1763). In short, "[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.

b. Fourth Amendment protections must be rigorously applied when First Amendment rights are at stake.

Because of the historic link between the First and Fourth Amendments, the Supreme 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) (emphasis added). Indeed, *Zurcher* expressly calls for "consideration of First Amendment values in issuing search warrants." *Id.* at 565.

The *Zurcher* Court concluded that the Fourth Amendment's warrant requirements were sufficiently protective of First Amendment rights. *Id.* at 567.

Specifically, the 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.

Unlike the warrant in *Zurcher*, Section 2703 of the SCA does not require probable cause, specificity with respect to the scope of the search, or reasonableness. Rather, it requires only a showing of "specific and articulable facts" demonstrating that the material sought is "relevant and material" to an investigation. This lower standard permits law enforcement to obtain comprehensive location data under the SCA without the safeguards that the Court in *Zurcher* found to be sufficiently protective of First Amendment rights.

The Fourth Amendment's requirements reflect the Framers' recognition that government searches and seizures can stifle expression and dissent. Thus, as the Supreme 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).

II. SEARCHES OF HISTORICAL CSLI AFFECT THE FIRST AMENDMENT RIGHTS OF THE PRESS.

As the Supreme Court has recognized, cell phones can contain data that is

"qualitatively different" from physical records. *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). "An 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." *Id.* In her 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." *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring).

In part because location information can be so revelatory of journalistic practice, reporters frequently go to great lengths to ensure that the places where they meet confidential sources are private. Journalists seek out private locations because exposure of sources and methods can put sources' jobs and lives at risk and compromise the integrity of the newsgathering process. The necessity of confidentiality inherent in journalistic work raises an important question, not yet decided, as to whether journalists and reporters have a reasonable expectation of privacy in the location, time, duration, and participants in confidential meetings and communications.

Safeguarding the identities of confidential sources is the very essence of journalistic professionalism. *The New York Times* used such contacts to break the story that the NSA 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.

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 a chill on newsgathering.[2] The identities of any of these sources could be easily obtained and revealed using nothing more than a cell phone provider's business records. But as the Court in *Riley* recognized, cell phones now serve as "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries,

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[2] In 2011, cellphone carriers reported that they responded to 1.3 million requests for subscriber information. Eric Lichtblau, *More Demands on Cell Carriers in Surveillance*, N.Y. Times, July 9, 2012, at A1. *See also* Dan Gillmor, *Beyond Encryption*, Colum. J. Rev., May 7, 2012, http://bit.ly/23h5AhX ("If you do need to talk to [a source] using a cell phone, Fed-Ex them a prepaid phone, and tell them not to use it, or even turn it on, near their home/office.").

albums, televisions, maps, or newspapers"—all tools that are integral to the craft of journalism. *Riley*, 134 S. Ct. at 2489. 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.

CONCLUSION

Because of the historical and contemporary relationship between the Fourth and First Amendments, this Court should consider the First Amendment concerns articulated above in determining the constitutionality of the warrantless acquisition of CSLI.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Fed. R. of App. P. 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 1,733, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2016, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon all parties in the case. I certify that all participants in the case are CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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