NO. 11-20884

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN RE: APPLICATIONS OF THE
UNITED STATES OF AMERICA
FOR HISTORICAL CELL-SITE DATA

On Appeal from the United States District Court
For the Southern District of Texas
Houston Division, Civil No. 4:11-MC-00223
Related Cases: 4:10-MJ-981, 4:10-MJ-990, 4:10-MJ-998

REPLY BRIEF OF UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ADDITIONAL STATEMENT OF JURISDICTION 1

ARGUMENT 3

I. THE FOURTH AMENDMENT ALLOWS THE UNITED STATES TO OBTAIN A 2703(d) ORDER TO COMPEL A CELL PHONE COMPANY TO DISCLOSE HISTORICAL CELL-SITE RECORDS 3

A. A cell phone customer has no Fourth Amendment interest in historical cell-site records because they are business records created and held by a cell phone provider 3

1. A customer has no reasonable expectation of privacy in business records made and stored at a business's discretion, and the United States has not mandated that providers generate and store historical cell-site records 4

2. Historical cell-site records have been voluntarily conveyed to the service provider 7

3. Obtaining historical cell-site records is not invasive, and the third-party doctrine is not limited to information that is only minimally revealing 10

B. Compulsory process is subject to a reasonableness requirement, not a warrant requirement 13

C. *United States v. Jones* does not require a warrant for the compelled disclosure of historical cell-site records 15

II. THE JUDICIALLY-NOTICED FINDINGS OF FACT MUST BE REJECTED 19

III. THIS COURT SHOULD REJECT THE ACLU'S ALTERNATIVE INTERPRETATION OF § 2703(d), UNDER WHICH A COURT MAY REJECT AN APPLICATION THAT MEETS THE "SPECIFIC AND ARTICULABLE FACTS" STANDARD 23

CONCLUSION 29

CERTIFICATE OF SERVICE 30

CERTIFICATE OF COMPLIANCE 31

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Alabama v. Bozeman, 533 U.S. 146 (2001) 26

Application of the United States, 427 F.2d 639 (9th Cir. 1970) 1, 2

Application of the United States, 563 F.2d 637 (4th Cir. 1977) 1, 2

In re Application of the United States, 620 F.3d 304 (3d Cir. 2010) . . . . . *passim*

In re Application of the United States, 632 F. Supp. 2d 202 (E.D.N.Y. 2008) . . . 27

In re Application of the United States, ___ F. Supp. 2d ___, 2011 WL 5508991 (E.D. Va. Nov. 10, 2011) . . . . . *passim*

In re Application of the United States for Historical Cell Site Data, 747 F. Supp. 2d 827 (S.D. Tex. 2010) 19, 20, 23

Branzburg v. Hayes, 408 U.S. 665 (1972) 15

Donaldson v. United States, 400 U.S. 517 (1971) 5, 6, 15

Hardy v. Johns-Manville Sales Corporation, 681 F.2d 334 (5th Cir. 1982) 20

Hoffa v. United States, 385 U.S. 293 (1966) 11, 19

Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006) 26

Lopez v. United States, 373 U.S. 427 (1963) 11

SEC v. Jerry T. O'Brien, Incorporated, 467 U.S. 735 (1984) 12, 15, 16

Sibron v. New York, 392 U.S. 40 (1968) 27

Smith v. Maryland, 442 U.S. 735 (1979) . . . . . *passim*

TABLE OF AUTHORITIES
(continued)

CASES **PAGE(S)**

TRW Incorporated v. Andrews, 534 U.S. 19 (2001) 26

Taylor v. Charter Med. Corporation, 162 F.3d 827 (5th Cir. 1998) 22

United States v. Anderson-Bagshaw, 2012 WL 774964 (N.D. Ohio Mar. 8, 2012) 17

United States v. Graham, ___ F. Supp. 2d ___, 2012 WL 691531 (D. Md. Mar. 1, 2012) . . . . . *passim*

United States v. Howard, 106 F.3d 70 (5th Cir. 1997) 22

United States v. Jones, 132 S. Ct. 945 (2012) . . . . . *passim*

United States v. Matlock, 415 U.S. 164 (1974) 14

United States v. Miller, 425 U.S. 435 (1976) . . . . . *passim*

United States v. Palmer, 536 F.2d 1278 (9th Cir. 1976) 14

United States v. Santiago, 410 F.3d 193 (5th Cir. 2005) 22

United States v. Savides, 658 F. Supp. 1399 (N.D. Ill. 1987), *aff'd sub nom. United States v. Pace*, 898 F.2d 1218 (7th Cir. 1990) 2

United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) 11, 12

United States v. White, 401 U.S. 745 (1971) 11

STATUTES

18 U.S.C. § 2518(10)(b) 2

TABLE OF AUTHORITIES
(continued)

STATUTES **PAGE(S)**

18 U.S.C. § 2703(b) 25

18 U.S.C. § 2703(c)(1) 25

18 U.S.C. § 2703(d) . . . . . *passim*

18 U.S.C. § 2711(4) 25

18 U.S.C. § 3731 3

28 U.S.C. § 1291 . . . . . 1, 2, 3

47 U.S.C. § 1002(a) 6

Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) ("CALEA") 6

OTHER AUTHORITIES

Wright, Miller & Cooper, *15B Federal Practice and Procedure* § 3919.9 (2d ed. 2011) 2, 3

