SUPREME COURT
STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

Original Proceeding,
City and County of Denver District Court,
Case No. 21CR20001

Plaintiff-Respondent,
THE PEOPLE OF THE STATE OF COLORADO,

v.

Defendant-Petitioner,
GAVIN SEYMOUR.

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Case No. 23SA0012

PHILIP J. WEISER, Attorney General
JILLIAN J. PRICE, Deputy Attorney General*
HELEN NORTON, Special Assistant Attorney General
BROCK J. SWANSON, Senior Assistant Attorney General
MATTHEW J. WORTHINGTON, Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: 720-508-6483
E-Mail: jillian.price@coag.gov
Registration Number: 40815
*Counsel of Record

BRIEF OF *AMICUS CURIAE* COLORADO ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF-RESPONDENT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 4,170 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Jillian J. Price
Signature of attorney or party

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IDENTITY OF AMICUS CURIAE

The Colorado Attorney General ("Attorney General") is the chief legal officer of the State of Colorado and represents and defends the legal interests of the State and the People of Colorado. Colo. Const. Art. IV, § 1; § 24-31-101, C.R.S. (2022). The Attorney General has a significant interest in protecting Coloradans from violent crimes, providing justice for victims, and the fair treatment of people in the criminal justice system.

INTEREST OF AMICUS CURIAE

This case involves the interplay of the government's law enforcement needs with free speech rights. More specifically, what standard applies when law enforcement seeks to obtain an individual's online search queries and how does that standard apply to this specific search?

This Court grappled with a similar issue over twenty years ago in *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002). There, police attempted to execute a search warrant authorizing an innocent third-party bookseller to disclose information related to

customer purchase records. Because the actions of law enforcement threatened to have a chilling effect on people's free speech freedoms of thought and expression, this Court held that the object of the search had a right to a special preliminary hearing and that the government must establish a compelling need for the information sought at that hearing. Then, assuming that need is established, its importance must be balanced against the risk of harm to constitutionally protected interests posed by executing the search warrant.

A warrant seeking records of an individual's online search queries can intrude on free speech rights in ways analogous to a warrant seeking an individual's book-purchasing records. Therefore, the Attorney General submits this amicus brief to explain why *Tattered Cover's* heightened scrutiny standard should apply here and why, under the exact factual circumstances of this case, the search at issue satisfied that standard.

ARGUMENT

I. Because warrants seeking records of individuals' online search queries burden free speech rights in ways akin to warrants seeking records of their book purchases, *Tattered Cover*'s heightened scrutiny applies.

The United States Supreme Court has long recognized that an individual's right to receive information and ideas is necessary to preserve their First Amendment freedoms of thought and expression. *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas. . . . If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

The U.S. Supreme Court has understood this right to include an individual's ability to access information and ideas without revealing their identities to the government. *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (holding that requiring individuals to reveal their

identities before receiving literature about Communism chills expressive activity in violation of the First Amendment); *see also Packingham v. North Carolina,* 137 S. Ct. 1730, 1737-38 (2017) (holding that the First Amendment protects individuals' access to social media, which "for many are the principal sources of knowing current events" and "exploring the vast realms of human thought and knowledge").

This Court has held that Colorado's state constitution provides even broader free speech protections—including greater protection of an individual's right to purchase reading materials anonymously—than does the First Amendment. *Tattered Cover,* 44 P.3d at 1054. Specifically, this Court observed that "[s]earch warrants directed to bookstores, demanding information about the reading history of customers, intrude upon the First Amendment rights of customers and bookstores because compelled disclosure of book-buying records threatens to destroy the anonymity upon which many customers depend." *Id.* at 1053. It thus required law enforcement officials to "make a heightened showing of their need" for customers' book-buying records before taking actions "that are likely to chill people's willingness

to read a full panoply of books and be exposed to diverse ideas." *Id.* at 1056.

