SUPREME COURT OF NEW JERSEY
DOCKET NO. A-61-14 (075691)

STATE OF NEW JERSEY, Plaintiff-Movant, v. GARY LUNSFORD, Defendant-Respondent.	CRIMINAL ACTION On Appeal From a Final Order of the Superior Court, Appellate Division, Denying Leave to Appeal an Interlocutory Order of the Superior Court, Law Division, Monmouth County, Quashing a Grand Jury Subpoena, Duces Tecum. Sat Below: Hon. Joseph L. Yannotti, P.J.A.D. Hon. Mary Whipple, J.A.D.

BRIEF OF AMICI CURIAE, THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, THE BRENNAN CENTER FOR JUSTICE, THE ELECTRONIC FRONTIER FOUNDATION, AND THE OFFICE OF THE PUBLIC DEFENDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE INTEREST OF AMICI

American Civil Liberties Union of New Jersey

The American Civil Liberties Union of New Jersey (ACLU-NJ) is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has approximately 15,000 members and supporters in New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and comprises approximately 500,000 members and supporters nationwide.

The ACLU-NJ strongly supports everyone's right to be free from unreasonable searches and seizures. It has participated as amicus curiae or direct counsel in numerous cases that raise this issue. See, e.g., State v. Coles, 218 N.J. 322 (2014) (holding that illegal detention vitiated consent); State v. Earls, 214 N.J. 564 (2013) (recognizing expectation of privacy in cell phone location information); State v. Hinton, 216 N.J. 211 (2013) (finding no constitutionally implicated search where eviction proceedings had advanced to lock-out stage); State v. Best, 201 N.J. 100 (2010) (challenging special needs searches in school parking lots); State v. Reid, 194 N.J. 386 (2008) (finding expectation of privacy in Internet Service Provider records); A.A. ex rel. B.A. v. Att'y Gen. of N.J., 189 N.J. 128 (2007) (challenging DNA testing of juvenile offenders).

Brennan Center for Justice

The Brennan Center for Justice at NYU School of Law is a non-partisan public policy and law institute focused on fundamental issues of democracy and justice, including access to the courts and constitutional limits on the government's exercise of power. The Center's Liberty and National Security (LNS) Program uses innovative policy recommendations, litigation, and public advocacy to advance effective national security policies that respect the rule of law and constitutional values.

The LNS Program is particularly concerned with domestic counterterrorism policies, including the dragnet collection of Americans' communications and personal data, and the concomitant effects on First and Fourth Amendment freedoms. As part of this effort, the Center has filed numerous amicus briefs on behalf of itself and others in cases involving electronic surveillance and privacy issues, including Riley v. California, 134 S. Ct. 2473 (2014); United States v. Jones, 132 S. Ct. 945 (2012); United States v. Carpenter, 2014 WL 943094 (E.D. Mich. 2014), appeal docketed, No. 14-1805 (6th Cir. Jun. 24, 2014); United States v. Ganias, 755 F.3d 125 (2d Cir. 2014), rehearing en banc granted, 2015 WL 3939426 (Jun. 29, 2015) (No. 12-240-cr); In re Warrant to Search a Certain Email Account Controlled and Maintained by Microsoft Corporation, 15 F. Supp. 3d 466 (S.D.N.Y. 2014),

appeal docketed, No. 14-2985-cv (2d Cir. Aug. 12, 2014); Amnesty International USA v. Clapper, 638 F.3d 118 (2d Cir. 2011); Hepting v. AT&T Corp., 539 F.3d 1157 (9th Cir. 2008); and In re Nat'l Sec. Agency Telecommunications Records Litigation, 564 F. Supp. 2d 1109 (N.D. Cal. 2008). This brief does not purport to represent the position of NYU School of Law.

Electronic Frontier Foundation

The Electronic Frontier Foundation ("EFF") is a member-supported civil liberties organization based in San Francisco, California that works to protect innovation, free speech, and privacy in the digital world. With over 22,000 active donors, EFF represents the interests of technology users both in court cases and in broader policy debates surrounding the application of law in the digital age. As part of its mission, EFF has served as amicus curiae in landmark state and federal cases addressing constitutional issues raised by technological advancement. See, e.g., Riley v. California, supra, 134 S. Ct. 2473; United States v. Jones, supra, 132 S. Ct. 945; United States v. Graham, 2015 U.S. App. LEXIS 13653 (4th Cir. Md. Aug. 5, 2015); United States v. Davis, 785 F.3d 498 (11th Cir. 2015) (en banc); In re Application of U.S. for Historical Cell Site Data, 724 F.3d 600 (5th Cir. 2013); 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);

Commonwealth v. Augustine, 467 Mass. 230 (2014); Commonwealth v. Rousseau, 465 Mass 372 (2013).

Office of the Public Defender

Since 1967, the New Jersey Office of the Public Defender (OPD) has sought to balance the scales of justice in the criminal courts by providing attorneys – at the trial and appellate level – for those people who cannot afford them when charged with a crime.

The OPD, on behalf of its clients, supports New Jerseyans' right to be free from unreasonable searches and seizures. It has participated as amicus curiae or direct counsel in numerous cases that raise this issue. See, e.g., State v. Shannon, 218 N.J. 528 (2014) (granting leave to appeal regarding good-faith exception); Coles, supra, 218 N.J. 322; Hinton, supra, 216 N.J. 211; State v. Privott, 203 N.J. 16, 20 (2010) (scope of investigatory detention); State v. Pena-Flores, 198 N.J. 6 (2009) (exploring automobile exception).