ADDITIONAL STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291 because an application for a court order under 18 U.S.C. § 2703(d) (a "2703(d) order") is filed in an "independent plenary proceeding" pursuant to statute, and the district court's order in this case "was dispositive thereof and had the requisite finality to make it appealable under section 1291." *Application of the United States*, 563 F.2d 637, 641 (4th Cir. 1977) (finding jurisdiction under § 1291 over an appeal of the denial of a wiretap application); *see also* Brief for the United States ("Initial Brief") at 2 n.1. The Amicus Curiae Brief of Professor Orin S. Kerr ("Kerr Brief") argues that this Court lacks jurisdiction to hear this appeal under § 1291, but it presents no persuasive reason to depart from the decisions of the Third, Fourth, and Ninth Circuits exercising jurisdiction over appeals from the denials of *ex parte* applications in criminal investigations. *See Application of the United States*, 563 F.2d at 641 (appeal of denial of wiretap application); *Application of the United States*, 427 F.2d 639, 642 (9th Cir. 1970) (same); *In re Application of the United States*, 620 F.3d 304 (3d Cir. 2010) (appeal of denial of application for 2703(d) order).

Although the Kerr Brief attempts to distinguish the Fourth and Ninth Circuit wiretap appeals by arguing that "[t]he Wiretap Act expressly contemplates appeals from denials of applications," Kerr Brief at 23, neither the Fourth nor the Ninth

Circuits relied on 18 U.S.C. § 2518(10)(b), the Wiretap Act's provision for appellate jurisdiction, in exercising jurisdiction over the government's appeal. *See Application of the United States*, 427 F.2d at 641 (stating that the Wiretap Act "does not expressly authorize an appeal from such a district court order"); *Application of the United States*, 563 F.2d at 640 ("the Government does not advance 18 U.S.C. § 2518(10)(b) as a basis for appeal"). Instead, the Fourth and Ninth Circuits concluded that an appeal was permissible under § 1291, and their reasoning regarding § 1291 applies equally to an appeal from a denial of an application for a 2703(d) order.

The only case cited by the Kerr Brief against appeals under § 1291 from denials of *ex parte* applications does not even involve an attempt to appeal by the government. In *United States v. Savides*, 658 F. Supp. 1399, 1404 (N.D. Ill. 1987), *aff'd sub nom. United States v. Pace*, 898 F.2d 1218 (7th Cir. 1990), the court rejected the defendant's argument that a magistrate judge's denial of a search warrant application should have had preclusive effect; the court stated that "the government has no right to appeal if it believes the magistrate erred in denying the warrant." One leading treatise disagrees: "Denial of a government application for a search warrant concludes the only matter in the district court. . . . Appeal is available as from a final decision." Wright, Miller & Cooper, *15B Federal Practice and Procedure* § 3919.9 (2d ed.

2011).[1]

This Court should hold that it has jurisdiction over this appeal under 28 U.S.C. § 1291. In the alternative, the United States agrees with the Kerr Brief that if this Court otherwise lacks jurisdiction over this appeal, this Court should exercise mandamus jurisdiction. *See* Kerr Brief at 24-25.

ARGUMENT

I. THE FOURTH AMENDMENT ALLOWS THE UNITED STATES TO OBTAIN A 2703(d) ORDER TO COMPEL A CELL PHONE COMPANY TO DISCLOSE HISTORICAL CELL-SITE RECORDS.

A. A cell phone customer has no Fourth Amendment interest in historical cell-site records because they are business records created and held by a cell phone provider.

Historical cell-site records are business records generated and stored by cell phone companies, without governmental compulsion, when customers make or receive telephone calls. Requiring the companies to disclose historical cell-site records does not violate the Fourth Amendment under the well-established principle that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *United States v. Miller*, 425 U.S. 435, 443 (1976)*; Smith v. Maryland*, 442 U.S. 735, 744 (1979)

[1]The United States agrees with the Kerr Brief that 18 U.S.C. § 3731 does not provide jurisdiction here. Section 3731 applies to an appeal "[i]n a criminal case," and an *ex parte* application in a criminal investigation is not a criminal case. *See In re Application of the United States*, 563 F.2d at 640.

(quoting *Miller*). Amici strain to distinguish the many Supreme Court and appellate court cases upholding this broad principle, but their efforts are unavailing. *See* Brief of Amicus Curiae ACLU *et al.* ("ACLU Brief") at 33-45; Brief of Amicus Curiae Susan Freiwald ("Freiwald Brief") at 18-21; Brief of Amicus Curiae Electronic Privacy Information Center ("EPIC Brief") at 18-31.

1. A customer has no reasonable expectation of privacy in business records made and stored at a business's discretion, and the United States has not mandated that providers generate and store historical cell-site records.