The keyword warrant at issue in this case required a search engine (here, Google) to produce the records of individuals that made search queries using certain terms, or keywords, during a certain time period. Through such queries, individuals can navigate the internet to access information and ideas about countless matters. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997) (equating the internet to "a vast library including millions of readily available and indexed publications"); *see also Packingham,* 137 S. Ct. at 1737-38. Warrants seeking records of what individuals searched online may intrude on their free speech rights in ways akin to warrants seeking their book-buying records. After all, both book buying habits and search queries can reveal intimate or sensitive details about a person's life choices or political views. Because the government's access to individuals' online search queries is comparable to book buying choices, it can potentially chill an individual's exercise of their right to receive

information and ideas; therefore, *Tattered Cover's* heightened scrutiny standard—and relevant balancing test—should apply here.

II. The search in this case complied with *Tattered Cover's* heightened scrutiny standard.

The search in this case complied with *Tattered Cover's* heightened scrutiny standard because (A) the government showed a compelling need for the information sought, and (B) the need for that information clearly outweighs the harm to constitutional interests caused by its execution.

A. The government showed a compelling need for the information sought.

The government showed a compelling need for the information sought because (1) the information was crucial to the investigation; (2) there were no reasonable alternative means for obtaining it; and (3) the warrant was sufficiently particularized and not overly broad.

1. The information was crucial to the investigation, and there were no reasonable alternative means for obtaining it.

In assessing whether law enforcement has demonstrated a "compelling need" for the information sought, courts should consider

whether there are "reasonable alternate ways of conducting an investigation other than by seizing [it]." *Tattered Cover*, 44 P.3d at 1058-59. "Officials must exhaust these alternatives before resorting to techniques that implicate fundamental expressive rights of [the target of the search]." *Id.* at 1059.

In *Tattered Cover*, law enforcement asserted that they needed the book-purchasing records to place the suspect at the scene of a methamphetamine lab and prove that the suspect intentionally operated the lab. *Id.* at 1061. But because there were easily available and alternate means of obtaining that information, the asserted justifications did not establish a sufficiently "compelling need" to outweigh the constitutional harm in executing the warrant. *Id.* at 1061-62. Indeed, the physical presence of a fully operational and functional methamphetamine lab, plus the presence of the "how to" books, "[left] no doubt that that the person or persons who operated this lab did so intentionally." *Id.* Additionally, there were many alternate ways to establish that the suspect occupied the room and operated the lab, such as interviewing neighbors; fingerprinting objects found in the lab;

examining the bed and flooring for hair or other DNA samples; and assessing whether the clothing and shoes found in the bedroom matched the suspect's size. *Id.* Police did not even attempt to exhaust any of those options before seeking the book-purchasing records.

Unlike *Tattered Cover*, police in this case only turned to Google as a last resort after they conducted a "rather extensive investigation" which yielded no results. (Pet. Ex. 8; TR. 11-16-22, pp. 9:4-11:8).

First, police "became familiar with the nature of the neighborhood" and investigated what remained of the house. (Pet. Ex. 8; TR. 11-16-22, pp. 9:15-11:8; Pet. Ex. 9; TR. 11-12-21, pp. 28:13-33:1). But there was little physical evidence – aside from the accelerants – to examine because that evidence was "destroyed by the fire itself." (Pet. Ex. 9; TR. 11-12-21, pp. 108:13-109:20).

Second, police interviewed the homeowner and his family and searched the family's cell phones to rule out the possibility of their involvement. (Pet. Ex. 9; TR. 11-12-21, p. 64:4-16).

Third, police theorized based on "the nature of the fire [and] all of the circumstances," including the presence of accelerants, "that the

house was in some fashion targeted" and "it was a personal type of attack." (Pet. Ex. 8; TR. 11-16-22, p. 11:16-23, 13:2-4; Pet. Ex. 9; TR. 11-12-21, pp. 108:13-109:20). In pursuing that theory, police executed "roughly 60 search warrants" to "search specific areas [and] residences"; "cell phone tower searches"; and "all phone numbers within a 1-mile radius of the fire." (Pet. Ex. 9; TR. 11-12-21, pp. 61:14-62:8, 67:25-68:6, 69:5-71:23, 80:25-81:7). Officers also canvassed the neighborhood and spoke with residents as well as people whose cell phones pinged on the nearby towers at the relevant times. (Pet. Ex. 9; TR. 11-12-21, pp. 28:14-29:2, 44:3-14, 72:3-76:20).