PRELIMINARY STATEMENT

Recently the Attorney General has declared open season on venerable New Jersey search and seizure precedent. He has challenged state constitutional limits on automobile searches. See State v. Witt, 219 N.J. 624 (2014)(granting State leave to appeal limits to the automobile exception set forth in State v. Pena-Flores, supra, 198 N.J. 6). He has sought to inject a "good faith" exception into New Jersey's version of the exclusionary rule. See State v. Shannon, supra, 218 N.J. 528 (granting leave to appeal in State's challenge to State v. Novembrino, 105 N.J. 95, 159 (1987)). He has asked the Court to abandon the "inadvertence" requirement for plain view searches this Court established in State v. Bruzzese, 94 N.J. 210, 236 (1983). See State v. Gamble, 218 N.J. 412, 423 (2014).

This case escalates that assault. In it, the Attorney General asks this Court to overrule State v. Hunt, 91 N.J. 338, 347 (1982), which held as a matter of state constitutional law that law enforcement requires a warrant to obtain an individual's telephone billing records.

Amici urge the Court to reject that request. Hunt was correct when this Court decided it 33 years ago, and subsequent events have confirmed its correctness.

Unlike utility records or Internet subscriber information, and similar to cell phone location data, telephone billing

records can reveal a wealth of content-laden information about an individual's private affairs, including expressive and associational activities protected by the First Amendment. That material deserves the highest degree of constitutional protection. Only a warrant, which particularly describes the information sought and which issues only on probable cause, adequately protects this sensitive material from unjustified state access.

Hunt's warrant requirement reflects New Jersey's historical commitment to protecting individual telephonic privacy. The State offers this Court no reason to deviate from that commitment, or to dilute the level of constitutional protection the warrant requirement affords.

Indeed, the State's arguments would require the Court to violate the principle of stare decisis, and to repudiate its carefully developed and nuanced privacy jurisprudence. In place of its meticulous assessment of the importance of the privacy interest involved and the degree of protection necessary to safeguard it, the State would have the Court substitute a unitary, "one-size-fits-all" approach to privacy that elevates the state interest in efficiency and expedience over fundamental constitutional values.

Nothing the State says supports this radical departure from precedent. Neither administrative efficiency nor federal-state

"collaboration" justifies abandoning New Jersey's warrant requirement. Nor should the purported existence of "new criminal threats" override constitutional values; to the contrary, their existence should renew, not diminish, our commitment to the State Constitution.

Put another way, the State is on the wrong side of history. At a time when technological change requires society to strengthen privacy protections, the State wants to weaken them. This Court must not take that regressive step.

PROCEDURAL HISTORY/STATEMENT OF FACTS

Amici adopt the Procedural History and Statement of Facts in the parties' briefs.

ARGUMENT

POINT I

BECAUSE TELEPHONE BILLING RECORDS REQUIRE THE HIGHEST DEGREE OF CONSTITUTIONAL PRIVACY PROTECTON, HUNT CORRECTLY IMPOSED A WARRANT REQUIREMENT ON LAW ENFORCEMENT.

When it decided State v. Hunt, this Court recognized an expectation of privacy in telephone billing records, based in the New Jersey Constitution. Hunt, supra, 91 N.J. at 348. This interest is so important, the Court held, that law enforcement must obtain a warrant before intruding on it. Id. at 347.

Hunt got this issue right. The decision recognized that telephone billing records contain sensitive personal information

that merits the highest degree of constitutional protection. And it reflected and maintained New Jersey's historic commitment to protecting the privacy of telephonic communications.

In the 33 years since Hunt established the warrant requirement, New Jersey's commitment to the protection of telephone privacy has not wavered. This Court should not now accept the State's invitation to abandon that commitment. It should reaffirm its holding in Hunt that only a warrant can adequately protect the important privacy interests involved.

A. Telephone Billing Records, Particularly When Collected In Bulk, Can Reveal Intimate Private Information

Telephone billing records provide a window into an individual's life. On their face, billing records identify all incoming and outgoing local, long distance and international phone numbers associated with the targeted subject. They reveal the length of the calls, the number of calls placed to the same number, and the time each call was made. This information is preserved in billing records regardless of whether a call is completed.

When combined and analyzed, this data can paint a complete portrait of an individual's most intimate life activities, relationships and beliefs. Telephone billing records reveal information about one's familial, political, professional, religious and intimate relationships.

With this data, the government can determine one's sleep and work habits, whether one is social, and how many friends one has. It can tell whether one is ill, in need of legal advice, entangled in an extra-marital affair, looking for a new job, buying a new house, juggling child-care, or planning a vacation. The government can ascertain from a telephone bill whether one is suffering from financial hardship and the preferred methods of payment.

Indeed, as Justice Handler noted in his concurrence in Hunt, "in the area of telephonic communications, the number dialed and the conversation that follows are 'inextricably related.'" Hunt, supra, 91 N.J. at 371-72 (Handler, J., concurring) (quoting In re Wiretap Communication, 76 N.J. 255, 271 (1978) (Handler, J., dissenting)).

The prevalence of cell phones and the development of modern data aggregation techniques only underscore the importance of protecting telephone billing records. "Cell phone use has become an indispensable part of modern life." Earls, supra, 214 N.J. at 586; see Hunt, supra, 91 N.J. at 346 (the telephone "has become an essential instrument in carrying on our personal affairs"). And the State can now collect and assemble large quantities of this information, to create patterns that reveal far more about a person than the individual bits of data themselves. See, e.g.,

Brad Heath, "U.S. secretly tracked billions of calls for decades" USA Today, April 8, 2015, available at: http://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616/; Case Studies: Edith Cowan University, IBM i2 Solutions Help University Researchers Catch a Group of Would-Be Hackers, International Business Machines (Mar. 27, 2013), available at: http://ibm.co/13J2o36 ("Analyzing this volume of data is nothing new to many law enforcement users who routinely analyze tens of thousands of telephone records using IBM® i2® Analyst's Notebook®."); T-Mobile, Transparency Report for 2013 & 2014, at 5 (2015), available at http://newsroom.t-mobile.com/content/1020/files/NewTransparencyReport.pdf ("The average law enforcement request in both 2013 and 2014 (not including national security requests) asks for approximately fifty-five days of records for two phone numbers").