As shown by *United States v. Miller*, 425 U.S. 435 (1976), customers have no protected privacy interest in historical cell-site records. In *Miller*, the Supreme Court rejected a Fourth Amendment challenge to a third-party subpoena for bank records and explained that the bank's records "are not respondent's 'private papers'" but are "the business records of the banks" in which a customer "can assert neither ownership nor possession." *Miller*, 425 U.S. at 440. This reasoning applies equally to the historical cell-site records at issue in this case. The ACLU objects that in *Miller*, the Supreme Court also "proceeded to consider whether Miller nevertheless could maintain a reasonable expectation of privacy in the bank's records." ACLU Brief at 34. But the ACLU ignores the basis for this further analysis: the Supreme Court in *Miller* explained that this further analysis was necessary due to the Bank Secrecy Act, a federal law requiring the bank to keep the targeted records. *Miller*, 425 U.S. at 441

("we must address the question whether the compulsion embodied in the Bank Secrecy Act as exercised in this case creates a Fourth Amendment interest in the depositor where none existed before").[2] There is no data-retention law in this case; as discussed below, EPIC is wrong to argue otherwise.

Donaldson v. United States, 400 U.S. 517 (1971), confirms that where no law imposes a data-retention requirement on a business, a third party cannot object to the compelled production of business records. In *Donaldson*, the Supreme Court held that a taxpayer could not intervene in the enforcement of IRS summonses to his former employer for his employment records. The Court found "no constitutional issue" with compelling the disclosure of the employment records and explained "that question appears to have been settled long ago when the Court upheld, against Fourth Amendment challenge, an internal revenue summons issued under the Revenue Act of 1921 and directed to a third-party bank." *Donaldson*, 400 U.S. at 522. Significantly, the Court did not engage in the expectation-of-privacy analysis urged by amici here. Instead, the Court explained that the material sought "consists only of [the employer's] routine business records in which [Donaldson] has no proprietary

[2]In addition, there is no suggestion in *Miller* that a warrant might have been necessary to obtain bank records if the account owner retained an expectation of privacy in the records. Instead, the account owner in *Miller* sought to challenge alleged defects in the subpoena used to compel disclosure of the records. *See id.* at 438-39. The Supreme Court held that account owner could not do so because the allegedly defective subpoena did not implicate his Fourth Amendment interests. *See id.* at 444.

interest of any kind . . . . Donaldson's only interest – and of course it looms large in his eyes – lies in the fact that those records presumably contain details of [employer-to-employee] payments possessing significance for federal income tax purposes." *Id.* at 530-31.

Freiwald and EPIC both mistakenly claim that data collection and retention by the providers is mandated in this case. First, EPIC incorrectly asserts that "the government itself first mandated the collection of this data." EPIC Brief at 24. EPIC's assertion is apparently based on the Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) ("CALEA"), *see* EPIC Brief at 20-23, but CALEA merely requires providers to be capable of implementing specific court orders; nothing in CALEA requires providers to collect and store cell-site records absent a specific court order pertaining to a specified phone. *See* 47 U.S.C. § 1002(a). CALEA no more requires providers to store and maintain historical cell-site records than it requires them to store and maintain recordings of all telephone conversations carried on their networks. *See United States v. Graham*, ___ F. Supp. 2d ___, 2012 WL 691531 at *12 (D. Md. Mar. 1, 2012) (stating that "Federal law does not mandate that cellular providers create or maintain" historical cell-site records).[3]

[3]EPIC is also completely mistaken regarding governmental policies and practices when it states that "[t]he Government requires that service providers gather this location data automatically in case it gets a warrant, then applies for an order under the minimal pen register standard after that data is stored." EPIC Brief at 23-24.

Second, the Freiwald Brief incorrectly asserts that the government is seeking an order "compelling MetroPCS to create records on a continuous basis," and thus that the government may obtain information beyond the records stored by MetroPCS in the ordinary course of providing cell phone service. Freiwald Brief at 6-7. But that is not what the United States is seeking in this appeal. Although the applications of the United States in this case included requests for prospective information, the government through this appeal seeks only historical cell-site records for a 60-day period prior to the issuance of the court's order. No law required the providers to create and store those records in the first place.

2. Historical cell-site records have been voluntarily conveyed to the service provider.

In the initial Brief for the United States ("Initial Brief"), the United States explained that under both the terms of service of MetroPCS and T-Mobile and also the reasoning of *Smith v. Maryland*, customers voluntarily convey information to their providers. *See* Initial Brief at 19-23. EPIC acknowledges that providers have privacy policies that "discuss the location data automatically stored by their networks." EPIC Brief at 27. It nevertheless argues that these policies do not demonstrate that consumers voluntarily convey their location information to phone companies. *See* EPIC Brief at 27-31. EPIC's argument is contrary to the reasoning of *Smith v. Maryland*. In *Smith*, the Supreme Court relied on the fact that "[m]ost phone books

tell subscribers, on a page entitled 'Consumer Information,' that the company 'can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls.'" *Smith v. Maryland*, 442 U.S. at 742-43. It used this fact to support its conclusion that users "typically know that they must convey numerical information to the phone company," and it did so without addressing the extent to which consumers actually read introductory pages in their phone books. *Id.* at 743; *see also In re Application of the United States*, ___ F. Supp. 2d ___, 2011 WL 5508991, at *19 (E.D. Va. Nov. 10, 2011) (rejecting argument that court should disregard privacy policies).