Lastly, police reviewed several surveillance videos from neighbors. (Pet. Ex. 8; TR. 11-16-22, pp. 9:15-11:8; Pet. Ex. 9; TR. 11-12-21, pp. 28:13-33:1). The videos showed three individuals approaching the side of the house and then running away as "flames . . . and screams [came] from the house," but police could not identify them because each wore "hoodies and masks." (Pet. Ex. 8; TR. 11-16-22, pp. 9:15-11:8; Pet. Ex. 9; TR. 11-12-21, p. 31:1-2).

It was only after these "traditional investigative techniques" were exhausted that police turned to Google in a final effort to develop viable suspects. (Pet. Ex. 8; TR. 11-16-22, p. 11:9-15). These particular facts establish that law enforcement had a "compelling need" for the information sought and that there were no other reasonable options for obtaining it. *Tattered Cover*, 44 P.3d at 1058-59.

2. The warrant was sufficiently particularized and not overly broad.

"When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, . . . official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). "The warrant itself must describe with particularity the place to be searched and the objects that may be seized." *Tattered Cover*, 44 P.3d at 1054. "[W]hen expressive rights are implicated, a search warrant must comply with the particularity requirements of the Fourth Amendment with 'scrupulous exactitude.'" *Id.* at 1055 (quoting *Zurcher v. Stanford*

Daily, 436 U.S. 547, 564 (1978)). "For any particular expressive material sought, if the request is overly broad, then the law enforcement officials will not have a compelling need for that particular item." *Id.* at 1059.

The warrants at issue in this case authorized the police to acquire records in which individuals had a reasonable expectation of privacy, from third parties, using compulsory process. In such cases, "the Government's *acquisition* of the . . . records was a search within the meaning of the Fourth Amendment." *Carpenter*, 138 S. Ct. at 2220-23 (emphasis added).

Petitioner contends that Google locating the requested records from within its internal computer database was also a police-instigated search within the meaning of the Fourth Amendment, such that the police needed probable cause to examine the search history of every person in the database. But such a ruling would effectively preclude obtaining any records contained within a digital database. *Carpenter* did not suggest that the need for a wireless carrier to locate the requested records within its database would prohibit the government

from acquiring any records in a case where they had probable cause to acquire the *requested* records.

When Google located the requested records within its own database, it was not an official, governmental intrusion into the protected interests of any Google user whose record was not ultimately disclosed to the police. Nor are even government searches categorically prohibited because they may require the cursory examination of innocuous records "in order to determine whether they are, in fact, among those [records] authorized to be seized." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976); *see also Matter of Search of Info. that is Stored at Premises Controlled by Google LLC*, 579 F. Supp. 3d 62, 84 (D.D.C. 2021) (collecting cases where searches were upheld that permitted a search of a business' filing cabinet or of a home office even though it was certain that some innocent third-party documents must be reviewed to determine they were not to be seized). Thus, when considering whether the warrants in this case were overly broad, this Court should examine the breadth of the *requested* records, not the ministerial steps Google would take to locate them.

