No. 12-12928

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

QUARTAVIOUS DAVIS,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida; Case No. 1:10-cr-20896-JAL-2

UNOPPOSED MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

Counsel certifies that, in addition to those people and entities already identified in the appellant's Certificate of Interested Persons, these people and entities have an interest in the outcome of this case:

Bruce Brown
Hannah Bloch-Wehba
Katie Townsend
Reporters Committee for Freedom of the Press

UNOPPOSED MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

The Reporters Committee for Freedom of the Press moves pursuant to Rule 35-9 and with the consent of the parties for leave to file as amicus curiae a brief in support of Defendant-Appellant Quartavious Davis.

1. Proposed *amicus* seeks to file an en banc amicus brief in support of Defendant-Appellant Quartavious Davis in the above-captioned case. The proposed brief is attached to this motion.
2. This case raises important questions about the relationship between Fourth and First Amendment rights that have broad implications for journalists, reporters, and media organizations.
3. An amicus brief from the Reporters Committee for Freedom of the Press will aid the Court's consideration of this case by providing additional analysis of the First Amendment implications presented by the Fourth Amendment issues in this case.
4. Counsel for the United States does not oppose this motion. Counsel for Quartavious Davis does not oppose to this motion.

The Reporters Committee for Freedom of the Press respectfully requests leave to file the attached amicus brief.

Dated: November 17, 2014

s/ Hannah Bloch-Wehba

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2014, this motion and the accompanying brief and 20 copies were hand-delivered to the Court. I further certify that on the same day a copy of this motion and the brief were e-mailed and mailed to: Jacqueline Shapiro, 40 N.W. Third Street, Penthouse One, Miami, Florida 33128; and Assistant United States Attorney Kathleen Salyer, United States Attorney's Office, 99 N.E. Fourth Street, Miami, Florida 33132.

s/ Hannah Bloch-Wehba

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Eleventh Circuit Rules of Appellate Procedure, the Reporters Committee for Freedom of the Press discloses that:

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STATEMENT OF INTEREST

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. CSLI permits long-term tracking of an individual's location; in the case of Defendant-Appellant Davis, the tracking lasted for over two months. The Reporters Committee for Freedom of the Press (the "Reporters Committee" or "*amicus*") writes to emphasize the relationship that the Fourth Amendment questions presented by Davis's appeal have to current First Amendment issues that impact press freedom. 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. This material is protected by the First Amendment. 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, chills the activity of both reporters and sources, impinging upon newsgathering and reporting and the full-throated exercise of First Amendment rights more generally. Warrantless searches of CSLI allow the government to evade the constitutional safeguard of the probable cause requirement as well as the well-established protections that accompany subpoenas to the media.[1] For all these reasons, searches of CSLI require the enhanced safeguards that the Fourth Amendment's warrant requirement provides.

[1] *See* 20 C.F.R. § 50.10.

ARGUMENT

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

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.

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

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). In the pre-revolution era, the issuance of "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 odious to the press. *Boyd v. United States*, 116 U.S. 616, 626 (1886). Against this background, it is unsurprising that the two landmark cases that form the basis for

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.* In *Wilkes v. Wood*, Lord Camden also dismissed a general warrant issued against 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, "[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.

Today, the Supreme Court has recognized that an individual can have a reasonable expectation of privacy in his or her location. The touchstone of the Fourth Amendment is reasonableness. "A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). 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." *Katz v. United States*, 389 U.S. 347, 357 (1967).

It is equally settled that "the Fourth Amendment protects people, not places." *Id.* at 351. Society recognizes that individuals retain a reasonable expectation of privacy in their location. Historically, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *United States v. Jones*, 565 U.S. __, __ (slip op., at 13) (2012) (Alito, J., concurring). In *Jones*, the government installed a GPS tracking device on the undercarriage of the defendant's car and tracked the defendant's movement for 28 days. The Supreme Court unanimously held that the use of the device constituted a search under the Fourth Amendment, but fractured

on the reasoning. *Jones* thus left open the question of whether long-term observation of location through electronic means violates a reasonable expectation of privacy.

b. Long-term location tracking impinges on the confidentiality of journalists' communications.

In part because location can be so revelatory, journalists frequently go to great lengths to ensure that the locations in which they meet confidential sources are private. 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. In *United States v. Karo*, the Supreme Court held that electronic location monitoring in a residence, or "a location not open to visual surveillance," constituted a search. 468 U.S. 705, 714 (1984). As the Supreme 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 v. California*, 573 U.S. __, __ (slip op., at 20) (2014). Journalists frequently seek out locations "not open to

visual surveillance" because exposure of sources and methods can put sources' jobs and lives at risk and compromise the integrity of the newsgathering process.[2]

Safeguarding the identities of confidential sources is at the core of journalistic practice. *The New York Times* used these kinds of 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. *The Washington Post* relied on

[2] For example, when Mark Felt began meeting with Bob Woodward about the Watergate case, Felt required Woodward to meet in person, alone, at 2 a.m. on the bottom level of a parking garage in Rosslyn, Virginia. Felt instructed Woodward: "Take the alley. Don't use your own car. Take a taxi to several blocks from a hotel where there are cabs after midnight, get dropped off and then walk to get a second cab to Rosslyn. Don't get dropped off directly at the parking garage. Walk the last several blocks. If you are being followed, don't go down to the garage. I'll understand if you don't show." If Woodward had been unable to keep Felt's identity confidential—a secret Woodward kept for over thirty years—the Watergate story, a story about one of the deepest corruption scandals in American history, would never have been published. Bob Woodward, *How Mark Felt Became 'Deep Throat,'* WASHINGTON POST (June 20, 2005), http://www.washingtonpost.com/politics/how-mark-felt-became-deep-throat/2012/06/04/gJQAlpARIV_story.html.