The ACLU and Freiwald rely heavily on *In re Application of the United States*, 620 F.3d 304, 317 (3d Cir. 2010), in which the court stated that a customer did not voluntarily disclose location information to his cell phone provider,[4] but that decision is contrary to the reasoning of *Smith v. Maryland*. The Third Circuit stated that a customer did not voluntarily disclose cell-site information because "it is unlikely that cell phone customers are aware that their cell phone providers *collect* and store

[4]The Third Circuit did not hold that using a 2703(d) order to compel a provider to disclose historical cell-site records would violate the Fourth Amendment. It stated that such records were "obtainable under a § 2703(d) order and that such an order does not require the traditional probable cause determination." *In re Application of the United States*, 620 F.3d at 313. However, it also held that § 2703(d) "gives the MJ the option to require a warrant showing probable cause." *Id.* at 319. As explained in Section III below, this interpretation of § 2703(d) is incorrect.

historical location information." *In re Application of the United States*, 620 F.3d at 317. The Supreme Court rejected this argument in *Smith v. Maryland*, where it held that "[t]he fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not in our view, make any constitutional difference." *Smith*, 442 U.S. at 745. The Court explained that "[r]egardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record." *Id.* In addition, the Third Circuit decision failed to address providers' privacy policies, which inform customers that providers collect and store their location information. *See* Initial Brief at 19-21.

Amici also ignore a lengthy and well-reasoned recent district court case holding that a defendant had no reasonable expectation of privacy in historical cell-site records and denying the defendant's motion to suppress such records. *See United States v. Graham*, ___ F. Supp. 2d ___, 2012 WL 691531 (D. Md. Mar. 1, 2012). *Graham* held "the third-party doctrine applicable to historical cell site location information." *Id.* at *14. The Court noted that some courts had "concluded that a cellular customer does not 'voluntarily' convey this information to his cellular provider," but it held that the reasoning of *Smith v. Maryland* "cautions against any assumption of ignorance on the part of cellular customers." *Id.* The court further held that "any assumption of

ignorance is belied by Sprint/Nextel, Inc.'s privacy policy, which informs its customers that it collects location data." *Id.* This reasoning is fully applicable to this case.

3. Obtaining historical cell-site records is not invasive, and the third-party doctrine is not limited to information that is only minimally revealing.

Amici argue that a warrant should be required for compelled disclosure of historical cell-site records because obtaining cell-site records is invasive or intrusive, s*ee* ACLU Brief at 35-36; Freiwald Brief at 13-17, but this argument is doubly mistaken. First, as discussed in the United States's Initial Brief, obtaining historical cell-site information is not invasive or intrusive. *See* Initial Brief at 35-36. It can disclose only past information about the general location of a cell phone when a call is made, (A. 110-112), and it cannot reveal whether a cell phone was within a private space, such as a home. Historical cell-site information provides less information to law enforcement than a traditional pen register on a home phone, which can enable law enforcement on an ongoing basis to conclude that a person is located in a particular private space (the home) at a particular time (when a call is made).

Second, the Supreme Court has never limited the third-party doctrine – the principle that information revealed to a third party may subsequently be conveyed to the government – to information that is unrevealing or of limited use to law enforcement. Indeed, *United States v. Miller* cites three cases for the proposition that

"the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities," and all three of these cases involve the content of communications, rather than the kind of non-content business records that are at issue here. *See Miller*, 425 U.S. at 443 (citing *United States v. White*, 401 U.S. 745 (1971) (content of conversation with informant), *Hoffa v. United States*, 385 U.S. 293 (1966) (content of conversations with or in presence of informant), and *Lopez v. United States*, 373 U.S. 427 (1963) (content of conversation with government agent)). Thus, because historical cell-site records are the provider's business records and obtaining them is substantially less intrusive than obtaining the content of communications, the United States may compel the provider to disclose them using a 2703(d) order.

Amici cite *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), in support of their arguments against the third-party doctrine, *see* ACLU Brief at 37-38; Freiwald Brief at 20-21, but *Warshak* does not limit the compelled disclosure of cell-site records. In *Warshak*, the Sixth Circuit held that the government "may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause." *Warshak*, 631 F.3d at 288. *Warshak* expressly distinguished the content of email from provider business records: it stated that *Miller* "involved simple business records, as opposed to the potentially unlimited

variety of 'confidential communications' at issue here." *Id.* Cell-site records, of course, are business records rather than confidential communications. Second, *Warshak* concluded that the provider was merely an "intermediary" with respect to the content of customer communications. *Id.* In contrast, historical cell-site records are the phone company's own records, that it chooses to retain of its own accord, of the service it offers to its customers. Because historical cell-site records are business records of the provider, the provider may be compelled to disclose them by means of a 2703(d) order.

Significantly, none of the Supreme Court cases cited by amici, including *Miller*, *Smith v. Maryland*, and *SEC v. Jerry T. O'Brien*, reject the use of subpoenas or require a warrant for business records. These cases cannot be distinguished. The Supreme Court's compulsory process jurisprudence is grounded in principles fully applicable to the compelled disclosure of historical cell-site records using a 2703(d) order: the government's authority to compel disclosure of every person's evidence, the absence of a probable cause requirement for subpoenas and other compulsory process, and the rule that when a person communicates information to another, that person's Fourth Amendment rights are not violated when the third party conveys the information to the government. Amici even come close to inviting this Court to ignore Supreme Court precedent. Citing Justice Sotomayor's solo concurrence in *United States v.*

Jones, 132 S. Ct. 945 (2012), the ACLU declares that "the idea that people have no reasonable expectation of privacy in information they divulge to third parties is obsolete." ACLU Brief at 37. Similarly, the Freiwald Brief asserts that *Miller* and *Smith* do not govern location data "in light of Justice Sotomayor's discussion of those cases in *Jones*." Freiwald Brief at 18. Comments made in a solo concurrence do not reflect the judgment of the Supreme Court. The Supreme Court has not overruled *Smith* and *Miller*, and this Court remains bound by those precedents.

