No. 17-950

In The
Supreme Court of the United States

ROSS WILLIAM ULBRICHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMERICAN BLACK CROSS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2015, American Black Cross is a Section 501(c)(3) charitable organization dedicated to reforming our nation's prison-industrial complex, and aiding Americans imprisoned as a consequence of their principled opposition to government policies.

Amicus advocates for positions that elicit disapproval in some corners of society. In today's environment, where expressing any opinion that may touch on a growing list of controversial matters significantly risks one's livelihood and social standing, *amicus* cannot function without guaranteeing its supporters' privacy.

The need to shield one's associations from government surveillance is particularly acute, as Americans reasonably fear exposure and retaliation for holding or advancing dissenting views. The government's asserted power to monitor private Internet communication without a warrant impacts *amicus*'s ability to attract, retain, and communicate with its supporters, who are justifiably reluctant to afford the government a view into their conscience.

[1] Per U.S. Sup. Ct. Rule 37: statement: All parties received timely notice of intent to file this brief, and have consented. No counsel for any party authored this brief, in whole or in part, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

The First and Fourth Amendments secure overlapping interests. Accordingly, this Court has long understood that the need to protect speech and associational interests weighs upon the question of whether a particular search or seizure is unreasonable in violation of the Fourth Amendment.

The right to assemble and organize for political and social action requires freedom from unwarranted surveillance of the sort the government employed in this case. The government's continued at-will gathering of Internet communication, revealing people's private associations, interests, and beliefs without judicial authorization or exigent circumstance, offends the First Amendment and dissuades Americans from exercising fundamental rights essential to the functioning of a free, self-governing society. This type of search and seizure should require a warrant.

ARGUMENT

I. Given the Overlap of First and Fourth Amendment Interests, Courts Should Closely Review Searches and Seizures That Implicate Freedoms of Speech and Association.

"The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus* v. *Search Warrant of Property*, 367 U.S. 717, 729 (1961). "[T]he struggle

from which the Fourth Amendment emerged is largely a history of conflict between the Crown and the press." *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978) (internal quotation marks omitted). That history, having "been fully chronicled in the pages of this Court's reports," *Stanford* v. *Texas*, 379 U.S. 476, 482 (1965) (footnote omitted), requires no detailed recitation. What matters here is that the First and Fourth Amendments "are indeed closely related" in securing, among other interests, "conscience and human dignity and freedom of expression as well." *Walter* v. *United States*, 447 U.S. 649, 655 n.6 (1980) (plurality opinion) (internal quotation marks omitted).

"[I]n issuing warrants and determining the reasonableness of a search, state and federal magistrates should be aware that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Zurcher*, 436 U.S. at 564 (internal quotation marks omitted). But while "the use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new," *Marcus*, 367 U.S. at 724, the right of free speech is not the only First Amendment freedom imperiled by an unrestrained appetite for surveillance.

The "freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments." *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973) (internal quotation marks omitted). "Inviolability of privacy in group association may in many circumstances be indispensable to

preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (citation omitted).

> History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.

United States v. *United States Dist. Court*, 407 U.S. 297, 314 (1972).

Courts must thus police the government's "temptation to utilize [ostensible 'security'] surveillances to oversee political dissent." *Id.* at 320. "Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" *Zurcher*, 436 U.S. at 564 (quoting *Stanford*, 379 U.S. at 485).

II. The Warrantless Search and Seizure of Internet Routing Data Violates the First Amendment.

1. On its face, this is a Fourth Amendment case questioning the government's ability to seize people's data. Not deep beneath the surface, however, this case concerns the government's power to uncover First

Amendment-secured associations that it could never demand people disclose. "Freedoms such as [the rights of speech and association] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Gibson* v. *Fla. Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963) (quoting *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960)). When the government "attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment." *Baird* v. *State Bar of Ariz.*, 401 U.S. 1, 6 (1971). The government should not be able to accomplish what the First Amendment forbids, by eroding Fourth Amendment standards.

2. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] . . . effective . . . restraint on freedom of association." *Gibson*, 372 U.S. at 544 (quoting *NAACP*, 357 U.S. at 462). Such prying "[makes] group membership less attractive, raising . . . First Amendment concerns about affecting the group's ability to express its message." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006).

"The Constitution protects against the compelled disclosure of political associations and beliefs. Such disclosures can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982) (internal quotation marks and citations omitted). "[A]bsent a countervailing governmental

interest, [organizational membership] information may not be compelled." *Cal. Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 55 (1974) (citations omitted).

The government faces a heavy burden when seeking to unmask Americans' private associations. This Court "ha[s] never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000). "As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest." *Kusper*, 414 U.S. at 58 (citations omitted).

> The right to privacy in one's political associations and beliefs will yield only to a subordinating interest of the State that is compelling, and then only if there is a substantial relation between the information sought and an overriding and compelling state interest.

Brown, 459 U.S. at 91-92 (internal quotation marks, citations and punctuation omitted); see also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984) (infringements on associational freedom must "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms") (citation omitted).

"Since *NAACP v. Alabama* we have required that the subordinating interests of the State [in seeking disclosure] must survive exacting scrutiny. We also have insisted that there be a 'relevant correlation' or

'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (footnotes and citation omitted). Under exacting scrutiny, "[t]he interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976) (citations omitted). "The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, and the government must employ means closely drawn to avoid unnecessary abridgment." *Id.* at 362-63 (citation, internal quotation marks and punctuation omitted). "[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe* v. *Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks and footnote omitted).

3. At-will warrantless search and seizure of pen/trap Internet routing data cannot survive exacting scrutiny. If there exists a "substantial relation between the information sought and an overriding and compelling state interest," *Brown*, 459 U.S. at 92 (internal quotation marks and bracket omitted), the government should not mind carrying its burden of proving that relationship in applying for a warrant. Considering the sensitive, highly-revealing nature of such information, the cost to associational freedom of allowing such searches and seizures on anything less than probable cause is too high.

Just as "[a]n Internet search and browsing history . . . could reveal an individual's private interests or concerns," *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014), so, too, can the data seized here offer a window into one's conscience. Details of how a person communicates with the outside world via the Internet – from the privacy of the home, no less, and including with what particular device – may detail the range and intensity of political and social associations. Analogizing data such as IP addresses and port usage to the dialed phone numbers of *Smith* v. *Maryland*, 442 U.S. 735 (1979), let alone to envelopes carried by horse-and-buggy in the era of *Ex parte Jackson*, 96 U.S. 727 (1877), see *United States* v. *Forrester*, 512 F.3d 500, 511 (9th Cir. 2008), simply fails to comprehend the Internet's pervasive role in twenty-first century civic engagement.

The information seized here without benefit of a warrant or exigent circumstance deeply implicates First Amendment freedoms. At a minimum, IP addresses may reveal that a person regularly spends time exchanging information with a server assigned to a political, religious, or other social advocacy organization. While "IP addresses *probably* do not reveal anything about the underlying content of web surfing communications, courts must recognize the possibility that the purpose or subject matter of certain communications might be exposed simply through the disclosure of an IP address." Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law*, 50 Wm. & Mary L. Rev. 2105, 2150 (2009) (emphasis added).

Indeed, IP addresses need not directly relate to matters of conscience to unmask a user's beliefs or intended actions. IP addresses assigned to neutral commercial websites may suggest, by themselves or in light of other information, First Amendment-protected activity, *e.g.*, that a person intends to travel to a demonstration or political conference. Even the volume of transmitted data may reveal a communication's content. For example, if a website has files of varying sizes, learning how much data a visitor downloaded may reveal which specific political manifestos he or she read. *Id.* at 2151.[2]

And by aggregating and sorting data relating to people's various associations, the government could fairly approximate, if not reverse-engineer, the sort of membership lists that it could not directly demand of targeted organizations. Indeed, the government might use its unfettered access to Americans' online habits to identify a movement's potential adherents, donors, and activists in ways that political organizers could not dream of approximating.