In sum, anyone who uses a telephone generates indelible, highly personal information in the form of billing records. Without strong protection against unwarranted government access, individuals risk exposing large portions of their private lives, and will be discouraged from using an essential tool of modern life.

B. Hunt's Warrant Requirement Reflects New Jersey's Historic Commitment to Preserving Telephone Privacy.

Hunt also has an historical pedigree. Although the United States Supreme Court first established a right to privacy for telephonic communications in Katz v. United States, 389 U.S. 347 (1967), New Jersey recognized this right decades before. In 1930, the New Jersey Legislature criminalized the unauthorized tapping of telephone lines. L. 1930, c. 215 § 1 at 987.

This Court reaffirmed the importance of privacy in telephonic communications in Morss v. Forbes, 24 N.J. 341, 363 (1957). The decision illustrates the early adoption of what became the State's consistent policy to protect against invasion of telephonic privacy.

In 1968, the Legislature replaced the 1930 statute with the Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 et seq., which maintained a similar ban on wiretapping telephonic communications. Although the statute's language tracks the federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§2510-2520, our courts have consistently interpreted it to grant greater protections than its federal counterpart.

Hunt exemplifies this policy. As Justice Handler put it, "[T]hrough our statutory and case law, it has been the firm policy in this State to protect the privacy of telephonic

communications to the fullest extent possible." Hunt, supra, 91 N.J. at 371 (Handler, J., concurring).[1]

Since Hunt, our courts have continued to afford the highest standard of protection to telephonic communications. See, e.g., State v. Mollica, 114 N.J. 329, 345 (1989) (a warrant premised on probable cause is required to obtain telephone numbers dialed by a hotel guest); Earls, supra, 214 N.J. at 569 (cell phone location data requires a warrant).

This long-standing commitment to telephone privacy must inform the Court's consideration of this case.

C. A Warrant Is the Only Adequate Way to Protect Private Information in Telephone Billing Records.

The inextricable relationship between telephone billing records and the private content of the calls themselves, considered in light of the state's commitment to telephone

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[1] In his concurrence, Justice Handler listed New Jersey decisions whose protection for telephonic communications exceeded federal law. See, e.g., State v. Catania, 85 N.J. 418, 437 (1981)(minimization provision of the New Jersey wiretap statute more demanding than the federal statute); State v. Cerbo, 78 N.J. 595, 601 (1979)(sealing requirements for wiretap tapes after expiration); In re Wiretap Communication, supra, 76 N.J. at 260 (wiretap statutes must be strictly interpreted to limit privacy invasion); State v. Molinaro, 117 N.J. Super. 276, 285 (Law Div. 1971), rev'd, 122 N.J. Super. 181 (App. Div. 1973)(intrinsic minimization is required and suppression must be enforced); State v. Sidoti, 116 N.J. Super. 70 (Law Div. 1971) rev'd on other grounds, 120 N.J. Super. 208 (App. Div. 1972)(wiretap of a public phone requires a special needs warrant); State v. Christy, 112 N.J. Super. 48 (Law Div. 1970)(in order to obtain a wiretap order, requirements must be meticulously met).

privacy, requires that billing records receive the highest degree of constitutional protection.

Because of the breadth and intimacy of information they provide, telephone billing records are content-laden. Government access to those records jeopardizes "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1927)(Brandeis, J., dissenting).

Access raises First Amendment concerns as well. The constitutional right to freedom of association protects against state intrusion into the "choices to enter into and maintain certain intimate human relationships," Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984), and proscribes government action that discourages or limits the free exercise of this First Amendment right. NAACP v. Ala., 357 U.S. 449, 461 (1958).

In this respect, telephone business records resemble the cell phone location data at issue in State v. Earls, which this Court subjected to a warrant requirement. See Earls, supra, 214 N.J. at 586. And conversely, access to those records poses a greater danger to privacy and free association than access to utility records or Internet subscriber information. Cf. State v. Domicz, 188 N.J. 285, 299 (2006)(finding utility records are protected by a constitutional right to privacy but the limited information revealed can be accessed through the lesser

protection of a grand jury subpoena); State v. Reid, 194 N.J. at 404 (accord, with respect to Internet subscriber information).[2]

Accordingly, both the degree of intrusion posed by access to telephone billing records and the state's historic commitment to telephone privacy demand protection by warrant. Only a warrant, which requires both a finding of probable cause and a particularized description of the information sought, adequately protects the constitutional interests at risk when the government seeks access to telephone billing records. See State v. Marshall, 199 N.J. 602, 611 (2009) (describing purpose and application of particularity requirement).

The state's proffered alternative - a grand jury subpoena - does not provide adequate protection. A subpoena does not require judicial review and the concomitant finding of probable cause. State v. McAllister, 184 N.J. 17, 34-36 (2005) citing In re Addonizio, 53 N.J. 107, 124 (1968). It does not require a particularized description of the material sought; it allows for the collection of large amounts of "relevant" information. See In re Grand Jury Subpoena Duces Tecum, 143 N.J. Super. 526, 535-36 (Law Div. 1976). Moreover, a third-party subpoena does not typically require notice to the target. See McAllister, supra, 184 N.J. at 37-38.

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[2] See discussion at Point II(B), infra, which develops this point in detail.

In short, a grand jury subpoena creates a risk of unjustified governmental intrusion disproportionate to the significant constitutional values embodied in telephone billing records. Hunt's warrant requirement correctly balances the privacy and state interests involved. This Court should maintain that balance.

POINT II

THE STATE'S CASE FOR OVERRULING HUNT OFFENDS STARE DECISIS, MISREADS THIS COURT'S PRIVACY JURISPRUDENCE, AND FAILS ON ITS MERITS.

The State advances two basic arguments for abandoning Hunt's warrant requirement: 1) administrative efficiency in the face of "new criminal threats"; and 2) "logical consistency" in New Jersey's search-and-seizure jurisprudence. See PBrLTA 3.[3] The first argument fails on its merits; the second misreads this Court's precedents. Moreover, the State's approach violates a fundamental jurisprudential principle: the doctrine of stare decisis.

A. Principles of Stare Decisis Compel This Court to Reject the State's Challenge to Hunt.

Almost casually, the Attorney General asks this Court to repudiate Hunt. But the Court has stressed that because "stare decisis 'carries such persuasive force . . . we have always

[3] "PBrLTA" refers to the State's Brief in Support of Leave to Appeal.

required a departure from precedent to be supported by some special justification.'" Luchejko v. City of Hoboken, 207 N.J. 191, 208 (2011) (quoting State v. Brown, 190 N.J. 144, 157 (2007) and Dickerson v. United States, 530 U.S. 428, 443 (2000)).

Here the State not only fails to provide any "special justification"; it suggests that the burden to uphold a thirty-year-old precedent should fall on the Defendant. PBrLTA 21 (noting that in the decade since State v. McAllister was decided, "no one has even suggested, much less demonstrated, that prosecutors have abused the grand jury subpoena process to obtain third-party business records").

As discussed above, Hunt's rationale is sound. But just as importantly, Hunt deserves respect as a binding precedent of this Court. Absent a compelling justification, stare decisis demands that this Court refrain from diminishing the privacy rights of New Jerseyans.

Stare decisis is the presumed course "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991); Luchejko, supra, 207 N.J. at 208. Stare decisis is

> the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.
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> [Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986).]

Thus, even if they have disagreed with the reasoning of a prior decision, when "that perspective did not prevail" members of this Court have acknowledged that a controlling decision "nevertheless remains precedent deserving of respect," and that such "respect for stare decisis is the simple, and sole, reason" to concur in subsequent judgments applying that decision. Flomerfelt v. Cardiello, 202 N.J. 432, 462-63 (2010) (LaVecchia and Rivera-Soto, JJ., concurring). See also Johnson v. Johnson, 204 N.J. 529, 550 (2010) (Rabner, C.J., concurring).

Stare decisis may yield if "conditions change and as past errors become apparent," White v. North Bergen, 77 N.J. 538, 551 (1978) (quoting and adopting dissent of Chief Justice Vanderbilt in Fox v. Snow, 6 N.J. 12, 27 (1950)). But this is a high bar to surmount; "every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by stare

decisis yield in favor of a greater objective." Vasquez, supra, 474 U.S. at 266.

"Among the relevant considerations in determining whether to depart from precedent are whether the prior decision is unsound in principle, unworkable in practice, or implicates reliance interests." State v. Shannon, 210 N.J. 225, 227 (2012) (citing Allied Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 783 (1992)).

As the following discussion establishes, the State's position does not satisfy these standards, and does not justify departing from Hunt's established rule.

B. The State's Position Misreads This Court's Privacy Precedents.

The State claims there are two types of privacy intrusions. The greater intrusion is exemplified by Earls, which requires a warrant for cell phone location data; the lesser, by McAllister and Reid, which require something less than a warrant for bank and internet subscriber records, respectively. The State says telephone billing records fall into the second category. PBrLTA 13.

The State is wrong. Like the privacy interest in cell phone location data recognized in Earls, the interest in telephone billing records recognized in Hunt is of the highest order.

The privacy interests recognized in McAllister and Reid are distinguishable. Bank records have historically been afforded lesser protection. Reid dealt only with Internet subscriber information; it did not implicate the greater intrusion posed by access to the comprehensive, content-laden information contained in telephone billing records.

The State relies on this Court's discussion in Earls of the privacy interests established in Hunt, McAllister and Reid. It notes that the Court grouped those three cases together when it found the use of "a cell phone to determine the location of its owner [to be] far more revealing than acquiring toll billing, bank or Internet subscriber records." Earls, supra, 214 N.J. at 586. From this single phrase, the State argues that telephone billing records merit the same degree of protection as bank or Internet subscriber records, and a lesser degree of protection than cell phone location data.

The State's premise is incorrect, and rests on a false equivalency. It does not follow that, because tracking an individual's movement may be a "more" invasive government action than obtaining telephone billing records, telephone billing records should be afforded a lesser degree of protection - any more than the search of a garage merits less protection than the search of a home merely because the latter is "more invasive" than the former. Compare State v. Wright, 221 N.J. 456, 467

(2015) (quoting United States Supreme Court's view that "when it comes to the Fourth Amendment, the home is first among equals") with State v. Dispoto, 189 N.J. 108, 123 (2007) (invalidating search warrant required for search of garage). The State's argument improperly consigns all "lesser" invasions to a "one-size-fits-all" constitutional treatment.

The State ignores this Court's nuanced approach to privacy rights, which assesses the importance of the specific privacy interest involved and calibrates the proper degree of protection based on that assessment. It also ignores the significant dangers to privacy, discussed above, posed by unwarranted access to telephone billing records, and this Court's (and the Legislature's) repeated recognition of those dangers.

