

IN THE SUPREME COURT OF THE UNITED STATES

23-5291

Andrew James Johnston,

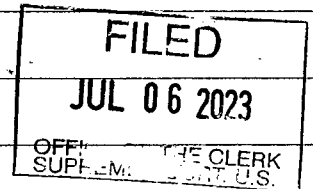
Petitioner,

ORIGINAL

v.

United States,

Respondent.



PETITION FOR WRIT OF HABEAS CORPUS

To: USCA 7, Appeal No 23-1348

Executed on: July 4, 2023

Andrew Johnston

Mr Andrew James Johnston

Prisoner ID No 22712424

U.S. Penitentiary

P.O. Box 24556

Tucson, AZ 85757

RECEIVED

JUL 18 2023

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

## QUESTION PRESENTED

Does a secret exception exist to the personal protection of the Fourth Amendment that permits FBI counter-terrorism squads to encourage, promote, coerce, and use third-party social media company data to perform warrantless searches of physical movements?

## JURISDICTIONAL STATEMENT

The district court's jurisdiction was founded upon 18 U.S.C. § 3231. The court of appeals' jurisdiction was founded upon 28 U.S.C. § 1291. This Court's jurisdiction is founded upon 28 U.S.C. § 1254 (1) in light

of the court of appeals' April 28, 2023  
judgment summarily affirming the district  
court's February 2, 2023 order, and June 1,  
2023 order denying rehearing en banc.

## TABLE OF AUTHORITIES

### ORGANIC

U.S. Const. Amendment IV, Searches Clause

### CASES

*Ex Parte Jackson*, 96 U.S. 727, 733 (1878)

*United States v. Miller*, 425 U.S. 435, 443 (1976)

*United States v. U.S. District Court*, 407 U.S. 297, 321 (1972)

*Wong Sun v. United States*, 371 U.S. 471, 487 (1963)

### STATUTES

18 U.S.C. § 2113(a)

## OTHER

Federal Rule of Criminal Procedure 33(b)(1)

Kerr, The Case For The Third-Party Doctrine,  
107 Mich. L. Rev. 561, 563 n. 5, 564 (2009)

## STATEMENT OF THE CASE

On August 23, 2017, a grand jury charged  
petitioner with one count of 18 U.S.C. § 2113(a) R. 31.

Between August 25, 2017 - January 7, 2019  
petitioner objected to the withholding, and  
incomplete/materially altered police radio  
dispatch recordings tendered in discovery.

R. 91 - 291. On January 9, 2019, the incomplete/  
altered recordings were admitted over petitioner's  
objections, and played to the jury. R. 331, Page 1 -  
Page 6 (Gov. Ex. 3C); R. 331, Page 48 (Gov. Ex. 4A).

Similarly, on September 8, 2018, petitioner sought dismissal of the indictment and/or suppression of the fruits of the arrest per illegal electronic surveillance by an FBI counter-terrorism squad leading up to the arrest. R. 218, 223, and 469 (Appendix-B).

On August 4, 2021, the FBI released a new police dispatch recording, in part, with heavy redactions under FOIA. FBI FOIA No. 1484187, Johnston v. FBI, Case No. 4:20-cv-520-SHR, R. 38-2. At 32:30-35:00, the recording shows FBI was directing local police's investigation from the time petitioner was pulled over - about 15 minutes

after the alleged attempted bank robbery. The court of appeals completely ignored this evidence in Appeal No. 22-1558, November 11, 2022 Order (Appendix-A). On December 16, 2022, the FBI issued a public statement admitting and defending its use of third-party company social media data to search individuals for law enforcement objectives.

Also, on August 25, 2022, Facebook CEO Mark Zuckerberg admitted publicly to podcaster Joe Rogan the same - that Facebook does what the FBI tells it to.

On January 31, 2023, petitioner filed a First Amended Motion For A New Trial, R.469,

which the district court unilaterally denied on February 2, 2023 R. 470. Before its May 17, 2023 deadline to file a reply brief, on April 28, 2023 the court of appeals summarily affirmed. On May 15, 2023, the court of appeals refused to consider petitioner's reply brief and prevented the reply brief from being circulated with petitioner's rehearing en banc petition. Appendix - D - Appendix - F On June 1, 2023, the court of appeals denied rehearing en banc, and never sent petitioner that order. Petitioner learned of the June 1, 2023 order by calling the clerk on June 30, 2023.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should reconcile the tension between its precedent and hold the court of appeals accountable. In *Ex Parte Jackson*, 96 U.S. 727, 733 (1878), this Court held a letter given to a third-party mail courier receives full Fourth Amendment protection. Then, in *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 321 (1972), this Court held national/domestic security investigations cannot perform illegal warrantless electronic surveillance. But in *United States v. Miller*, 425 U.S. 435, 443 (1976), this Court held there is no right to privacy in records given



to a third-party bank to hold and maintain. The reasoning of Jackson, and US District Court (Keith) should override Miller, at least with respect to social media companies like Facebook, for example, that collect and supply data to the FBI to search physical movements, religious beliefs, sexual preferences, and political affiliations without a warrant. Petitioner had his Facebook messenger app open on his cell phone the whole way from his job up until the arrest. An FBI counter-terrorism squad tracked the location of the Facebook app - through

Facebook's permission - and followed  
petitioner in real time all the way until  
there was a momentary evasion of the  
FBI by petitioner just a few minutes  
before the arrest. As petitioner's May 15,  
2023 reply brief highlights, the government's  
April 26, 2023 response brief raises  
arguments for the first time on appeal  
- because the district court didn't allow it  
to respond - and concedes through  
silence the facts about the FBI's illegal  
electronic surveillance by way of Facebook.  
All the government stated was the trial  
transcript is contradicted by this claim.

It did not say the electronic surveillance did not take place, or dispute the content of the August 4, 2021 recording, August 25, 2022 Zuckerberg admission, or the December 16, 2022 FBI statement. This Court should hold Jackson bars the FBI from searching physical location data provided by Facebook without a warrant because such data is materially different than banking records held by a bank, as in *Miller*. The collected criticisms in *Kerr*, *The Case For The Third-Party Doctrine*, 107 Mich. L. Rev. 561, 563 n. 5, 564 (2009) support this conclusion.

Thus, for the reasons stated in the attached First Amended Motion, Opening Brief, and Reply Brief this Court should grant certiorari to harmonize its precedent, and reverse the court of appeals' April 28, 2023 judgment.

### Conclusion

Wherefore petitioner prays this petition is granted for the foregoing reasons.

Respectfully Submitted,

Date: 07/04/23 Andrew Johnston

Mr. Andrew James Johnston