Long before the Internet's advent, courts appreciated the danger that this sort of surveillance posed to

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[2] The record does not disclose that the government targeted petitioner's URL data, but the rationale for allowing the pen/trap search and seizure here might readily be stretched to support that level of intrusion. That URLs containing search terms are inherently communicative may be obvious, but by focusing on this fact, "many scholars have ignored or given insufficient attention to the fact that all URLs reveal underlying web surfing communications, exposing the website content requested by and sent to users." Tokson at 2137 (footnote omitted).

First Amendment associational freedom. Condemning the warrantless seizure of an advocacy group's phone calls, a D.C. Circuit plurality agreed that merely logging "the names and addresses of many individuals who called the organization, contributed funds or membership dues, and gave the office receptionist information regarding their mailing addresses" would be unconstitutional. *Zweibon* v. *Mitchell*, 516 F.2d 594, 634 (D.C. Cir. 1975) (en banc) (plurality) (quotation omitted).

> A broadside attempt to obtain such a membership list would plainly violate the First Amendment's protection for association, and to obtain it by such clandestine means is a patent evasion of the constitutional liberty.

Id. (quotation and citations omitted). The seizure of Internet pen/trap data could easily be put to the same purpose. It ought to require a warrant.

But Internet pen/trap data enables far more mischief than the mere compilation of lists. Sifted, organized, and properly understood,

> communication patterns also reveal degrees of intimacy. Frequent contact with an individual denotes a closer relationship than those with whom one rarely interacts. Mapping the strength of these relationships, in turn, help to elucidate broader social networks and an individual's relationship to others in the network. From this, leaders can be identified. By mapping social networks, critical connections

> between different groups also can be identified.

Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. Ann. Surv. Am. L. 553 (2017) (footnotes omitted).

In this way, "the government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." *United States* v. *Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring). While the Framers might never have imagined the Internet, one can predict what George III might have done with unfettered access to the Colonists' IP address information. Writing as a "junior analytical scribe" at the "Royal Security Administration," Duke Professor Kieran Healy showed how social network analysis of eighteenth-century "metadata" – the mere knowledge of which of 254 people belonged to which of seven Boston-area patriotic groups – revealed "a picture of a kind of social network between individuals, a sense of the degree of connection between organizations, and some strong hints of who the key players are in this world." Kieran Healy, *Using Metadata to Find Paul Revere*, Kieran Healy Blog (June 9, 2013), https://kieranhealy.org/blog/archives/2013/06/09/using-metadata-to-find-paul-revere/; see also Shin-Kap Han, *The Other Ride of Paul Revere: The Brokerage Role in the Making of the American Revolution*, 14 Mobilization 143 (June 2009). The First and Fourth Amendments secure the American people's right to decline entrusting the government with such knowledge.

As technology – including the government's data mining capabilities – advances and becomes ever-more complex, it stands to reason that Internet routing information may reveal ever-more about a user's conscience and associations. The law of search and seizure must catch up, and keep up, with technology's evolving consequences for First Amendment freedoms.

III. Warrantless Search and Seizure of Internet Routing Data Deters the Enjoyment of First Amendment Rights.

"Awareness that the Government may be watching chills associational and expressive freedoms." *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring). People need not be computer science experts to intuitively grasp the threat posed by warrantless surveillance – and to react to that intrusion by voluntarily foregoing protected First Amendment activity.

> [T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect "discouragements" undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.

American Communications Ass'n v. *Douds*, 339 U.S. 382, 402 (1950). As the Second Circuit recently determined, "[w]hen the government collects [groups'] metadata, [their] members' interests in keeping their associations and contacts private are implicated, and

any potential 'chilling effect' is created at that point." *ACLU* v. *Clapper*, 785 F.3d 787, 802 (2d Cir. 2015).