In its "simple syllogism," PBrLTA 17, the State asserts that any government action less invasive than tracking an individual can be accomplished through a grand jury subpoena. PBrLTA 13. But Earls does not stand for that proposition, and the Court's prior jurisprudence does not support it. The State's logic is simply incorrect and should not be used to overturn Hunt.

1. As This Court Recognized in McAllister, Bank Records Have Historically Been Afforded Lesser Protection Than Telephone Billing Records.

In McAllister, this Court held that a grand jury subpoena was adequate to protect the privacy interest in bank records. It based this holding, in large part, on the state's historically lesser standard of protection for these records. McAllister, supra, 184 N.J. at 26-28. McAllister thus represents the culmination of this Court's long-standing precedent requiring only a grand jury subpoena to access bank records. See Brex v. Smith, 104 N.J. Eq. 386 (Ch. 1929)(denying a prosecutor's "formal request" for bank records to assist in his investigation, and, instead, instructing the prosecutor to present his case to the grand jury which could subpoena bank records accordingly); In re Addonizio, supra, 53 N.J. at 124 (grand jury subpoena was sufficient process to procure financial documents).

The State's argument disregards the historical context that informed this Court's decision to apply a grand jury subpoena standard for bank records, and that distinguishes McAllister from Hunt. Hunt and McAllister represent two different lines of cases that account for the different treatment of the privacy interest in each type of record.

In fact, this Court explicitly distinguished Hunt in its McAllister decision. McAllister, 184 N.J. at 36. The State's request that the Court equate Hunt and McAllister thus asks the Court to disregard its own rationale for distinguishing one standard of protection from the other. The State offers no reason for the Court to take that extraordinary step.

2. The State Incorrectly Suggests That Reid Encompasses Content-Based Internet Searches.

In Reid, this Court held that a grand jury subpoena is sufficient for law enforcement to obtain subscriber information from Internet service providers. See Reid, supra, 194 N.J. at 389. The State now says Reid extends not just to subscriber information, but to an Internet subscriber's search history. PBrLTA 9, 16, 17. This is inaccurate and significantly overstates this Court's holding in the case.

The State interchangeably refers to the privacy interest protected in Reid as Internet subscriber information and "websites that one visits on the [I]nternet." PBrLTA 16. Conflating Internet subscriber information with website content is wrong. In fact, these two interests are significantly different. Internet subscriber information is limited to "one's name, billing information, phone number, and home address." Reid, supra, 194 N.J. at 390. That information does not

implicate search histories or other content-laden information about internet usage.[4]

Reid does not address Internet content information; its holding is limited to subscriber information. Law enforcement cannot obtain search histories (or other Internet content information) with only a grand jury subpoena. For the State to suggest otherwise is troubling. As Hunt makes clear, the type of information accessed through telephone billing records is content-based, just like Internet searches and cell phone location data. Earls, supra, 214 N.J. at 586. See also Gonzales v. Google, Inc., 234 F.R.D. 674, 687 (N.D. Cal. 2006) (discussing privacy interest in search queries); Reform and the Revolution in Cloud Computing: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. On the Judiciary, 111th Cong. 73 (2010) (testimony of Michael D. Hintze, Associate Gen. Counsel, Microsoft Corp.) ("[W]e think probably the best interpretation of search under ECPA is that the query itself would be content . . . .").

In New Jersey, call information has traditionally been linked to telephone content and is not analogous to the less-revealing Internet subscriber information. The State is simply,

[4] In the context of telephone records, the distinction between subscriber information and content-based toll billing records is also clear. State v. Smith, 212 N.J. 365, 420 (2012) (addressing improperly obtained billing records, but not challenging authority to obtain subscriber information without a warrant).

and disturbingly, incorrect when it equates the privacy interest protected in Reid with that protected in Hunt.

This Court has never suggested that content-based technology device information might be obtained with a grand jury subpoena. Reid does not stand for the proposition. Moreover, the decision in Earls rejects that notion and reaffirms the Court's long-standing recognition that such sensitive, revealing information can only be accessed through the warrant process. Earls, supra, 214 N.J. at 586.

C. The State Offers No Reason to Overrule Hunt's Warrant Requirement, Which Has Effectively Balanced Privacy and Law Enforcement Interests for 33 Years.

In Hunt, this Court correctly noted that "[a]llowing such [billing record] seizures without warrants can pose significant dangers to political liberty," and that such records may not be obtained by law enforcement without "judicial sanction or proceeding." Hunt, supra, 91 N.J. at 347-48. For more than 33 years, the search and seizure of telephone billing records has been guided by this simple, well-defined boundary. This Court should maintain the legal clarity it established in Hunt.

The State Constitution "requires the approval of an impartial judicial officer based on probable cause before most searches may be undertaken." State v. Hempele, 120 N.J. 182, 217 (1990) (quoting State v. Patino, 83 N.J. 1, 7 (1980)). Noting the importance of the warrant requirement, this Court has

stated that "a lower expectation of privacy is not a sufficient basis on which to carve out an exception to the warrant and probable-cause requirement." Hempele, supra, 120 N.J. at 218; see also Riley v. California, supra, 134 S. Ct. at 2493 ("Our cases have historically recognized that the warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow 'weighed' against the claims of police efficiency'") (internal citations omitted). Rather, these protections may only be eroded in "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make a warrant and probable cause requirement impracticable." Hempele, supra, 120 N.J. at 218 (quoting New Jersey v. T.L.O., 469 U.S. 325, 251 (1985))(Blackmun, J., concurring in judgment holding that a school still requires a warrant to search a student regardless of the swiftness with which school officials need to effect punishment).

