Testimony of Greg Smith to the House State Affairs Committee in Support of HB 316: "An Act relating to law enforcement requests for wireless telephone location information in emergencies."

Chair Shaw, Vice Chair Wright, and Members of the State Affairs Committee:

Thank you for the opportunity to present testimony in support of **HB 316 : "An Act relating to law enforcement requests for wireless telephone location information in emergencies."**

My name is Greg Smith. I am a Special Deputy Sheriff for the Johnson County (KS) Sheriff's Office. In that capacity I oversee our government affairs division where I frequently testify in various committees concerning legislation that my impact our agency.

I am also a former state legislator from the State of Kansas. I served six years in the Kansas Legislature. Two years in the House of Representatives, where I served on the House Corrections and Juvenile Justice Committee, which oversees legislation dealing with our state's criminal code for both adults and juveniles, as well as our prison system. I also served on the House Judiciary Committee and the House Utilities Committee, which oversees the wireless telecom industry in our state.

I served four years in the Kansas Senate, serving on the same committees as I did on the House side. However, I was the Chairman of the Senate Committee on Corrections and Juvenile Justice, and the Vice Chair of the Senate Judiciary Committee. I was fortunate enough to advocate for several legislative changes which helped our state, including a total reform of our adult and juvenile criminal justice system.

I have served for over 25 years in law enforcement, received numerous awards including graduating as valedictorian in two academy classes in two states, received training in wireless device location, trained dozens of officers as a Field Training Officer (FTO), commanded a patrol squad, and had the privilege of working with many fine men and women who daily put their lives on the line so that others may live in safety.

I serve as the Executive Director of the Kelsey Smith Foundation, Inc.® that was started in 2007 after the murder of my daughter, Kelsey Smith. I conduct training for law enforcement across the United States on the use of geolocation of wireless devices in exigent circumstances. It is an area of law that is constantly changing. However, the change is usually due to court action, case law, rather than the legislative process.

I appear before you today as Kelsey's father to support this legislation. I took the time to present my background in the hopes that you will see that, while I am a grieving father, I am also a capable, experienced, knowledgeable, and trained law enforcement officer.

Thirty states have passed this legislation. Kansas was the first – Illinois was the most recent. I can tell you from every perspective of my life experiences and training that this bill will save lives and will not cost one cent to the state of Alaska. This legislation is too important to ignore. It brings people home, to their loved ones, alive.

The Kelsey Smith Act, as it is known in many states, is an invaluable tool to law enforcement that provides a way for an efficient emergency response. Simply put, it allows law enforcement access to location from a wireless device when a person is believed to be at risk of serious bodily harm or death and their whereabouts are unknown.

Deputy sheriffs and police officers are intimately familiar with the fourth amendment. Nearly every action we take hinges on understanding what the meaning of this amendment is. Deputies and officers receive hours and hours of training on this one topic alone. It is imperative we get it right.

You may hear opponent testimony that claims that the Kelsey Smith Act is a violation of the 4th Amendment to the U.S. Constitution. This is a false narrative.

The Fourth Amendment of the U.S. Constitution spells out what searches are permissible.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

"The Constitution, through the Fourth Amendment, protects people from unreasonable searches and seizures by the government. The Fourth Amendment, however, is not a guarantee against all searches and seizures, but only those that are deemed unreasonable under the law."[2]

There are many "exceptions" to the Fourth Amendment that are well recognized by the judicial system. These fall under exigent circumstances. