No. 15-1789

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN CREED,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM 4
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether a court order, under 18 U.S.C. § 2703(d) of the Stored Communication Act, gathering geolocation information that a defendant voluntarily conveyed to an independent third party, violates the Fourth Amendment.

II. Whether evidence that meets the "ancient document" authentication requirements under Federal Rules of Evidence 803(16) and 901(b)(8) may then be excluded if it lacks additional indicia of reliability beyond what is required by the Federal Rules of Evidence.

III. Whether admitting a testimonial, unconfronted dying declaration under the firmly rooted hearsay exception codified in Federal Rule of Evidence 804(b)(2) and backed by centuries of precedent, violates a criminal defendant's Sixth Amendment right of confrontation under *Crawford v. Washington.*

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The pertinent constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, a–e.

STATEMENT OF THE CASE

I. Statement of Facts

On September 21, 2013 Boerum City Police Officer John Creed (Respondent) shot and killed Angelo Ortiz (Mr. Ortiz)—an unarmed man participating in a human rights march in Boerum City. R. 2. The march was sponsored by Open the Gates, an organization with a mission to protect and advocate for the rights of individuals of Latino ethnicity in the United States. R. 4. Approximately 5,000 people were expected to participate in the march and 300 police officers were assigned to patrol the march, including Respondent and Officer Jesús Familia (Officer Familia), both of whom were assigned to patrol the corner of Cobble Road and Slope Place. R. 4.

The march started peacefully, but a confrontation soon ensued between the spectators and the march participants at the corner of Cobble Road and Slope Place. R. 6–7. Spectators began yelling ethnic slurs and obscenities at the participants. R. 7. Additionally, Officer Familia heard sounds of shattering glass and a scream from a participant, while more objects continued to be thrown at the participants. R. 7. At this point, Respondent and Officer Familia jumped over the barricades, which were erected to separate the spectators from the participants, and the crowd

immediately began to scatter in an attempt to flee the commotion. R. 7. Mr. Ortiz was one of the march participants present during this commotion, and he decided to flee down a nearby alleyway. R. 7. Respondent followed Mr. Ortiz down the alleyway while yelling: "Hey Paco, get the fuck back where you and your people came from," and "Stay behind the fence." R. 2. Mr. Ortiz was carrying a handheld camera, which captured a recording of Respondent's aforementioned statements. R. 2.

Officer Familia observed Respondent following Mr. Ortiz, but did not see any objects in Mr. Ortiz's hands, nor did he see Mr. Ortiz make any threatening gestures towards Respondent. R. 7. Officer Familia attempted to catch up to Respondent but was shoved and knocked over by a participant attempting to flee the area. R. 7. Immediately after, three gunshots sounded and Respondent radioed for assistance confirming that shots were fired, the suspect was down, and that the suspect was armed. R. 8. Officer Familia ran over to the alley and found Respondent sitting against the wall of the alley, holding his gun, albeit unharmed. R. 8. Officer Familia then saw Mr. Ortiz further down the alley, bleeding profusely from gunshot wounds on his chest and abdomen. R. 8. Mr. Ortiz's injuries were so severe he struggled to breathe, but indicated that he was not a threat. R. 8. Officer Familia knelt beside Mr. Ortiz to ask him what had happened. R. 8. Mr. Ortiz replied:

> That cop—he shot me. I didn't do anything! I told him I was just filming. I was just filming! And he told me I was a filthy wetback and I should go back where I came from. And then he shot me. Check the camera—it's all on the camera! I can't believe this is it, that I'm going to go out this way. R. 8.

Soon after, Mr. Ortiz slipped into unconsciousness and was subsequently pronounced dead on arrival at Pitler Memorial Hospital. R. 8.

An autopsy was performed on Mr. Ortiz, which signified that there was no physical altercation between Mr. Ortiz and Respondent prior to Respondent shooting Mr. Ortiz to death.

R. 8. As the investigation of Mr. Ortiz's death continued, Respondent's long-time membership to the Brotherhood of the Knights of Boerum (the Brotherhood)—a notorious white-Anglo supremacist hate group with a mission to restore white-Anglo dominance in the United States—was discovered. R. 20. Respondent's cell phone showed he regularly visited the White Knight Tavern, a known meeting place of the Brotherhood for the past twelve years, as well as the residences of two other members of the Brotherhood, Jerry Johnson and Matt Jones. R. 12–14. This information was routinely collected by AB&C wireless, pursuant to Respondent's wireless service agreement, and obtained by the government through a court order under 18 U.S.C. § 2703(d), the Stored Communications Act (SCA). R. 11.

Based on the information from the geolocation data and an independent investigation by FBI agents, the FBI obtained and executed a warrant to search the White Knight Tavern. R. 14. The search revealed a letter dated July 4, 1993 handwritten by the founder of the Brotherhood, Martin Blythe Cole located in a filing cabinet. R. 14–15, 16. The letter was addressed to the Brotherhood, and stated in relevant part that Respondent's contributions to the Brotherhood were expected to result in "nothing but continued excellence." R. 16.

II. Nature of the Proceedings

Based on overwhelming evidence, Respondent was terminated from the Boerum City Police Department and was indicted on one count of violating the Hate Crime Prevention Act, 18 U.S.C. § 249, for shooting and killing Mr. Ortiz because of Mr. Ortiz's perceived national origin. R. 5. During the investigation of Mr. Ortiz's death, Petitioner applied for an order for geolocation records from AB&C Wireless connected with Respondent's cell phone number pursuant to the SCA, 18 U.S.C. § 2703(d). R. 1.

Following the investigation of Mr. Ortiz's death, and Respondent's indictment under the Hate Crimes Prevention Act, Respondent filed a motion to suppress and two motions *in limine* in the United States District Court for the Eastern District of Boerum. R. 18. Prior to Respondent's criminal trial, a hearing on the three pre-trial motions was held on July 24, 2014 in the District Court. R. 17. Respondent's first motion was to suppress the geolocation records obtained from AB&C Wireless, which indicated Respondent frequented locations with known connections to the Brotherhood. Respondent argued the geolocation records would violate his Fourth Amendment rights. R. 22, 26. Respondent's second motion was to exclude the 22 year old letter found in the White Knight Tavern, the known meeting place of the Brotherhood, on the grounds that it did not qualify for the ancient documents rule against hearsay. R. 28–29. Respondent's final motion was to exclude Mr. Ortiz's dying declaration on the grounds that it would violate his Sixth Amendment right of confrontation. R. 34.

On Aug. 27, 2014, the District Court made an oral ruling granting Respondent's motion to suppress and the motions *in limine*. R. 41–42. Respondent's first motion to suppress the geolocations records was granted on the grounds that the third party doctrine does not apply to the facts in this case, and is therefore unconstitutional in the absence of a warrant supported by probable cause. R. 43. The District Court granted Respondent's second motion regarding the ancient documents rule on the grounds that the letter requires additional reliability, despite the Court stating the letter met the requirements of the ancient documents rule. The third motion was granted by the District Court by reasoning that, absent a Supreme Court ruling, admitting a dying declaration violates the Sixth Amendment Confrontation Clause. R. 44.