There is no convincing basis to dispense with the warrant requirement for access to telephone records. That requirement does not hamper investigations. Unlike a vehicle, telephone billing records are not mobile, so they cannot disappear before they are secured. See, e.g., State v. Lund, 119 N.J. 35, 38-39 (1990).

Telephone billing records are held by a third party. Accordingly, no concern exists that a potential target could

alter or destroy the records.[5] See, e.g., Reid, 194 N.J. at 404 (notice of grand jury subpoena ill-advised because "unscrupulous individuals aware of a subpoena could delete or damage files on their home computer and thereby effectively shield them from a legitimate investigation."). What is more, the public interest in investigating and fighting drug crime is not a sufficient reason to forgo the warrant requirement. Hempele, supra, 120 N.J. at 220.

1. The State's Interest in Efficiency and Speed, Especially When Unsupported by Evidence, Cannot Justify Abandoning the Warrant Requirement.

The State's contention that a warrant takes more time and effort than a grand jury subpoena to obtain telephone billing records, Pb17-20, is accurate but not significant. It is certainly not a ground for overruling Hunt. This Court has proclaimed that "improving the efficiency of law enforcement can 'never by itself justify disregard of the Fourth Amendment.'" Hempele, supra, 120 N.J. at 220 (quoting Mincey v. Arizona, 437 U.S. 385, 393 (1978)). Indeed, the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution address the reasonableness of searches and seizures, not the reasonableness

[5] Indeed, if law enforcement requests a service provider to preserve records while law enforcement obtains a search warrant, federal law requires the service provider to do so. 18 U.S.C. § 2703. Federal law even requires the creation and preservation of backup records upon request. 18 U.S.C. § 2704.

of the speed with which law enforcement accomplishes investigations.

"The requirement that police obtain a warrant before seizing toll billing records is at most a minimal burden that in no way intrudes upon legitimate police activity. There is no danger that billing records will be destroyed or secreted during the time needed to get a warrant." Hunt, supra, 91 N.J. at 352 (Pashman, J., concurring). The State dismisses Justice Pashman's observation by claiming that the probable cause standard is unreasonably time-consuming. PBrLTA 19, n. 9.

But the State fails to present a single example of law enforcement's inability to prosecute an individual as a result of the ostensible delay. And its remaining efficiency arguments are meritless - and paradoxical, given its role in prosecuting offenders. The State professes concern for the promptness of exoneration, and cites the length of federal sentences. The State thus argues that, by adhering to the warrant requirement, investigations may be lengthened, which in turn could be disadvantageous for defendants. PBrLTA 19-20. Such disingenuous reasoning, however, is unconvincing and irrelevant where our State imposes greater constitutional protections.

It is hardly surprising that law enforcement would prefer to access telephone billing records more quickly and more easily, without a probable cause requirement, but efficiency

does not suffice to overturn the standard set in Hunt. Speed and ease are not values more significant than constitutionally recognized privacy rights. See Pena-Flores, supra, 198 N.J. at 33 ("[A]s much as ease of application matters, it has never been our only polestar. Instead . . . the importance of the rights involved has lit our way.").

2. Federal Law Enforcement Standards Cannot Be the Measure of New Jersey's Constitutional Protection.

The State suggests that federal law enforcement agencies are not constrained by Article I, Paragraph 7, and contends that "the Hunt warrant requirement can impede cooperation between state and federal law enforcement agencies. . . ." PBrLTA 20. But at its core, this is an attack on the very concept that Article I, Paragraph 7 provides greater protection than the Fourth Amendment. For more than three decades, the New Jersey Supreme Court has found greater protections against unreasonable searches and seizures in the State Constitution than exist in the Federal Constitution.[6] New Jersey courts provide greater

[6] The reach of the New Jersey Constitution may be disappointing to some, but it should surprise no one. Almost two decades ago, one commentator wrote that although "prosecutors as advocates invariably oppose . . . a more expansive reading of Article 1, Paragraph 7, I acknowledge that no one today seriously challenges the authority of the New Jersey Supreme Court to interpret the state constitution and to have the last word in matters of state criminal procedure." Ronald Susswein, Symposium, The "New Judicial Federalism" and New Jersey Constitutional Interpretation: The Practical Effect of the "New

protections than their federal counterparts in the context of standing,[7] defective warrants,[8] plain-view seizures,[9] consent searches,[10] automobile searches,[11] abandonment,[12] and expectations

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Federalism" on Police Conduct in New Jersey, 7 SETON HALL CONST. L.J. 859, 862 (1997).

[7] Compare State v. Alston, 88 N.J. 211, 228-29 (1981) (taking broad view of standing to challenge validity of searches) with Rakas v. Illinois, 439 U.S. 128, 134 (1978) (taking narrow view).

[8] Compare Novembrino, supra, 105 N.J. at 157-58 (rejecting good-faith exception to the exclusionary rule) with United States v. Leon, 468 U.S. 897, 905 (1984) (recognizing good-faith exception).

[9] Compare Bruzzese, supra, 94 N.J. at 236 (requiring showing of inadvertence to justify plain-view seizure) with Horton v. California, 496 U.S. 128, 130 (1990) (dispensing with inadvertency requirement).

[10] Compare State v. Johnson, 68 N.J. 349, 353-54 (1975) (requiring showing that consent to search was knowingly given) with Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (requiring simply that consent to search be voluntary); compare State v. Carty, 170 N.J. 632, 651 (2002) (disallowing routine requests for consent to search in automobile stops) with Florida v. Bostick, 501 U.S. 429, 434 (1991) (approving routine requests for consent without reasonable suspicion).