B. Compulsory Process is Subject to a Reasonableness Requirement, Not a Warrant Requirement.

In its Initial Brief, the United States explained that no warrant or showing of probable cause is required to use a 2703(d) order to compel disclosure of historical cell-site records because a 2703(d) order functions as a subpoena, and because no warrant is required to use a subpoena to compel disclosure of non-privileged evidence relevant to a criminal investigation. *See* Initial Brief at 30-34. The ACLU asserts that this principle does not apply where "the government secretly seeks to compel the disclosure of information through a third party, and the target possesses a Fourth Amendment-protected reasonable expectation of privacy." ACLU Brief at 46. Similarly, the Freiwald Brief asserts that "[w]hen the records at issue implicate a reasonable expectation of privacy, as location data does, the compelled disclosure argument falls away." Freiwald Brief at 26.

To be clear, the government's ability to compel third-party disclosure is limited by the extent of the third party's right to access or control. For example, a landlord has authority to access a tenant's apartment in certain limited circumstances, but the government may not subpoena the landlord to produce the tenant's personal papers from her apartment. The government, however, may compel an entity to produce items or information over which the entity has joint access or control for most purposes. This rule is consistent with the common authority doctrine of *United States v. Matlock*, 415 U.S. 164, 172 n.7 (1974), and also with the third-party doctrine of *Miller* and *Smith v. Maryland*. This rule turns on the authority of the recipient of the subpoena or other compulsory process over the items or information sought, not the privacy interests of another. *Cf. United States v. Palmer*, 536 F.2d 1278, 1281-82 (9th Cir. 1976) (rejecting defendant's challenge to subpoena directed to third party and stating "[w]e do not explore the issue of a reasonable expectation of privacy, however, because the use of a properly limited subpoena does not constitute an unreasonable search and seizure under the fourth amendment."). In this case, there is no dispute that the historical cell-site records sought by the government are the service providers' own business records. Thus, the government may compel their disclosure with a 2703(d) order.

Amici's claimed limitations are inconsistent with the fundamental principles of

compulsory process. Amici argue that a person may not be compelled to disclose her own documents or information when some other person expects her not to disclose them. This is contrary to "the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

In addition, in *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984), the Supreme Court squarely rejected the argument that the target of an investigation must receive notice of a subpoena directed to a third party. In reaching this conclusion, the Court did not address whether the targets retained a reasonable expectation of privacy in the information they had conveyed to others. *See id.* The Court held that *Miller* and *Donaldson* "disable respondents from arguing that notice of subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers." *Id.* Under *Jerry T. O'Brien*, the target of an investigation is not entitled to prior notice of a 2703(d) order for historical cell-site records.

C. *United States v. Jones* does not require a warrant for the compelled disclosure of historical cell-site records.

Amici argue that the Supreme Court's recent decision in *United States v. Jones*, 132 S. Ct. 945 (2012), requires the government to obtain a warrant to compel disclosure of historical cell-site records, but that decision does no such thing. Significantly, the ACLU explicitly concedes that the opinion of the Court in *Jones*,

which held that a physical trespass for the purpose of obtaining information is a search, "is of limited relevance here" and that "the majority left cell phone tracking for another day." ACLU Brief at 23-24. Neither the EPIC Brief nor the Freiwald brief contend otherwise. Instead, amici cite the concurrences in *Jones*, which they argue establish a reasonable expectation of privacy in location information. *See* EPIC Brief at 7-8; ACLU Brief at 22-26; Freiwald Brief at 9-12. But the *Jones* concurrences do not state the holding of the Supreme Court: Justice Sotomayor's concurrence was joined by no other Justice, and Justice Alito's concurrence was joined by only three other Justices.[5] Indeed, the five-Justice opinion of the Court in *Jones* made clear that the Court was not reaching non-trespassory searches. It stated that "[w]e may have to grapple with these 'vexing problems' in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis, but there is no reason for rushing forward to resolve them here." *Jones*, 132 S. Ct. at 954.

Two district courts – one of them in the context of cell-site records – have already rejected arguments that Justice Alito's concurrence creates a broad right to location privacy. In *United States v. Graham*, ___ F. Supp. 2d ___, 2012 WL 691531

[5]The Freiwald Brief mistakenly characterizes Justice Alito's concurrence as "joined by Justice Sotomayor," and the EPIC brief mistakenly describes Justice Alito as "joined by four members of the court." Freiwald brief at 10; EPIC brief at 7. Although her concurrence agrees with certain aspects of Justice Alito's concurrence, Justice Sotomayor joined the explicitly narrow opinion of the Court and did not join Justice Alito's concurrence in whole or in part.