Petitioner appealed the District Court's ruling on the motions to the United States Court of Appeals for the Fourteenth Circuit, which subsequently affirmed the District Court's rulings

on the pre-trial motions. R. 55. Following the Fourteenth Circuit's decision, Petitioner filed a petition for a writ of certiorari, which this Court granted on Oct. 15, 2015. R. 61.

SUMMARY OF THE ARGUMENT

I. Geolocation Records

For the Government's actions in collecting evidence to violate the Fourth Amendment, there must first be a "search," and second, that search must be unreasonable. A search occurs when the Government intrudes on a reasonable expectation of privacy, which requires the defendant to exhibit a subjective expectation of privacy which society is prepared to accept as objectively reasonable.

Here, Respondent did not have a reasonable expectation of privacy as he did not exhibit a subjective expectation of privacy in the location information from his cell phone, and even if he did, it is not an expectation of privacy that is objectively reasonable. The subjective expectation of privacy is not purely a subjective standard, but requires that the individual exhibit an expectation that the information will be kept private. In this case, Respondent explicitly agreed to AB&C's Wireless Privacy Policy, which states that his location information will be gathered and collected by AB&C. Further, while he disabled the general "location services" on his phone, Respondent did not stop the applications on his phone from gathering his location in order to provide him with accurate information. Based on these facts, an individual could not maintain a reasonable subjective expectation that their location would be kept private.

Further, even if Respondent did have a subjective expectation, it is not objectively reasonable based on the well-established third party doctrine. The third party doctrine clearly states that any information, even in the defendant's own home, which is voluntarily conveyed to a third party, holds no reasonable expectation of privacy and the defendant assumes the risk that

the information will be turned over to the government. This doctrine comes from consistently established Supreme Court precedent and is clearly applicable to this case. Based on this doctrine, Respondent cannot have a reasonable expectation of privacy in the information he agreed to share with AB&C. After he shared the information, it was recorded in the private business records of AB&C which were properly requested by the Government in this case.

Finally, even if the Government's actions in this case did constitute a search, it was reasonable under the Fourth Amendment. Any diminished expectation of privacy Respondent might have is clearly outweighed by the large governmental interest in gathering this type of information to investigate serious criminal offenses. Further, the constitutionality of the Government's actions is strongly supported by acting pursuant to a Congressional statute. The Fourth Amendment protects only reasonable expectations of privacy and any additional privacy protections are guided by legislative enactments such as the one the Government properly complied with in this case.

II. Ancient Document Exception

Statements in an ancient document are an exception to hearsay if the document is 20 years old and is properly authenticated. The authentication requirements are laid out specifically in Federal Rule of Evidence 901(b)(8), which requires that the document (A) is in a condition that creates no suspicion about its authenticity; (B) was in a place where, if authentic, it would likely be; and (C) is at least 20 years old when offered. Federal and state courts have long held that once an ancient document is properly authenticated, the hearsay exception applies automatically.

Despite both the District Court and the Fourteenth Circuit conceding that the 22 year old letter found in the White Knight Tavern meets the authentication requirements for the ancient

documents rule, the courts added an additional element of reliability to the hearsay exception which, prior to the instant case, no court has ever established. If a document is considered suspicious, that suspicion goes not to the content of the document but whether the document is what it purports to be. In other words, suspicion may exist if the document appears physically altered but the document is not suspicious if there is uncertainty regarding who signed it. Similarly, the location found does not need be a specific location but where the document would likely be, such as in the instant case, in a filing cabinet.

Once a document meets the authenticity requirements, and is therefore admissible, the determination of evidence reliability is left to the sole discretion of the trier of fact. The common law and congressional intent behind the rule was one of necessity. After 20 years, memories fade and witnesses pass own. The ancient document rule is clearly defined within the Rules of Evidence and has even been expanded over time to include electronic documents.

While there is no guarantee, nor has there ever been such a guarantee, that just because the document is old it is reliable, it is extremely unlikely that after such a long amount time the document was created with the present controversy in mind. Adding an additional requirement of reliability to the long-standing rule negates the purpose of rule and rule's function to help the trier of fact weigh the evidence in seeking the truth.

III. Dying Declaration Exception

The dying declaration exception, codified in Federal Rule of Evidence 804(b)(2), is a historical exception to the Sixth Amendment right of confrontation. The Confrontation Clause in the Sixth Amendment is implicated when a testimonial statement is offered against a criminal defendant, when the declarant is subsequently unavailable and the defendant did not have the opportunity to cross-examine the declarant. The Confrontation Clause bars testimonial hearsay

unless the statement falls under one of two historical exceptions: (1) forfeiture, or (2) dying declarations.

Here, Mr. Ortiz's statement to Officer Familia falls squarely under the latter, as it was conceded by Respondent that the statement fits the elements of the dying declaration exception. Thus, this Court should reverse the Fourteenth Circuit's decision to exclude Mr. Ortiz's dying declaration from evidence in light of the centuries of precedent before this Court's decision in *Crawford* as well as the decade of precedent in lower federal and state post-*Crawford* upholding the dying declaration exception.

Moreover, relevant policy considerations such as the reliability of dying declarations and the necessity of the evidence they present strongly favor upholding the dying declaration exception. Despite today's secular society, strong psychological pressures are still present, which place sincere doubt on the notion that a dying declarant would be untruthful. However, the reliability of the statement does not end with the elements set forth in Rule 804(b)(2) and the present psychological pressures. Federal Rule of Evidence 806 allows a defendant to discredit a declarant's hearsay statement through inconsistent statements or conduct of the declarant.

Finally, the Federal Rules of Evidence include preferences. Specifically, testimony given on the stand in person is preferred over hearsay, and hearsay, if it is of the specified quality, is preferred over a complete loss of the evidence of the declarant. Therefore, to avoid the complete loss of evidence and to affirm the centuries of precedent recognizing the dying declaration exception, this Court should reverse the Fourteenth Circuit's decision and remand the case for trial.

ARGUMENT

I. OBTAINING A COURT ORDER, UNDER 18 U.S.C. § 2703(d) OF THE STORED COMMUNICATION ACT, TO GATHER GEOLOCATION INFORMATION THAT A DEFENDANT VOLUNTARILY CONVEYED TO AN INDEPENDENT THIRD PARTY, DOES NOT VIOLATES THE FOURTH AMENDMENT

The Stored Communications Act (SCA) allows Government entities to "require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications)" when the entity "obtains a court order for such disclosure." 18 U.S.C. § 2703(c)(1)(B) (2012). The SCA also specifically provides that such an order "shall issue only if the governmental entity offers *specific and articulable facts* showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. 18 U.S.C. § 2703(d) (2012) (emphasis added). *But see* 18 U.S.C. § 2703(a)–(b) (2012) (requiring probable cause for a warrant for information involving the contents of communications).

Under Section 2703(c)(1)(B), the Government may obtain cell site location information (CSLI) under the specific and articulable standard of the SCA. *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 313 (3d Cir. 2010) (holding "that CSLI from cell phone calls is obtainable under a § 2703(d) order and that such an order does not require the traditional probable cause determination"). This is allowable because the Government's gathering of CSLI from cell phone service providers does not conflict with the commandments of the Fourth Amendment. The Fourth Amendment clearly protects the people from "unreasonable searches and seizures." U.S. Const. amend. IV. This means that in order for there to be a Fourth Amendment violation, two elements must be met:

first, there must be a search; and second, it must be unreasonable. *See Kyllo v. United States*, 533 U.S. 27 (2001).

Following this analysis, every other Circuit Court to address the issue has held that Government collection of CSLI does not infringe on the Fourth Amendment. *See United States v. Davis*, 785 F.3d 498 (11th Cir. 2015), *cert denied*, 136 S.Ct. 479 (2015); *In re Application of U.S. for Historical Cell Cite Data*, 724 F.3d 600 (5th Cir. 2013); *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012); *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304 (3d Cir. 2010); *see also United States v. Thousand*, 558 Fed. App'x 666, 670 (7th Cir. 2014) ("We have not found any federal appellate decision accepting [defendant's] premise that obtaining cell-site data from telecommunications companies—under any factual scenario—raises a concern under the Fourth Amendment.").[1]

Additionally, a multitude of district courts have held that admitting historical CSLI does not violate the Fourth Amendment. *See, e.g.*, *United States v. Lang*, 78 F. Supp. 3d 830, 835 (N.D. Ill. 2015); *United States v. Giddins*, 57 F. Supp. 3d 481 (D. Md. 2014); *In re Application of the U.S.A. for an Order Pursuant to 18 U.S.C. 2703(c), 2703(d) Directing AT&T, Sprint/Nextel, T-Mobile, Metro PCS, Verizon Wireless*, 42 F. Supp. 3d 511 (S.D.N.Y. 2014); *United States v. Rogers*, 71 F. Supp. 3d 745 (N.D. Ill. 2014); *Smith v. Obama*, 24 F. Supp. 3d 1005 (D. Idaho 2014); *United States v. Banks*, 52 F. Supp. 3d 1201 (D. Kan. 2014); *United States v. Gordon*, No. 09-153-02, 2012 WL 8499876 (D.D.C. Feb. 6, 2012); *In re Applications of U.S. for Orders Pursuant to Title 18, U.S.Code Section 2703(d)*, 509 F. Supp. 2d 76 (D. Mass. 2007).

[1] The Fourth Circuit held in *United States v. Graham*, 796 F.3d 332, 344–45 (4th Cir. 2015), that collecting historical CSLI does constitute a search under the Fourth Amendment. However, a rehearing en banc was granted in *United States v. Graham*, 624 Fed. App'x. 75 (4th Cir. 2015).

These courts have all come to this conclusion based on firmly established constitutional law. *See In re Application of the U.S. for an Order Authorizing the Disclosure of Cell Site Location Info.*, No. 6:08-6030M-REW, 2009 WL 8231744, at *10 (E.D. Ky. Apr. 17, 2009) (‘‘The Supreme Court has recognized ‘repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party.’’’). Therefore, this Court should reverse the decision of the Fourteenth Circuit and hold that the Government’s gathering of CSLI does not violate the Fourth Amendment because: (1) under the third party doctrine, obtaining business records from a third party does not constitute a search; and (2) even if it did constitute a search, it would be reasonable under the Fourth Amendment.

A. Under the Well-Established Third Party Doctrine, Obtaining Defendant’s Location Information from a Third Party’s Business Records Does Not Constitute a Search Under the Fourth Amendment

In determining whether a particular action violates the Fourth Amendment, the first question is whether the actions of the Government constitute a “search.” *Davis*, 785 F.3d at 506. Traditionally, this Court looked to the common law trespass doctrine in determining whether a search occurred, “at least until the latter half of the 20th century.” *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (citing *Kyllo*, 533 U.S. at 31). Then, in 1967, this Court adopted a broader understanding of a “search,” and held that the Government’s actions in “electronically listening to and recording the petitioner's words” constituted a search, even in the absence of a physical trespass. *Katz v. United States*, 389 U.S. 347, 353 (1967). In what would become the clear standard for future cases, Justice Harlan wrote that for a search to occur, a person must first, “have exhibited an actual (subjective) expectation of privacy” and, second, the expectation must “be one that society is prepared to recognize as ‘reasonable.’” *Id.* at 361 (Harlan, J., concurring).

The “Harlan standard” has consistently been applied to decide whether a search has occurred under the Fourth Amendment. *Jones*, 132 S. Ct. at 950 (citing *California v. Ciraolo*,

476 U.S. 207 (1986) (holding that aerial surveillance over the defendant's home did not constitute a search). However, it has also consistently been applied with certain well-established exceptions, including the "third-party doctrine," at issue in this case. *See Davis*, 785 F.3d at 507 (noting that "individuals have no reasonable expectation of privacy in certain business records owned and maintained by a third-party business"). The third party doctrine unequivocally states, as this Court has consistently held, "that a person has no legitimate expectation of privacy in information he [or she] voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (finding no reasonable expectation of privacy in phone numbers dialed, even on a home phone) (citing *United States v. Miller*, 425 U.S. 435, 442–44 (1976) (finding no reasonable expectation of privacy in financial records given to a bank); *United States v. White*, 401 U.S. 745, 752 (1971) (finding no reasonable expectation of privacy in information given to one's companions)).

The evidence obtained by the Government in this case consists of the CSLI of Respondent, gathered from the business records of AB&C after Respondent voluntary shared the information pursuant to a wireless contract. R. 11. Therefore, this Court should find that there is no search under the Fourth Amendment because: (1) Respondent did not have a subjective expectation of privacy in the CSLI; and (2) Respondent did not have an objectively reasonable expectation of privacy in the CSLI.

1. *Respondent did not exhibit a subjective expectation of privacy in the location information he agreed to share with his wireless provider*

The first step in establishing a search under the Fourth Amendment is to show that the defendant exhibited a subjective expectation of privacy. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). This standard is not a "purely subjective criterion," but instead and requires that the defendant *exhibit* an expectation of privacy. *United States v. Taborda*, 635 F.2d 131, 137 (2d Cir.

1980) (emphasis added). This standard "'transcends the subjective'" and looks to whether "the defendant . . . acted in such a way that it would have been reasonable for him to expect that he would not be observed." *Id.* (quoting *White*, 401 U.S. at 786 (Harlan, J., dissenting)).

Here, the Fourteenth Circuit majority placed a great deal of emphasis on the fact that Respondent turned off the "location services" on his cell phone. R. 50. That, however, cannot be the only inquiry into whether he exhibited a belief that his location would be kept private. At the most basic level, cell phone users "know that they must transmit signals to cell towers within range" and "that users when making or receiving calls are necessarily conveying or exposing to their service provider their general location within that cell tower's range, and that cell phone companies make records of cell-tower usage." *Davis*, 785 F.3d at 511 (citing *In re Application of U.S. for Historical Cell Cite Data*, 724 F.3d at 613–14). This is directly analogous to *Smith v. Maryland*, where this Court rejected the idea that people have any subjective expectation in the phone numbers they dial. 442 U.S. at 742. This Court wrote: "All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Id.*

In addition to Respondent's general knowledge of the phone system, Respondent in this case also agreed to AB&C's privacy policy which explicitly states: "Service usage information we collect includes call records, websites visited, wireless location, application and feature usage, network traffic data, product and device-specific information and identifiers, service options you choose, mobile and device numbers, video streaming, and other similar information." R. 11. This is telling evidence that Respondent agreed to convey his location information to AB&C wireless in exchange for their services and that this information would be

collected based on his usage of the wireless network and not simply his cell phone's location services.

Most telling, however, is the fact that Respondent did not prevent the *applications* on his phone from gathering his location information "in order to function." R. 11. While the Fourteenth Circuit majority does not address this fact, the dissent aptly recognizes that "the Defendant could not have sincerely believed" he was not transmitting his location. R. 55. Applications such as the "*Weather App*," installed on Respondent's phone, "as if by some dark, voodoo magic, is capable of telling you what the weather is like outside." R. 55. Furthermore, although it is not clear from the record what type of phone Respondent was using, many modern smartphones, such as the vastly popular iPhone, require you to individually agree to transmit your location to each app and the phone will show an icon that alerts you to when an app is using your location. *About privacy and Location Services for iOS 8 and iOS 9*, Apple.com, https://support.apple.com/en-us/HT203033 (last visited Feb. 5, 2016). If Respondent wanted to stop AB&C Wireless from collecting his location information, he could have turned these features off. Additionally, if Respondent wished to keep certain excursions private, such as his Brotherhood meetings, he also had the option of simply turning his phone off. *In re Smartphone Geolocation Data Application*, 977 F. Supp. 2d 129, 147 (E.D.N.Y. 2013) (holding that "cell phone users who fail to turn off their cell phones do not exhibit an expectation of privacy"). Looking at these circumstances in the totality, it is clear that Respondent did not exhibit even a subjective expectation that his location would be kept to himself.

2. *Respondent did not have an objectively reasonable expectation of privacy in the location information he agreed to share with his wireless provider*

Even if Respondent did have a subjective expectation, he must also have an expectation "that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J.,

concurring). From the time that *Katz* was decided, this Court explained: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* at 351 (majority opinion). Extrapolating on *Katz*, this Court in *United States v. Miller*, held that "checks and other bank records" the defendant conveyed to the bank did not hold any reasonable expectation of privacy. 425 U.S. at 443. This Court noted that the "depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* (citing *White*, 401 U.S. at 751–52). As a result, it is not a search when the Government subpoenas this information, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Miller*, 425 U.S. at 443 (citing *Hoffa v. United States*, 385 U.S. 293, 302 (1966); *Lopez v. United States*, 373 U.S. 427 (1963)); *see also United States v. Phibbs*, 999 F.2d 1053, 1077 (6th Cir. 1993) (holding that credit card statements hold no reasonable expectation of privacy).

Next, this Court applied the third party doctrine in cases directly applicable to this case: phone records in *Smith v. Maryland*, 442 U.S. 735 (1979), and location information in *United States v. Knotts*, 460 U.S. 276 (1983). In *Smith*, this Court applied *Katz* and *Miller* and held that the defendant could not have a reasonable expectation of privacy in the numbers he dialed because he conveyed them to the phone company in order to complete the call. *Smith*, 442 U.S. at 744. In *Knotts*, this Court held that the Government's use of a "beeper" to track a defendant's location infringed on no reasonable expectation of privacy because "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281. This Court reasoned that the location information is being exposed to the public and "visual surveillance" would have revealed the same information

to the police. *Id.* at 282. As technology advances, police are permitted to use new tools available to them as long as they are not infringing on a reasonable expectation of privacy and there can be no reasonable expectation of privacy when the information at issue is being voluntarily shared with the public. *Id.*

These cases taken together show the clear application of the third party doctrine to the evidence at issue in this case. Like the records in *Miller* and *Smith*, the CSLI is AB&C's business records, created with information voluntarily conveyed to them. *Davis*, 785 F.3d at 511. The Fourteenth Circuit majority relies on one Supreme Court Justice's concurrence to toss aside the well-established third party doctrine based on the "revealing" type of information involved. R. at 49–50 (citing *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring)). However, this "revealing" information has always been obtainable without Fourth Amendment violation. For example, the Eleventh Circuit recognized that the information in *Smith* "included location data far more precise than the historical cell site location records here, because the phone lines at issue in *Smith* corresponded to stationary landlines at known physical addresses." *Davis*, 785 F.3d at 511–12. Further, the geolocation information in this case is directly analogous to the location information obtained in *Knotts*, or that could be obtained from traditional police surveillance of following a suspect. *See Knotts*, 460 U.S. at 282.

Therefore, because the evidence in this case is the private business records developed from information voluntarily conveyed to AB&C from the Respondent, the third party doctrine applies and there can be no reasonable expectation of privacy. Since the Respondent did not exhibit a subjective expectation of privacy and it is not one which society would recognize as reasonable, the Government's actions did not constitute a search under the Fourth Amendment.

B. Even if Obtaining the Location Information Did Constitute a Search, It Was a Reasonable Search Under the Stored Communication Act and the Fourth Amendment

Even if this Court were to find that a search occurred, that does not end the analysis, as the Fourth Amendment only prohibits *unreasonable* searches. *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013). The reasonableness of a search is determined by balancing "'the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Davis*, 785 F.3d at 517 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Additionally, the SCA garners a "strong presumption of constitutionality" as an Act of Congress addressing what is reasonable under the Fourth Amendment. *Davis*, 785 F.3d at 517 (citing *United States v. Watson*, 423 U.S. 411, 416 (1976).

In balancing the interests in this case, any privacy interest held by the Respondent is minimal at best. *Davis*, 785 F.3d at 517. For the reasons discussed above, the SCA does not infringe on a reasonable expectation of privacy by allowing collection of a third party's business records. Even if it did, however, it would be a severely diminished expectation. *Id.* (citing *King*, 133 S. Ct. at 1969). Additionally, CSLI is all non-content information which does not disclose any private conversations and it only shows historical data, not real-time tracking. *Davis*, 785 F.3d at 517. These factors all show no more than a minimal intrusion into Respondent's privacy interests.

On the other hand, the Government's interest in these types of records is substantial. *Id.* at 518. CSLI is regularly used "to investigate the full gamut of state and federal crimes, including child abductions, bombings, kidnappings, murders, robberies, sex offenses, and terrorism-related offenses." *Id.* Additionally, it is used at a critical stage of the investigation, where this evidence can "build probable cause against the guilty, deflect suspicion from the innocent, aid in the

search for truth, and judiciously allocate scarce investigative resources." *Id.* Further, the substantial societal interests in "promptly apprehending criminals and preventing them from committing future offenses," and in "vindicating the rights of innocent suspects" are both served by CSLI. *Id.*

Another factor showing the reasonableness of the SCA is the degree to which it protects citizens' privacy. Contrary to the Fourteenth Circuit's opinion, the SCA does not merely surrender "GPS coordinates to an inquisitive Government agent." R. 50. Instead, the SCA both places "limits on the government's ability to compel network service providers to disclose information they possess about their customers and subscribers" and restricts "the ability of network service providers to voluntarily disclose information about their customers and subscribers to the government." *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013). The SCA acts as a "judicial subpoena" and requires the Government to go before a "neutral and detached magistrate" and demonstrate "'specific and articulable facts,' that there are 'reasonable grounds to believe' that the requested records are 'relevant and material to an ongoing criminal investigation.'" *Davis*, 785 F.3d at 517. This does not simply allow rogue law enforcement agents to gather cell phone records of all Americans at will.

Finally, this Court has often recognized that Congress is the appropriate vehicle for ensuring citizens' privacy rights as technology evolves. *Jones*, 132 S. Ct. at 963 (Alito, J., concurring) (noting that this Court's suggestion that Congress be left to legislate these privacy interests has generally "been borne out"). As Justice Alito stated, "it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment." *Riley v. California*, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring). "Legislatures, elected by the people, are in a better position than we are to assess

and respond to the changes that have already occurred and those that almost certainly will take place in the future." *Id.* The Fifth Circuit correctly recognized that if the citizen's demand greater protection for CSLI, "the recourse for these desires is in the market or the political process: in demanding that service providers do away with such records (or anonymize them) or in lobbying elected representatives to enact statutory protections. The Fourth Amendment, safeguarded by the courts, protects only reasonable expectations of privacy." *In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013). Congress is "well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *Jones*, 132 S. Ct. at 964 (Alito, J., concurring). In this case, Congress did balance these interests, drew the appropriate lines, and the Government properly complied with those lines.

Therefore, even if the collection of cell phone records from an independent third party did constitute a search, it would be reasonable under the Fourth Amendment because the legitimate government interest in this type of critical information substantially outweighs any negligible privacy in the records.

II. THERE IS NO ADDITIONAL RELIABILITY REQUIREMENT IN THE ANCIENT DOCUMENTS RULE UNDER FEDERAL RULES OF EVIDENCE 803(16) AND 901(b)(8) BECAUSE A DOCUMENT'S RELIABILITY IS DETERMINED BY THE TRIER OF FACT, AND IMPOSING ADDITIONAL REQUIREMENTS NEGATES THE PURPOSE AND INTENTION OF THE RULE

Any document can be authenticated as an ancient document if the requirements of Rule 901(b)(8) of the Federal Rules of Evidence are met. Fed. R. Evid. 901; 7 Wigmore on Evidence § 2145 (Chadbourn rev. 1978). Once authenticated under 901(b)(8), the statements contained within the document are an exception to the rule against hearsay under Rule 803(16). Fed. R. Evid. 803. Collectively referred to as the "ancient documents rule," this straightforward evidence rule has existed for three centuries. Wigmore, *supra*, § 2137. The ancient documents rule, which has never guaranteed absolute reliability, has existed to assist evidence authentication when, over

time, memories fade and witnesses pass on. Thomas B. Aquino, *The Ancient-Document Rule: Ancient Is Not As Old As You Think*, Wis. Law., Feb. 2012, at 12, 13–14. The factors of "age, condition, and location of the found document" have consistently maintained the reliability for the necessity of the ancient documents rule. *Id*. at 14. Accordingly, this Court should reverse the Fourteenth Circuit's decision to require additional reliability outside of the long-standing ancient documents rule because: (1) imposing such a requirement negates both the common law and congressional intent of the rule; and (2) takes the power of determining evidence reliability away from the trier of fact.

A. Imposing Additional Reliability Requirements Negates Both the Common Law and Congressional Intent of the Ancient Documents Rule

At common law, the reasons for the rule were simple: first, after a long period of time those with personal knowledge of the document were practically unavailable and it was a necessity. Wigmore, *supra*, § 2137. Second, the documents age, along with its location, unsuspicious appearance, and possible other circumstances, together were sufficient as evidence to be submitted to the jury. *Id*. Further, unlike other methods of authentication, the genuineness of ancient documents would fall under what is known as the rule of presumption and not just the rule of sufficiency, meaning there is a presumption of genuineness. *Id*. at § 2135. The same presumption which applies to officially sealed documents. *Id*. at §§ 2135, 2146.

While historically the ancient documents rule has been primarily for authentication, through the American court system the rule evolved to an exception to hearsay for documents meeting the authentication requirements. Fed. R. Evid. 803(16); 2 McCormick on Evidence § 323 (7th ed. 2013). The exception to hearsay has been reliably justified first, because the rule only applies to written documents where there is minimal danger in "mistransmission," and second, the age requirement effectively assures that any statement in the document was made

before the present controversy. *Id.* In other words, it is less likely that the declarant had a motive to falsify the document given the length of time. *Id.*

The Fourteenth Circuit was overly concerned that the evolution of the ancient documents rule presents "vast potential for misuse" because of a "massive volume of electronically stored documents that are nearly 20 years old." R. 51. However, the Advisory Committee *already* addressed this issue when it extended the ancient documents rule to include electronically stored data. Fed. R. Evid. 901(b) advisory committee's note. The Notes provide that since importance of appearance decreases in such situations, custody or where the document is found become increasingly important. *Id.* Recognizing the increasing amount of documents stored electronically, the Committee thought it was necessary to expand the ancient documents rule, not restrict it.

B. The Document in This Case Was Properly Authenticated, and Imposing Additional Requirements for Admissibility Exceeds Judicial Discretion and Takes the Power of Determining Reliability Away from the Trier of Fact

Under the general authentication rule, Rule 901(a), "there need be only a prima facie showing, to the court, of authenticity, not a full argument on admissibility. Once a prima facie case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence." *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1375 (3d Cir. 1991) (citing *United States v. Goichman*, 547 F.2d 778, 784 (3d Cir.1976)). Rule 901(b) provides specific examples of authentication, including the specific example of authenticating ancient documents. Fed. R. Evid. 901. Under Rule 901(b)(8), an ancient document satisfies the age, condition, and location requirements for authentication if the document "(A) is in a condition that creates no suspicion about its authenticity; (B) was in a place where, if authentic, it would likely be; and (C) is at least 20 years old when offered." *Id.* Once an ancient document

meets the requirements for authentication, it is automatically an exception to the hearsay rule under Rule 803(16). *Threadgill*, 928 F.2d at 1375.