[11] Compare Pena-Flores, supra, 198 N.J. at 20 (reaffirming requirement of exigency to justify warrantless search of an automobile) with Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (allowing warrantless searches of automobiles without a showing of exigency); compare State v. Eckel, 185 N.J. 523, 540 (2006) and State v. Dunlap, 185 N.J. 543, 548 (2006) (disallowing warrantless search of passenger compartment of an automobile incident to arrest of driver) with New York v. Belton, 453 U.S. 454, 460 (1981) (allowing warrantless search of passenger compartment of an automobile incident to arrest of driver) and Arizona v. Gant, 556 U.S. 332 (2009) (retreating from Belton and adopting a rule similar to that in Eckel and Dunlap); compare State v. Smith, 134 N.J. 599, 618 (1994) (requiring specific and articulable facts that would warrant heightened caution to support a police officer's order that a passenger exit an automobile) with Maryland v. Wilson, 519 U.S. 408, 410 (1997) (allowing police to order a passenger out of the car without any suspicion).

of privacy in curbside garbage,[13] bank records,[14] utility records,[15] internet service provider subscription records,[16] and cellphone location.[17]

In each of these situations, a risk exists that federal law enforcement agencies will opt to sail alone through the easier waters of federal court search and seizure law. This Court has accepted that reality, noting that while federal search and seizure jurisprudence "may serve to guide us in our resolution of New Jersey issues, 'we bear ultimate responsibility for the

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[12] Compare State v. Johnson, 193 N.J. 528, 548-49 (2008) (setting rigorous standard for proof of abandonment) and State v. Tucker, 136 N.J. 158, 169 (1994) (holding that flight from police alone does not constitute reasonable suspicion to justify a search) with California v. Hodari D., 499 U.S. 621, 629 (1991) (finding juvenile's discarding of drugs constituted abandonment and that flight from police justified seizure).

[13] Compare Hempele, supra, 120 N.J. at 215 (expectation of privacy in curbside trash) with California v. Greenwood, 486 U.S. 35, 37 (1988).

[14] Compare McAllister, supra, 184 N.J. at 26 (expectation of privacy in bank records) with United States v. Miller, 425 U.S. 435, 442 (1976) (no expectation of privacy in bank records).

[15] Compare State v. Domicz, supra, 188 N.J. at 299 (acknowledging expectation of privacy in utility records) with United States v. Jacobsen, 466 U.S. 109, 117 (1984) (no expectation of privacy where information is revealed to a third-party).

[16] Compare State v. Reid, supra, 194 N.J. at 389 (expectation of privacy in Internet Service Provider records) with, e.g., Guest v. Leis, 255 F.3d 325, 336 (6th Cir. 2001) (no expectation of privacy in Internet Service Provider records).

[17] Compare Earls, supra, 214 N.J. at 585 (expectation of privacy in cell phone location data) with Smith v. Maryland, 442 U.S. 735, 743-44 (1979) (installation and use of a pen register not a search under Fourth Amendment) and United States v. Jones, supra, 565 U.S. __, 132 S. Ct. at 949 (2012) (deciding tracking case on trespass theory).

safe passage of our ship.'" State v. Cooke, 163 N.J. 657, 666-67 (2000) (quoting Hempele, supra, 120 N.J. at 196). A desire to synthesize State and Federal case law falls far short of the "special justification" needed to overcome stare decisis, or to justify abandoning Hunt's commitment to enhanced privacy protection.

3. The Purported Existence of "New" Criminal Threats Does Not Override Constitutional Protections.

The State's invocation of "new criminal threats," such as "domestic terrorism, human trafficking, identity theft, and hacking and other cybercrimes[,]" PBrLTA 21, does not change the calculus. Before and since the development of State constitutional jurisprudence as an independent protection for individual rights, state and federal authorities have cooperated on investigations dealing with organized crime, kidnapping, and murder. See, e.g., Hauptmann v. Wilentz, 570 F. Supp. 351, 368 (D.N.J. 1983) (referencing federal-state cooperation in the investigation surrounding the notorious kidnapping of the Lindbergh baby); Mollica, supra, 114 N.J. at 335-336 (explaining State-federal cooperation in organized crime investigation); State v. Hartley, 103 N.J. 252, 257 (1986) (detailing extensive federal-county-local law enforcement cooperation in murder investigation); DelaCruz v. Borough of Hillsdale, 365 N.J. Super. 127, 135 (App. Div. 2004) (referencing multi-

jurisdictional local-federal law enforcement cooperation to combat residential burglaries). Cooperation on serious crimes is nothing new and has continued even as New Jersey's search and seizure jurisprudence has developed and diverged from the United States Supreme Court's.

Indeed, the existence of these ostensible "new" threats should renew - not eviscerate - our commitment to the constitutional and democratic principles. When law enforcement seeks to compromise our constitutional privacy protections out of fear and for practicality's sake, "[h]istory teaches that our duty to remain faithful to this safeguard is *heightened* during moments of crisis. . . . When the government perceives its investigative duty is more urgent than usual, the temptation of overreach is also stronger, placing our privacy in 'greater jeopardy.'" Michael W. Price, Rethinking Privacy: Fourth Amendment "Papers" and The Third-Party Doctrine, 8 J. NAT'L SECURITY L. & POL'Y __, 40 (forthcoming 2015) (available at: https://www.brennancenter.org/analysis/rethinking-privacy-fourth-amendment-papers-and-third-party-doctrine). This Court should rebuff the State's request to diminish our constitutional protections in the name of "new threats."

In sum, the State provides no evidence to support degrading long-recognized constitutional protection of telephone billing records. For more than thirty years, New Jersey has benefitted

from the warrant requirement's clear balance between interests of law enforcement and telephone privacy rights.