The type of "reverse warrants" at issue here are not so unique that they lack pre-digital analogs in this Court's jurisprudence. Indeed, in *Tattered Cover*, this Court recognized that similar searches of the records maintained by a bookstore would be constitutionally permissible under appropriate circumstances. This Court indicated that, depending on the exact factual circumstances, it could be necessary and appropriate to obtain from a bookstore all records of who had purchased a book, such as The Anarchist's Cookbook, or the identity of who purchased a specific book about baseball "to place that person at the scene of the crime." *Tattered Cover*, 44 P.3d at 1055. And in *People v. Gutierrez*, 222 P.3d 925, 936-40 (Colo. 2009), this Court indicated that it could be appropriate to seize and search all of the individual tax records possessed by a third-party tax preparer if there was probable cause to believe that the business was so pervaded by fraud that evidence would be found in "*most or all*" of the seized records. As courts in other jurisdictions have recognized, "the Fourth Amendment does not and has never required that law enforcement know a suspect's identity for certain or even have a suspect in mind to

obtain a search warrant." *Google*, 579 F. Supp. 3d at 83 n.19 (collecting cases).

Here, the warrants in this case did not authorize an all-records search and seizure like that in *Gutierrez*. But even assuming they did, they were narrowly particularized so that there was probable cause to believe most or all of the requested records would reveal evidence relevant to the investigation.

The initially executed warrant was restricted to both a narrow date range and specific search terms. *See People v. Roccaforte*, 919 P.2d 799, 804 (Colo. 1996) (holding that warrants permitting the search of all of a business's records were not too broad where they "had a date restriction which related to the period of the alleged fraud" and "described in both specific and inclusive generic terms what was to be seized" (quotation omitted)).

The search warrant in this case only requested anonymized identifiers and IP addresses, (Pet. Ex. 16), which the police connected to particular individuals only through further court approved warrants. *See Google*, 579 F. Supp. 3d at 85-89 (holding geofence

warrant was not overbroad where it could not realistically have been narrowed further, the potential infringement on third-party privacy interests was modest, and a two-step process requiring two warrants was used before individuals were identified). The warrant that ultimately sought identification from Google of some of the individuals who had searched for the address in question was restricted to five accounts and supported by the additional information that those accounts had IP addresses located in Colorado. (Pet. Ex. 18).

In this case, law enforcement operated in a carefully tailored matter, using a tiered warrant approach, to ensure that the identity of any individual engaging in expressive search activity was disclosed only after the scope of the search had been narrowed as much as possible. The results of the search confirm its precise and careful focus. Notably, of the five individuals identified, three were ultimately

connected with the crime under investigation through other evidence.[1] (Pet. Ex. 19).

B. Law enforcement's need for the information sought outweighed any harm to constitutional interests caused by its execution.

The People acknowledge that, where government action collides with an individual's right to receive information and ideas, there may be potential for a chilling effect on protected expression. *See, e.g., Tattered Cover*, 44 P.3d at 1057; *Lamont*, 381 U.S. at 307. Therefore, even where law enforcement's need for the information sought is compelling, the court must still balance that need "against the harms caused to constitutional interests by execution of the search warrant." *Tattered Cover*, 44 P.3d at 1059.

[1] The fourth individual was a family member who was excluded as a suspect. (Pet. Ex. 9, TR. 11-12-21, p. 137:9-18). The fifth individual was excluded as a suspect after police "look[ed] for any reason or any information that related to the 5312 Truckee address or any of the other suspects in this case" but "found nothing." (Pet. Ex. 9, TR. 11-12-21, pp. 137:19-138:14)

Petitioner claims that balance was not struck here. More specifically, he argues that the search violated his constitutional rights and that any given reverse-keyword search would necessarily have an unacceptable chilling effect on the expressive and associational rights of "almost every member of the public." (*See, e.g.*, Petition at para. 26). Not so.

Whether a reverse-keyword search is "necessary and appropriate" is, and must be, dependent upon "the exact factual circumstances" of the case. *See Tattered Cover*, 44 P.3d at 1055; *cf. People v. Pannebaker,* 714 P.2d 904, 907 (Colo. 1986) (adopting the totality-of-the-circumstances test formulated in *Illinois v. Gates,* 462 U.S. 213, 231-32 (1983), in construing the search and seizure clause of the Colorado Constitution). In most situations, a search that is unrelated to expressive content is much less likely to have a chilling effect than one that is. *See Tattered Cover*, 44 P.3d at 1059.