The purpose of the authentication requirement is to determine whether the documents are what they appear to be. *Id.* at 1376. Any suspicion as to authenticity "goes not to the content of the document, but rather to whether the document is what it purports to be." *United States v. Kairys*, 782 F.2d 1374, 1379 (7th Cir. 1986); *see also United States v. Kalymon*, 541 F.3d 624, 633 (6th Cir. 2008); McCormick, *supra*, § 225 ("The only issue that the proponent must address is whether there is any suspicion that the document is not the type of document it is claimed to be."). A document may be "suspicious" if there is indication the document has been physically tampered with, or the document has been altered, such as erasures, changes in handwriting, or other physical marks. Aquino, *supra*, at 15.

Although the question of whether evidence is, or is not, suspicious is within the trial court's discretion, the content of the document, and its accuracy, goes to the weight of the evidence and is left to the sole discretion of the trier of fact. *Kalymon*, 541 F.3d at 633 (citing *United States v. Mandycz*, 447 F.3d 951, 966 (6th Cir. 2006)); see also McCormick, *supra*, § 225. The document's content is not relevant to the determination of the document's admissibility. *Kairys*, 782 F.2d at 1379 (referencing *United States v. Koziy*, 728 F.2d 1314, 1322 (11th Cir. 1984)).

In *United States v. Kalymon*, the document at issue, used in a denaturalization proceeding, was a handwritten note that listed "Kalymun" killed one person and injured another during a Jewish operation. 541 F.3d at 632. The defendant admitted there was sufficient evidence that the document was a World War II record but argued it should not be an exception to hearsay because there was no proof he signed the document implicating his involvement in persecuting

Jews. *Id.* at 633. The court held that the district court did not err in admitting the document because "whether or not the signature was his is a question that goes to the content of the document, not whether the document is what it purports to be—i.e., a wartime record." *Id.*

In *George v. Celotex Corp*., the court held a report warning of the danger of asbestos exposure was admissible when the appellant argued the report needed to be tested for reliability in order to be admissible. 914 F.2d 26, 30 (2d Cir.1990). The Court rejected this argument and pointed out that the "[d]efendant cite[d] neither caselaw nor commentary in support of [their] argument, nor could [the court] find any that limit the scope and application of the ancient documents exception to the hearsay rule in the manner suggested by the defendant." *Id.*

Like *Kalymon* and *George*, in the instant case there is no question and no suspicion that the document is what it purports to be – a letter to the Brotherhood. R. 16. If there is doubt that the letter came from its purported author, or if there is doubt concerning the statements therein, this is precisely the type of information for the jury to weigh and consider. Moreover, the district court and Fourteenth Circuit admitted that the letter met the requirements under 803(16). R. 43, 51. Both courts arbitrarily added an element of reliability that does not exist within the rules. R. 43, 51.

In *United States v. Stelmokas*, the defendant in a denaturalization proceeding argued that district court erred in admitting occupation documents because the documents lacked the trustworthiness to be considered ancient documents. 100 F.3d 302, 312 (3rd Cir. 1996). The defendant argued that the documents were not found where they would likely be and that they could have been falsified. *Id.* The court rejected this argument because the defendant had not "produced any evidence or forwarded any reason to impeach the validity of the documents." *Id.* Like *Stelmokas*, here, there has been no evidence put forward to doubt the authenticity based on

the location where the letter was found. Further, the letter was found among business records in a filing cabinet, and although it is not a business record, it was found where one would expect to find important documents. R. 29.

The Fourteenth Circuit also mischaracterized the purpose of the ancient documents rule when it stated "the 20-year age limit does nothing to ensure that only reliable evidence is admitted." R. 51. The purpose of the rule is one of necessity; to allow the jury to weigh all the evidence. The reliability is for the jury to decide. The 20-year requirement is indeed arbitrary. Even the Advisor Committee Notes of the Federal Rules of Evidence acknowledge that "[a]ny time period selected is bound to be arbitrary." Fed. R. Evid. 901(b) advisory committee's note. However, there are two other requirements in addition to the length of time. The Rule's focus is not on a specific time period but on the fact that it is unlikely there is still a viable fraud after such a length of time. *Id*.

"[T]here are discernible limits which judges must not transcend. *United States v. Sutton*, 426 F.2d 1202, 1207 (D.C. Cir. 1969). Admissibility is within the trial judge's discretion but the test for genuineness is not one that "induces a belief beyond a reasonable doubt that the document is the handiwork of its alleged drafter." *Id.* Rather, the test is that a reasonable mind could "fairly conclude favorably to the fact of authorship." *Id.* In requiring additional elements for Rules 901(b)(8) and 803(16), the District Court and Fourteenth Circuit exceeded what is within the trial court's discretion.

III. THE DYING DECLARATION EXCEPTION, CODIFIED IN FEDERAL RULE OF EVIDENCE 804(b)(2), IS A FIRMLY ROOTED HEARSAY EXCEPTION, BACKED BY CENTURIES OF PRECEDENT, WHICH HAS CONSISTENTLY BEEN HELD NOT TO VIOLATE A DEFENDANT'S SIXTH AMENDMENT RIGHTS

The Fourteenth Circuit's erroneous interpretation of the Federal Rules of Evidence did not end with the ancient documents exception. The Fourteenth Circuit's holding also attempted

to abrogate Rule 804(b)(2) by ignoring centuries of precedent recognizing the Rule as an exception to the Confrontation Clause of the Sixth Amendment. Rule 804(b)(2)—also known as the dying declaration exception—provides that "[i]n a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances." Fed. R. Evid. 804(b)(2).

Rule 804(b)(2) has long been recognized as an exception to the Confrontation Clause, which provides in relevant part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause is implicated when, in a criminal case, a statement is introduced against a defendant, and the declarant of that statement is subsequently unavailable. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). Additionally, the statement must be testimonial, meaning the primary purpose of the eliciting the statement was "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). Last, the defendant must be deprived of the opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 59. Here, it is not disputed that the declarant, Mr. Ortiz, is unavailable nor it is disputed that the statement in question was testimonial. R. at 34–36. Therefore, the question before this Court is narrowed to whether admitting Mr. Ortiz's testimonial, unconfronted dying declaration under Rule 804(b)(2) violates Respondent's Sixth Amendment right of confrontation under this Court's holding in *Crawford v. Washington.*

This Court should reverse the Fourteenth Circuit's decision to exclude Mr. Ortiz's dying declaration and hold that Rule 804(b)(2) survives this Court's holding in *Crawford* for two reasons: (1) centuries of precedent before this Court's decision in *Crawford* have recognized the dying declaration exception to the Sixth Amendment right of confrontation, and over a decade of

precedent in lower federal and state courts have near unanimously admitted testimonial dying declarations post-*Crawford*; (2) relevant policy considerations such as the reliability of dying declarations and the necessity of the evidence they present strongly favor upholding the dying declaration exception.

A. Centuries of Precedent Have Supported the Dying Declaration Exception, Even Before the Sixth Amendment Was Ratified

Prior to the ratification of the Sixth Amendment in 1771, dying declarations were recognized in English common law, despite confrontation rights set in place to prevent the use of ex parte examinations, which were used in lieu of cross-examination as evidence against the accused. *Crawford*, 541 U.S. at 45; *see also King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791); *Thomas John's Case*, 1 East 357, 358 (P.C. 1790).