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.

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, albums, televisions, maps, or newspapers"—all tools that are integral to the journalistic profession. *Riley*, 573 U.S. __, __ (slip op., at 17) (2014). 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] As a result, the panel's opinion below is correct that "when one's whereabouts are not public, then one may have a reasonable expectation of privacy in those whereabouts," regardless of whether one is in possession of a cell phone or not. *Davis*, No. 12-12928, at 20.

[3] 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*, Columbia Journalism Review, May 7, 2012, http://www.cjr.org/feature/beyond_encryption.php ("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.").

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

In addition to the Fourth Amendment issues presented in this case, the Court should also consider the First Amendment issues at stake. Information about location is integral to the newsgathering process and is protected by the First Amendment. 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). The Fourth Amendment caselaw relied upon in *Zurcher* calls for "consideration of First Amendment values in issuing search warrants." *Id.* at 565. Yet by acquiring historical CSLI without a warrant, the government evades any consideration of the First Amendment interests.

a. Warrantless searches of historical CSLI undermine reporters' qualified First Amendment privilege.

The Eleventh Circuit has recognized a qualified First Amendment privilege that protects a reporter's refusal to disclose the identity of a confidential source. *See, e.g.*, *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Price v. Time, Inc.*, 416 F.3d 1327, 1343 (11th Cir. 2005). To safeguard this privilege, the Court

has recognized that the privilege may only be overcome if "the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources." *Price v. Time, Inc.*, 416 F.3d at 1343 (quoting *Caporale*, 806 F.2d at 1504).

Warrantless acquisition of a journalist's historical CSLI undermines this qualified privilege by permitting law enforcement to ascertain the locations of calls and meetings and the identity of any confidential sources whom the journalist has contacted without satisfying the required safeguards. When the government obtains this information from a journalist's cell phone provider without a warrant, it avoids the obligation incumbent upon it to show that the identity of a source is highly relevant, necessary to the case, and unavailable from other sources. *See Caporale*, 806 F.2d at 1504. Instead, the SCA permits warrantless collection of CSLI based on a court order issued if there are "reasonable grounds to believe that the records are relevant and material to an ongoing investigation." 18 U.S.C. § 2703(d). The safeguards outlined in *Caporale* do not appear in the SCA context. The SCA also provides for gag orders directing the recipient of an order not to disclose the existence of either the order or the investigation. 18 U.S.C. § 2705(b).

The Eleventh Circuit's recognition of the reporter's privilege does not anticipate that prosecutors and investigators may be able to circumvent this inquiry altogether by seeking information to identify a source from the business records of

a journalist's phone company. Yet this is precisely what the SCA achieves. Under the SCA, it is possible that the government could obtain a journalist's historical CSLI and identify the journalist's source while the journalist remains unaware of the request for the information and thus unable to assert the First Amendment privilege that this Court has repeatedly recognized. By relying on the warrantless court order in 2703(d), the government evades the careful scrutiny of First Amendment interests that the warrant process protects and that *Zurcher* requires.

b. Warrantless searches of historical CSLI chill reporter-source relationships and the newsgathering process.

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 impedes robust exercise of First Amendment rights. "Awareness that the Government may be watching chills associational and expressive freedoms." *United States v. Jones*, 565 U.S. __, __ (2012) (slip op., at 3) (Sotomayor, J., concurring).

The use of phone company business records in criminal investigations has affected the press both directly and indirectly. Last year, 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.* He continued, "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." *See* Lindy Royce-Bartlett, *Leak Probe Has Chilled Sources, AP Exec Says*, CNN (June 19, 2013), http://bit.ly/11NGbOH.

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. Dylan Byers, *Reporters Say*

There's a Chill in the Air, Politico (June 8, 2013), http://politi.co/11znRrJ ("Reporters on the national security beat say it's not the fear of being prosecuted by the DOJ that worries them — it's the frightened silence of past trusted sources that could undermine . . . investigative journalism[.] Some formerly forthcoming sources have grown reluctant to return phone calls, even on unclassified matters, and, when they do talk, prefer in-person conversations that leave no phone logs, no emails, and no records of entering and leaving buildings[.]"). As the Supreme 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 location surveillance occurs without a warrant, that valuable check disappears.

CONCLUSION

Because of the historical and contemporary relationship between the Fourth and First Amendments, the Fourth Amendment requires careful scrutiny of the First Amendment interests at stake. Warrantless acquisition of CSLI may reveal sources and methods that are integral to newsgathering and protected by the First Amendment. The Court should weigh these important First Amendment concerns in assessing the constitutionality of the warrantless acquisition of CSLI.

November 17, 2014

s/ Hannah Bloch-Wehba

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 37(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 14-35555

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 2,852 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

s/ Hannah Bloch-Wehba
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