(D. Md. Mar. 1, 2012), the court rejected a defendant's motion to suppress historical cell-site records. The court noted that it was "cognizant" of Justice Alito's concurrence but concluded that "the law as it now stands simply does not contemplate a situation whereby traditional surveillance becomes a Fourth Amendment 'search' only after some specified period of time—discrete acts of law enforcement are either constitutional or they are not." *Id.* at *15. The court found that "[t]he majority opinion in *Jones* did not endorse the D.C. Circuit's mosaic theory." *Id.* In *United States v. Anderson-Bagshaw*, 2012 WL 774964 (N.D. Ohio Mar. 8, 2012), the district court rejected the defendant's challenge to video from a pole camera installed adjacent to her property. The court noted the defendant's argument "that the continuous duration of surveillance implicates concerns expressed in Justice Alito's concurrence," but it concluded that "*Jones* does not so hold" and that "no such [mosaic] theory was adopted." *Id.* at *2-*3.

In addition to overstating the authority of the Justice Alito concurrence in *Jones*, amici overstate its contents. Amici argue that "users have an objectively reasonable expectation of privacy in their location data," Freiwald Brief at 12, and that Justice Alito's concurrence "did not depend on the particular type of tracking technology at issue in *Jones*." ACLU Brief at 24. But Justice Alito's concurrence is specific and narrow: he states that "longer term GPS monitoring in investigations of

most offenses impinges on expectations of privacy." *Jones*, 132 S. Ct. at 963. As explained in the United States's Initial Brief, this statement is limited to "monitoring," as opposed to obtaining information from witnesses or other historical records, and it is limited to precise GPS information, as opposed to other less accurate information, such as historical cell-site records. *See* Initial Brief at 39-40.

Moreover, there is no precedent in Fourth Amendment jurisprudence for declaring a category of information to be protected regardless of how it is acquired by the government. The government may even obtain the contents of communications without a warrant when the communications are conveyed to another, who then reveals them to the government. *See, e.g., Hoffa*, 385 U.S. at 302. Yet under amici's interpretation of *Jones*, a warrant would be required for investigators to obtain employment attendance records, credit card transaction information, or conduct witness interviews, as these can reveal "location information" over an extended period of time. The district court in *Graham* described some of the difficulties inherent in the amici's proposed mosaic approach:

> After interviewing witnesses, conducting surveillance (perhaps enhanced by discrete requests for historical cell site location records under the Stored Communications Act), and reviewing pen registers and bank records, police may be able to paint an "intimate picture," of a personn's life. Under the mosaic theory, at some point this collection of data would become a Fourth Amendment search at some undefined point.

Graham, 2012 WL 691531 at *15 (citation omitted). In criminal investigations, law

enforcement needs investigatory tools to build the probable cause which serves as the basis for warrants. If a warrant were required whenever law enforcement obtained location information, many of these tools would be eliminated, and many investigations would be thwarted.[6]

II. THE JUDICIALLY NOTICED FINDINGS OF FACT MUST BE REJECTED.

In its Initial Brief, the United States argued that this Court must reject the "findings of fact" of *In re Application of the United States for Historical Cell Site Data*, 747 F. Supp. 2d 827 (S.D. Tex. 2010) (hereinafter, *Magistrate Judge Opinion*), which included assertions regarding the structure of phone companies' networks, the location information generated and stored by phone companies, and the accuracy of that location information. *See* Initial Brief at 41-46. Significantly, although the magistrate judge adopted these findings based on judicial notice, *see Magistrate Judge Opinion*, 747 F. Supp. 2d at 831, amici make no attempt to defend this use of judicial notice. Such a defense is foreclosed by this Court's rule that "judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach

[6]The Freiwald Brief also argues that a warrant must be required to compel disclosure of historical cell-site records because "the government must not police itself." Freiwald Brief at 26-27. This argument is out of place here, as 2703(d) orders are issued by courts. In *Graham*, the court noted this important distinction between using a 2703(d) order to obtain cell-site records and the warrantless GPS monitoring in *Jones*: "[i]n this case, however, the Stored Communications Act, with its attendant 'specific and articulable facts' standard, provides the necessary judicial backstop against which executive overreaching is measured." *Graham*, 2012 WL 691531 at *17.

platitudes or banalities." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347 (5th Cir. 1982).

The ACLU states that the *Magistrate Judge Opinion*'s findings of fact "are nowhere cited, let alone relied upon, by the district court," and it asserts that the findings are not before this Court. *See* ACLU Brief at 48-49. The United States agrees with the ACLU that if the district court did not adopt the *Magistrate Judge Opinion*'s findings of fact, those findings are not before this Court. (The United States previously noted that it is "unclear whether the district court adopted" the *Magistrate Judge Opinion*'s findings of fact. *See* Initial Brief at 41-42.) But if the district court did not adopt the *Magistrate Judge Opinion*'s findings of fact, those findings cannot be used to support the district court's decision or any ruling by this Court on historical cell-site records. The United States believes that this Court must disregard the *Magistrate Judge Opinion*'s findings of fact for either of two reasons: either because they were not adopted by the district court, or because they were not properly subject to judicial notice. Either approach yields the same result: this Court must reject the *Magistrate Judge Opinion*'s findings of fact.[7]