Although Confrontation Clause jurisprudence dates back to the 1770s, the most relevant jurisprudence to the case at hand stems from this Court's holding in *Crawford*. Before *Crawford*, the admission of an unavailable witness's statement against a criminal defendant did not violate his or her Sixth Amendment right of confrontation if the witness's statement "bore adequate indicia of reliability." *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980). To satisfy the standard set forth in *Roberts*, the statement had to fall within a "firmly rooted" hearsay exception or manifest "particularized guarantees of trustworthiness." *Id.* In 2004, this Court overruled *Roberts* and set forth a new test in *Crawford*, which requires unavailability of the declarant and a prior opportunity for cross-examination before testimonial hearsay evidence is deemed admissible. *Crawford*, 541 U.S. at 68.

Importantly, in creating the new test for admitting testimonial hearsay in *Crawford*, this Court stated, the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established *at the time of the*

founding." *Crawford*, 541 U.S. at 56 (citing *Mattox v. United States*, 156 U.S. 237, 243 (1895) (emphasis added)). It follows then, that because historical common law created the exception for dying declarations prior to the adoption of the Sixth Amendment, that the dying declaration exception now codified in Rule 804(b)(2), is not in contravention of the Sixth Amendment. In short, the dying declaration exception falls squarely under this Court's language, as it was established at the time the Sixth Amendment's founding.

Further, this Court specifically acknowledged that the dying declaration exception, although a sui generis exception, could not be disputed:

> The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. [Citations omitted]. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decided in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is sui generis.

Crawford, 541 U.S. at 56 n.6.

Therefore, although *Crawford* overruled the standard set forth in *Roberts* for admitting testimonial hearsay, it clearly acknowledged that the dying declaration exception would still remain an exception to the Sixth Amendment right of confrontation. *Id.*

The Fourteenth Circuit relied on this Court's holding in *Crawford* to exclude Mr. Ortiz's dying declaration from evidence. R. 53. The Fourteenth Circuit interpreted *Crawford* to fit its own conclusion, that the dying declaration exception was abrogated. However, the logic behind the analysis in *Crawford* indicates the contrary. *Crawford*, 541 U.S. at 40. Thus, the holding in *Crawford* did not abrogate the dying declaration exception, and therefore the Fourteenth Circuit erroneously excluded Mr. Ortiz's statement based on a fundamental misinterpretation of this Court's holding in *Crawford*.

B. Over a Decade of Precedent in Lower Federal and State Courts Have Near Unanimously Admitted Testimonial Dying Declarations Post-*Crawford*

The Fourteenth Circuit's misinterpretation unnecessarily complicates the post-*Crawford* jurisprudence. Since *Crawford*, this Court has acknowledged the existence of the dying declaration exception, never once suggesting the exception was abrogated through its decision in *Crawford*. *See Ohio v. Clark*, 135 S. Ct. 2173 (2015); *Giles v. California*, 554 U.S. 353, 358 (2008). With that, more than a decade of precedent in lower federal and state courts has near unanimously upheld the admissibility of dying declarations despite this Court's decision in *Crawford*.

Following *Crawford*, in 2008, this Court in *Giles* reiterated that history is the touchstone of Confrontation Clause analysis and clarified that its decision in *Crawford* meant, "that the Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.'" *Giles*, 554 U.S. at 358 (quoting *Crawford*, 541 U.S. at 54).

In *Giles*, this Court determined California's forfeiture exception could not stand due to the fact that the conditions of the statute did not conform with the exceptions that existed at the time the Sixth Amendment was adopted. *Giles*, 554 U.S. at 358. In this Court's explanation, it acknowledged that two forms of testimonial statements were admitted at common law despite the fact that they were unconfronted. *Id.* (citing *Crawford*, 541 U.S. at 56, n. 6). The first of the two exceptions acknowledged by this Court were declarations made by a speaker who was both on the brink of death and aware that he or she was dying. *Id.* The Court continued explaining that "[i]n cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying . . . the testimony was excluded unless it was confronted or fell within the dying-declarations exception." *Giles*, 554 U.S. at 361–62.

More recently, in *Ohio v. Clark*, Justice Scalia's concurrence acknowledged the dying declaration exception to the Sixth Amendment. 135 S. Ct. 2173, 2184 (2015) (Scalia, J., concurring). The crux of the *Clark* opinion was directed towards clarifying the scope of the term "testimonial," however, Justice Scalia explained *Crawford*'s role in confrontation clause jurisprudence by clarifying the procedure of admitting testimony over the bar set by *Crawford*. *Id.* at 2185. Specifically, Justice Scalia stated, "[t]he burden is upon the prosecutor who seeks to introduce evidence . . . to prove a long-established practice of introducing *specific* kinds of evidence, such as *dying declarations* . . . for which cross-examination was not typically necessary." *Id.* (emphasis added).

Further, one of the first courts presented with the issue of whether the admission of a dying declaration would violate the Sixth Amendment post-*Crawford* was *People v. Monterroso*, 101 P.3d 956 (Cal. 2004). In *Monterreso* the California Supreme Court followed this Court's logic in the *Crawford* opinion and determined that "the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment." *Id.* at 972. Since *Monterroso* lower federal and state courts have near unanimously held the same. *See* Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. Ill. L. Rev. 1411, 1460, n. 208 (2010) (discussing the courts that have held the dying declaration exception survived after *Crawford*).

Courts that have held the contrary have not done so under a valid justification. *See, e.g. United States v. Mayhew*, 380 F. Supp. 2d 961, 964–66 (S.D. Ohio 2005) (excluding the statement in question as a dying declaration relying on a law review article from 1960 asserting that dying declarations were not reliable, but admitting the statement under a theory of forfeiture—the theory this Court ruled to be in contravention with the Sixth Amendment three

years later in *Giles*); *United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at *3 (D. Colo. Mar. 3, 2005) (stating "[w]hether driven by reliability or necessity or both, admission of a testimonial dying declaration after *Crawford* goes against the sweeping prohibitions set forth in that case."). Importantly, the court in *Jordon* asserted, without authority, that dying declarations were not admitted into evidence prior to the adoption of the Sixth Amendment. *Jordan*, 2005 WL 513501, at *3. *But see Crawford*, 541 U.S. at 40 (discussing the English common law's use of dying declarations pre-1771).

C. Both the Reliability of Dying Declarations and the Necessity of the Evidence They Present, Provide Strong Policy Justifications for Upholding the Historical Exception

As established above, dying declarations have long been recognized as an exception to the hearsay rule and the Sixth Amendment. There are two primary reasons for allowing this exception through common law in the 1700s as well as through Rule 804(b)(2) in present day: (1) dying declarations are the only evidence available from the victim, who is often the best and sometimes the only eyewitness to the crime; and (2) it is thought that one who believes he or she is about to die will lose all motive to tell a lie. In reference to the latter, the Fourteenth Circuit asserted that today's secular society undermines the justifications of allowing dying declarations into evidence. R. 54. However, this assertion is without merit.