New Jersey's citizens trust this Court to protect their right to be free from unwarranted government intrusion. A grand jury subpoena may simplify law enforcement's job, but it must not do so at the expense of that trust.

4. The State's Quest to Overrule Hunt Conflicts With the Concerns Raised By Modern Technologies.

This Court has recognized that new, evolving technologies require enhanced privacy protection. In particular, it has recognized that modern society's necessary use of third-party vendors must not compromise individual privacy rights. See Reid, 194 N.J. at 389; see also, Earls, supra, 214 N.J. at 583; McAllister, supra, 184 N.J. at 31; Hunt, supra, 91 N.J. at 347. Even federal courts that historically have honored the "third-party doctrine" (denying an expectation of privacy in information held by third-parties) are reexamining that position. See, e.g., United States v. Graham, 2015 U.S. App. LEXIS 13653, *42 (4th Cir. Md. Aug. 5, 2015) (citing extensively to Earls and rejecting third-party doctrine for historical cell site location information). Paradoxically, it is at this pivotal moment that the State asks the Court to regress in its protection of telephone billing records.

New Jersey, of course, has never limited constitutional privacy interests by the third-party doctrine. See, e.g., Earls, supra, 214 N.J. at 583; Reid, supra, 194 N.J. at 389; McAllister, supra, 184 N.J. at 31; Hunt, supra, 91 N.J. at 347. The United States Supreme Court has also signaled that a change is imminent in its application of the third-party doctrine. In United States v. Jones, supra, Justice Sotomayor questioned the notion that "an individual has no reasonable expectation of privacy in information voluntarily disclosed to a third party":

> This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers, the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. . . . I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.
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> [565 U.S. at ___, 132 S. Ct. at 957 (Sotomayor, J., concurring).]

This mirrors the recognition of this Court in Earls. Supra, 214 N.J. at 587-88("No one buys a cell phone to share detailed information about their whereabouts with the police").[18]

The State has offered no adequate reason to reverse the progress this Court initiated more than thirty years ago. Given the growing national recognition that existing privacy doctrines do not adequately address disclosure to third parties, and as technology continues to evolve, the State's position is untenable. The State's request that this Court retreat from its forward-thinking decision in 1982 is out of step with our modern world.

In Hunt, this Court recognized that the privacy interest at stake in telephone billing records was high. Where information gleaned from telephone billing records can implicate First

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[18] Justice Alito too questioned the U.S. Supreme Court's treatment of privacy rights and the "increased convenience or security at the expense of privacy" complicated by ever-evolving technology. Id. at 962(Alito, J., concurring).

Citing both Justice Sotomayor and Justice Alito's concurrences for support, the District Court for the District of Columbia invalidated the NSA's bulk collection of telephone billing records. In response to the government's argument that this was inconsistent with Smith v. Maryland, the Court relied upon the fact that "the ubiquity of phones has dramatically altered the *quantity* of information that is now available and, *more importantly*, what that information can tell the Government about people's lives." Klayman v. Obama, 957 F. Supp.2d 1, 35-36 (D.D.C. 2013)(emphasis in original).

Amendment rights, only a warrant requirement suffices to protect individuals from government intrusion. Thirty-three years later, Hunt continues to provide clear guidelines to the government and effectively balance privacy interests and law enforcement needs. Overruling Hunt would be a step backwards for New Jersey citizens and would conflict with this Court's consistent recognition of important privacy interests. [19]

CONCLUSION

For the reasons explained above, the Court should affirm the decision of the Law Division quashing the Grand Jury subpoena duces tecum. It should further make clear that the state constitutional rule announced in State v. Hunt remains the law of New Jersey, and that law enforcement entities that seek

[19] The expectation of privacy has significantly advanced beyond court decisions. The United States Congress recently recognized that greater protections are essential to protect privacy interests even where information is shared with third parties. In response to the outcry following the disclosure of the mass collection of telephone call records by the NSA, Congress has taken steps to ensure privacy interests are not trampled by government intrusion. Senator Rand Paul has introduced two separate bills to address these issues. The first, known as the "Fourth Amendment Restoration Act of 2013" (S. 1121), would require any agency of the United States to obtain a warrant before searching the phone records of Americans. The second bill, known as the "Fourth Amendment Preservation and Protection Act of 2013", seeks to prohibit federal, state and local governments from obtaining records pertaining to an individual from third parties.

In June of 2015, Congress voted to reject the unrestrained authority that the NSA had claimed to collect the phone records of Americans. The bill requires that the Government obtain a targeted order to access telephone metadata from telecommunication companies. See USA FREEDOM Act, H.R.3361.

telephone billing records must do so through a warrant, issued by a judge on probable cause and particularly describing the records to be produced.

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Dated: 8/18/15

VIA NEW JERSEY LAWYER'S SERVICE

April 15, 2015

Mark Neary, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 Market Street
Trenton, NJ 08625-0970

Re: ***State v. Gary Lunsford***
Docket No. A-61-14 (075691)

Dear Mr. Neary:

Please be advised that the American Civil Liberties Union of New Jersey, the Brennan Center for Justice, the Electronic Frontier Foundation and the Office of the Public Defender seeks to submit a brief and participate in oral argument as *amici curiae* in the matter referenced above. Accordingly, enclosed for filing please find the original and nine copies of the following documents:

1. Notice of Motion for Leave to File a Brief and Participate in Oral Argument as *Amici Curiae;*
2. Supporting Certification of Alexander Shalom dated August 18, 2015;
3. Proposed brief;
4. Certification of Service;

Please file the same. Enclosed is a check to cover the filing fee.

If you have any questions or require any further information, please do not hesitate to contact me directly at (973)854-1714.

Sincerely,

Alexander Shalom
Senior Staff Attorney

Enclosures