[7]The ACLU also seeks to minimize the findings of fact themselves. The *Magistrate Judge Opinion* purports to set forth a detailed description of carrier practices and records, but the ACLU claims that the findings merely "amounted to a conclusion that the precision of cell site towers is improving, getting more accurate and leading to a greater ability of law enforcement to identify an individual's location over an extending period of time." ACLU Brief at 55. Such a vague conclusion, unrelated to the specific applications in this case, would provide an

The ACLU asserts that the district court relied "on certain facts, specifically that the records at issue 'would show the date, time, number called, and location of the telephone when the call was made.'" ACLU Brief at 49 (citing (R. 43)). To the extent the district court intended this statement to be a finding of fact, the United States objects only to the assertion that the records sought reflect the location of the telephone when the call was made. All evidence in the record demonstrates that the records at issue would show the location of the cell tower through which a call is made, not the location of the phone. (A. 57, 79, 110-12).

This Court should reject the ACLU's alternative argument that the magistrate judge's findings of fact do not merit reversal if the district court adopted them. *See* ACLU Brief at 50-56. First, the ACLU argues that the Federal Rules of Evidence do not apply to applications for 2703(d) orders, and thus that it does not matter whether the judicially-noticed findings of fact are subject to reasonable dispute. *See* ACLU Brief at 50-52. However, as the United States explained in its Initial Brief, the doctrine of judicial notice sets the appropriate limits on a court's ability to find facts beyond the scope of the record even in a proceeding not strictly governed by the Federal Rules of Evidence. *See* Initial Brief at 41 n.11. Under the ACLU's approach, a court could apparently find as fact anything beyond the scope of the record before

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insufficient basis to deny the government's applications for 2703(d) orders.

the court, perhaps limited only by its ability to find some supporting source on the Internet. The ACLU cites no case authorizing this sort of unconstrained fact finding.

This Court has reviewed district courts' use of judicial notice for abuse of discretion, *see, e.g.*, *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 829 (5th Cir. 1998), but the ACLU argues that the *Magistrate Judge Opinion*'s judicially-noticed findings of fact should be reviewed for clear error. *See* ACLU Brief at 53. Such deference makes little sense: deference to another court's findings of fact is appropriate when the other court has heard testimony, observed witnesses, and evaluated credibility. For example, clear error review is appropriate for appellate review of a suppression decision "because the judge had the opportunity to observe the demeanor of the witnesses." *United States v. Santiago*, 410 F.3d 193, 197 (5th Cir. 2005). Here, the magistrate judge's findings are based on extra-record research rather than courtroom testimony, so there is no reasoned basis for such deference.

In any case, the *Magistrate Judge Opinion*'s findings of fact are clearly erroneous. A finding of fact "is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Howard*, 106 F.3d 70, 73 (5th Cir. 1997) (internal quotation marks omitted). Here, the findings of fact are not supported by any evidence in the record: they are supported only by the extra-

record research of the magistrate judge. Moreover, the conclusion that the findings of fact are clearly erroneous is bolstered by the conflicts between the findings of fact and both the MetroPCS affidavit and the sample T-Mobile cell-site records. *See* Initial Brief at 44-45; (A. 79). For these reasons, the *Magistrate Judge Opinion*'s findings of fact are clearly erroneous.

III. THIS COURT SHOULD REJECT THE ACLU'S ALTERNATIVE INTERPRETATION OF § 2703(d), UNDER WHICH A COURT MAY REJECT AN APPLICATION THAT MEETS THE "SPECIFIC AND ARTICULABLE FACTS" STANDARD.

This Court should reject the ACLU's argument for an alternative interpretation of § 2703(d), under which magistrates would have arbitrary discretion to deny applications that meet the § 2703(d) "specific and articulable facts" standard. *See* ACLU Brief at 8-9 (citing *In re Application of the United States*, 620 F.3d at 315-17). This argument is doubly mistaken. First, neither the district court nor the magistrate judge adopted or relied upon a claim that courts have discretion to deny 2703(d) orders that satisfy the Fourth Amendment. Instead, the district court and magistrate judge held that the Fourth Amendment prohibited compelled disclosure of historical cell-site records. (R. 43); *Magistrate Judge Opinion*, 747 F. Supp. 2d at 846. Neither the district court nor the magistrate judge suggested that they would refuse to issue 2703(d) orders that were consistent with the Fourth Amendment. Because the district court and magistrate judge's denials of the government's applications were based on

the Fourth Amendment, rather than a claim that they had general discretion to reject applications for 2703(d) orders, the ACLU's alternative interpretation of 2703(d) cannot be used to defend the order of the district court.