1. *Despite the fact that today's society can accurately be described as more secular than the era the dying declaration exception was created, strong psychological pressures and Federal Rule of Evidence 806 guarantee the reliability of such statements*

The Fourteenth Circuit incorrectly equated today's secular society with an arbitrary finding of unreliability in dying declarations. R. 54. The justification for admitting dying declarations at the outset was indeed because it was thought no man would want to meet his maker with a lie on his lips. *Crawford*, 541 U.S. at 40. However, despite modern society's

diversity of religious convictions—psychological pressures are still present, which motivate a person on his or her deathbed to tell the truth. Orenstein, *supra*, at 1427–30. Additionally, it has been reasoned that despite one's religious beliefs, a statement made immediately preceding what one believes to be his or her death lacks a motive or reason to be a lie. *See People v. Calahan*, 356 N.E.2d 942, 945 (Ill. App. Ct. 1976) ("At the moment wherein the deceased realizes his own death is imminent there can no longer be any temporal self-serving purpose to be furthered regardless of the speaker's personal religious beliefs."); *see also* 5 Wigmore on Evidence § 1443, at 241–42 (3d ed. 1940) (discussing the peculiar moment one experiences before death despite one's theological beliefs).

Further, the justification for reliability does not end with satisfying the elements of Rule 804(b)(2) and the existing psychological pressures; reliability is still guaranteed as the declarant's statement may be discredited. *Hutcherson v. State*, 108 So. 2d 177 (Ala. Ct. App. 1958). Federal Rule of Evidence 806 exemplifies this point and emphasizes the role of the Federal Rules of Evidence and the jury:

> When a hearsay statement . . . has been admitted in evidence, the declarant's credibility may be attacked . . . by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it . . . .

Fed. R. Evid. 806. Rule 806 specifically allows for a hearsay statement to be discredited, therefore the reliability of a dying declaration is further secured through the defendant's opportunity to discredit the statement.

In *Grindle v. State*, a police officer questioned a victim who had been shot inquiring about the identity of his assailant—the victim answered the police office, which confirmed the identity of the defendant. 134 So. 3d 330, 336 (Miss. Ct. App. 2013). The defendant contested

the dying declaration was inadmissible, however the, the judge informed the defendant that he was free to offer evidence challenging the credibility of the statement. *Id.* Thus, ultimately the jury would weigh the credibility of the dying declaration contained in the officer's testimony. *Id.* Similarly here, it is the jury who is imposed with the duty to weigh the credibility of Mr. Ortiz's dying declaration contained within Officer Familia's testimony. The Fourteenth Circuit erred in taking away the jury's duty by not giving it the chance to weigh relevant testimony pertaining to Respondent's Hate Crimes Prevention Act charge.

Accordingly, there is no reason to deviate from the historical dying declaration exception and this Court should find no merit in the Fourteenth Circuit's arguments questioning the reliability of dying declaration statements in today's society.

2. *The evidence presented through dying declarations is often necessary as it is the only evidence available from the victim, who is often the best and sometimes the only eyewitness to the crime*

Considerations of public policy and necessity require the recognition of such exceptions as dying declarations and former testimony of unavailable witnesses. *Mattox v. United States*, 156 U.S. 237 (1895); *Motes v. United States*, 178 U.S. 458 (1900); *Delaney v. United States*, 263 U.S. 586 (1924). This Court has justified the admission of dying declarations to the general rule that hearsay testimony is not admissible, through "the necessities of the case and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present." *Carver v. United States*, 164 U.S. 694, 697 (1897).

Moreover, it is well established in the Federal Rules of Evidence that testimony given on the stand in person and under oath is preferred over hearsay, and hearsay, if it is of the specified quality, is preferred over a complete loss of the evidence of the declarant. Fed. R. Evid. 804 advisory committee's note. This is especially so in the case of dying declarations because it is frequent that there are no other witnesses present. *See Carver*, 164 U.S. at 697. This case at hand

illustrates the complete loss of evidence of the declarant: Mr. Ortiz's statement is hearsay, it is a statement made outside of court made to prove the truth of the matter asserted. However, it is hearsay of the specified quality, which in the text of the advisory committee, Mr. Ortiz's statement is preferred over the complete loss of evidence. *See* Fed. R. Evid 804(b)(2); Fed. R. Evid. 804 advisory committee's note.

Accordingly, this Court should reverse the Fourteenth Circuit's erroneous holding that admitting Ortiz's dying declaration under Rule 804(b)(2) would violate Creed's Sixth Amendment right of confrontation under *Crawford v. Washington*.

CONCLUSION

For the foregoing reasons, this Court should hold that gathering cell site location information pursuant to the Store Communication Act does not violate the Fourth Amendment, that there is no additional reliability requirement to the ancient document exception beyond the requirements of the Federal Rules of Evidence, and that dying declaration exception survives this Court's decision in *Crawford v. Washington*. Therefore, this Court should reverse the decision of the Fourteenth Circuit and remand this case for trial.

Respectfully Submitted,

TEAM 4
Attorneys for Petitioner

APPENDIX

1. U.S. Const. Amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. U.S. Const. Amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. 18 U.S.C. 249(a)(1) (2012) provides:

Hate crime acts

(a) IN GENERAL.—

(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person . . . .

4. 18 U.S.C. 2703 (2012) provides:

Required disclosure of customer communications or records

(a) CONTENTS OF WIRE OR ELECTRONIC COMMUNICATIONS IN ELECTRONIC STORAGE.— A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) CONTENTS OF WIRE OR ELECTRONIC COMMUNICATIONS IN A REMOTE COMPUTING SERVICE.—

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section; except that delayed notice may be given pursuant to section 2705 of this title.

(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(c) RECORDS CONCERNING ELECTRONIC COMMUNICATION SERVICE OR REMOTE COMPUTING SERVICE.—

(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

(E) seeks information under paragraph (2).

(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number), of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) REQUIREMENTS FOR COURT ORDER.—A court order for disclosure under subsection (b) or (c) 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 contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

(e) NO CAUSE OF ACTION AGAINST A PROVIDER DISCLOSING INFORMATION UNDER THIS CHAPTER.—No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing

information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

(f) REQUIREMENT TO PRESERVE EVIDENCE.—

(1) IN GENERAL.—A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) PERIOD OF RETENTION.—Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) PRESENCE OF OFFICER NOT REQUIRED.— Notwithstanding section 3105 of this title, the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

5. Fed. R. Evid. 803(16) provides:

Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(16) *Statements in Ancient Documents*. A statement in a document that is at least 20 years old and whose authenticity is established.

6. Fed. R. Evid. 804(b)(2) provides:

Hearsay Exceptions; Declarant Unavailable

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(2) *Statement Under the Belief of Imminent Death*. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

7. Fed. R. Evid. 901(a) provides:

Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

8. Fed. R. Evid. 901(b)(8) provides:

Authenticating or Identifying Evidence

(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:

(8) *Evidence About Ancient Documents or Data Compilations*. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.