Recent experiences have confirmed the suppressive impact of government surveillance on core First Amendment freedom. In 2001, New York City's Police Department "established a secret surveillance program that has mapped, monitored and analyzed American Muslim daily life throughout New York City, and even its surrounding states." Diala Shamas, Nermeen Arastu, *Mapping Muslims: NYPD Spying and Its Impact on American Muslims*, Long Island City, NY: Muslim American Civil Liberties Coalition (MACLC), and Creating Law Enforcement Accountability & Responsibility (CLEAR) Project, 2013 at 4.[3] Unsurprisingly, this "surveillance of Muslims' quotidian activities has created a pervasive climate of fear and suspicion, encroaching upon every aspect of individual and community life." *Id.*

"Surveillance has chilled constitutionally protected rights – curtailing religious practice, censoring speech and stunting political organizing." *Id.* All Muslims interviewed by researchers into the impact of such surveillance

> noted that they were negatively affected by surveillance in some way – whether it was by reducing their political or religious expression, altering the way they exercised those rights (through clarifications, precautions, or

[3] Available at http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf

> avoiding certain interlocutors), or in experiencing social and familial pressures to reduce their activism.

Id.

Fear of governmental harassment as a consequence of associating in disfavored ways is not the only deterrent to First Amendment freedom posed by uncontrolled surveillance. Americans may rightfully be skeptical of the government's efforts to maintain the confidentiality of the fruits of such surveillance. Even where the government's motives are benign and the surveillance is constitutional, there always exists some risk that the fruits of the surveillance would be disclosed.

The IRS's collection of charitable organizations' confidential donor lists illustrates the dangers in aggregating and storing such data. While the IRS requires that such organizations file a "Schedule B" identifying their leading donors, federal law forbids "the disclosure of the name and address of any contributor to [a § 501(c)] organization." 26 U.S.C. § 6104(d)(3)(A).

Alas, "mistakes" happen. In 2011, an IRS agent forwarded a copy of the National Organization for Marriage's ("NOM") unredacted Schedule B to a political activist, who shared the data with NOM's ideological opponent, the Human Rights Campaign. That group, in turn, saw to it that NOM's private donor information was published in the *Huffington Post*. Another activist, using the *Post*'s images of NOM's Schedule B, then prosecuted meritless legal actions against the

organization. See *Nat'l Org. for Marriage, Inc.* v. *United States*, 24 F. Supp. 3d 518 (E.D. Va. 2014).

Although the IRS cannot share Schedule Bs of 501(c)(3) groups with state officials, 26 U.S.C. § 6104(c)(3), some states have begun demanding that charitable organizations provide that material as a condition of permission to solicit funds. But, wherever sensitive data may be stored, it may be leaked. Notwithstanding the assurances by California's Attorney General that she would safeguard the donor lists of controversial groups, a trial recently "made abundantly clear" that "the Attorney General has systematically failed to maintain the confidentiality of Schedule B forms." *Americans for Prosperity Found*. v. *Harris*, 182 F. Supp. 3d 1049, 1056-57 (C.D. Cal. 2016). The Attorney General had leaked a total of 1,778 Schedule Bs, including the potentially "very damaging" list of the names and addresses of the top donors to Planned Parenthood Affiliates of California. *Id.* at 1057.

These disclosures are dangerous. The Central District of California "heard ample evidence establishing that [Americans for Prosperity], its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known." *Id.* at 1055. "Charles and David Koch, two of AFP's most high-profile associates, have faced threats, attacks, and harassment, including death threats" against themselves and their families, including grandchildren. *Id.* at 1056. "Many supporters [of California's same-sex marriage ban] (or their customers)

suffered property damage, or threats of physical violence or death, as a result" of having their support revealed. *Citizens United* v. *FEC*, 558 U.S. 310, 481 (2010) (Thomas, J., dissenting).

The government's accumulation of data about people's private associations is never without risk, and that risk, appreciated by the public, seriously damages First Amendment freedoms. That damage weighs on the Fourth Amendment balance, and compels a finding that it is unreasonable to allow the casual, warrantless search and seizure of Internet routing data.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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