The chilling effect that results from disclosure of book-purchasing records (or internet search queries) occurs because of the public's general fear that, if the government discovers what it reads, negative

consequences may follow. *Id.* at 1059; *see also Stanley*, 394 U.S. at 564-65 (holding that the State may not dictate what books an individual may read or what films they may watch). For example, if police sought to discover who queried the internet for information on whether engaging in bigamy based on a bona fide religious belief is lawful, the search warrant would be more likely to have a chilling effect on the public's exercise of its right to receive information and ideas. *See Tattered Cover*, 44 P.3d at 1063 (discussing potential "substantial chilling effect on the willingness of [Tattered Cover] customers to purchase controversial books"). By contrast, if law enforcement wished to learn who purchased a particular book about baseball found at the scene of a crime "in order to place that person at the scene . . ., the harm to constitutional interests caused by forced disclosure of the [purchase records] might well be permissible" under the *Tattered Cover* balancing test because it is unrelated to the book's content. *Id.* at 1059.

The "exact factual circumstances" of this case show that law enforcement had a compelling need for the information, and the specific keyword was unrelated to the free speech concerns at the core of First

Amendment protections. The address in question belonged to an otherwise unremarkable single-family home in a suburban neighborhood. (*See* Pet. Ex. 8, TR. 11-16-22, p. 11:5-10). The home was used as a private residence – it was not a medical facility; a house of worship; a union headquarters; a political party headquarters; or a by-the-hour motel. Nor were there any other facts about this address that would implicate an individual searcher's religious or political views; their sexual orientation or preferences; their medical conditions; their affiliations with any social groups or movements; or any other private information. Under these circumstances there was little, if any, harm to any individual's expressive rights.

Because there was no manual review of those records, there was little danger that the search would make public the expressive information in those innocent accounts, even indirectly. Instead, technology allowed the five potentially relevant accounts to be located within billions of records without any person reviewing the expressive content contained in the non-relevant accounts.

Therefore, on balance, the government's compelling need for the information sought outweighed the minimal harm to constitutional interests caused by executing the search warrant. Under these circumstances, the search passes muster under *Tattered Cover*.

CONCLUSION

This case presents a novel question related to the use of "reverse keyword searches" to solve crimes. In this case, law enforcement acted responsibly, appropriately, and in good faith to safeguard the expressive interests protected by the First Amendment. With the benefit of this Court's guidance in this case, law enforcement can act with confidence that the Constitution permits them to obtain information necessary to solve crimes and protect victims where – as was the case here – the expressive value of the information sought is low, the law enforcement need for the information is high, and the technique used to obtain the information is carefully tailored and responsible. This Court should therefore affirm the district court's order.

PHILIP J. WEISER
Attorney General

/s/ Jillian J. Price
JILLIAN J. PRICE, 40815*
Deputy Attorney General
Criminal Appeals
Attorneys for *Amicus Curiae* Colorado Attorney General
*Counsel of Record

/s/ Helen Norton
HELEN NORTON, 47048
Special Assistant Attorney General

/s/ Brock J. Swanson
BROCK J. SWANSON, 39116
Senior Assistant Attorney General

/s/ Matthew J. Worthington
MATTHEW J. WORTHINGTON, 47987
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing BRIEF OF AMICUS CURIAE COLORADO ATTORNEY GENERAL upon all parties listed below via Colorado Courts E-Filing on this 7th day of March, 2023.

JENIFER STINSON (#35993)
Alternate Defense Counsel
Stinson Law Office
1245 E. Colfax Avenue, Suite 300
Denver, Colorado 80218

MICHAEL JUBA (#39542)
Alternate Defense Counsel
The Juba Law Office, PLLC
675 N. Grant Street
Denver, CO 80203

MICHAEL W. PRICE (#22PHV6967)
National Association of Criminal Defense Lawyers
1660 L Street NW, 12th Floor
Washington, DC 20036

/s/ Jillian J. Price