Second, the ACLU's alternative interpretation of § 2703(d) is contrary to the SCA's language and structure. Section 2703(d) specifies that a 2703(d) order "may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought . . . are relevant and material to an ongoing criminal investigation." In *In re Application of the United States*, ___ F. Supp. 2d ___, 2011 WL 5508991 at *29-31 (E.D. Va. Nov. 10, 2011) ("*E.D.V.A. Opinion*"), the court correctly explained why under this language, a court must issue a 2703(d) order when the government satisfies the statute's "specific and articulable facts" standard. The court noted that "[t]he provision that the order 'may be issued' is enabling language that allows the government to seek an order in any court of competent jurisdiction." *Id. at *30.* It explained that the interpretation endorsed here by the ACLU "incorrectly treats the phrase 'may be issued' as if it governs the rest of the first sentence of § 2703(d), when in fact it governs only the first independent clause of the first sentence." *Id.* Instead, the court held that "it is clear that the general rule is that the judicial officer 'shall

issue' an order that meets the factual burden." *Id.*

The court further explained that the phrase "only if" in § 2703(d) does not give courts discretion to deny applications for 2703(d) orders, notwithstanding the Third Circuit's contrary decision:

> The Third Circuit relied on a prior case holding that the phrase "only if" established a necessary but not sufficient condition. *Third Circuit Opinion*, 620 F.3d at 316. The Court agrees that "only if" serves that function here. The fact that "only if" creates a necessary but not sufficient condition, however, does not automatically create a gap in the statute that should be filled with judicial discretion. The Court considers it more likely that the "only if" language in § 2703(d) clarifies that any conditions established by [§ 2703(b)] and [§ 2703(c)] are cumulative with respect to the standard set forth in paragraph (d). The default rule remains that the judicial officer "shall issue" an order when the government meets its burden.

Id. at 31. In other words, to obtain a 2703(d) order, the government must satisfy the criteria of 18 U.S.C. § 2703(b) and § 2703(c), as well as meeting the evidentiary threshold of § 2703(d). That court's interpretation of § 2703 is persuasive, and this Court should adopt it.

In addition, § 2703(c) vests the government with discretion regarding the means used to compel disclosure of non-content information. Section 2703(c) specifies that a "governmental entity may require a provider" to produce non-content information when the governmental entity obtains a warrant or 2703(d) order. 18 U.S.C. § 2703(c)(1); *see also* 18 U.S.C. § 2711(4) (defining "governmental entity" to mean "a

department or agency of the United States or any State or political subdivision thereof"). Thus, "it is the 'governmental entity' that may require disclosure of information, and it is the burden of the 'governmental entity' to show facts supporting the application." *E.D.V.A. Opinion*, 2011 WL 5508991 at *29.

The ACLU's alternative interpretation of § 2703(d) should also be rejected because it renders the phrase "and shall issue" in § 2703(d) superfluous. The ACLU's "necessary but not sufficient" interpretation of § 2703(d) is equivalent to the following formulation, which omits the critical "and shall issue" language of § 2703(d): a 2703(d) order "may be issued by any court that is a court of competent jurisdiction only if the governmental entity offers specific and articulable facts . . . ." This interpretation therefore violates the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Kaltenbach v. Richards*, 464 F.3d 524, 528 (5th Cir. 2006) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 21 (2001) (internal quotation marks omitted)). Furthermore, the word "shall" has critical importance in a statute: as the Supreme Court has stated, "[t]he word 'shall' is ordinarily 'the language of command.'" *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). Because the ACLU's interpretation of § 2703(d) improperly renders "shall" superfluous, it should be rejected. *See also In re Application of the United States*, 620

F.3d at 320 (Tashima, J., concurring) (stating that the interpretation of 2703(d) urged by the ACLU "is contrary to the spirit of the statute" and "provides *no* standards for the approval or disapproval of an application").

Finally, the ACLU is mistaken in asserting that the doctrine of constitutional avoidance requires this Court to adopt its interpretation of § 2703(d). In *In re Application of the United States*, 632 F. Supp. 2d 202, 209 (E.D.N.Y. 2008) ("E.D.N.Y. Opinion"), the district court rejected the application of the constitutional avoidance doctrine in the context of an order for prospective cell-site information. The court explained that "applications under the Pen Register Statute and the SCA, which directly implicate Fourth Amendment concerns, are uniquely suited to case-by-case decision." *Id.* Under the reasoning of the E.D.N.Y. Opinion, if a particular application of the United States for a 2703(d) order did violate the Constitution, it would be appropriate for a court to deny it. This approach is consistent with the Supreme Court's general case-by-case approach to Fourth Amendment claims. *See, e.g.*, *Sibron v. New York*, 392 U.S. 40, 59 (1968) (rejecting facial Fourth Amendment challenge to statute and stating "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case."); *see also E.D.V.A. Opinion*, 2011 WL 5508991 at * 31 (holding that because 2703(d) order did not pose

constitutional problems, and because magistrate did not have discretion to refuse issuance of a 2703(d) order, "the Court need not address the propriety of constitutional avoidance").

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order and remand with instructions to grant the government's applications for historical cell-site records. In the alternative, if this Court finds it necessary to apply tracking-device standards to cell-site records, *see* Initial Brief at 35-41, it should vacate the *Magistrate Judge Opinion*'s findings of fact and remand to the district court for further proceedings regarding the accuracy of historical cell-site records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nathan Judish, hereby certify that on March 30, 2012, an electronic copy of the foregoing Brief for the United States was served by notice of electronic filing via this Court's ECF system upon all counsel of record. Upon notification that the electronically filed brief has been accepted as sufficient, and upon the Clerk's request, a paper copy of this brief will be placed in the United States Mail, postage prepaid, addressed to the Clerk.

s/ Nathan Judish
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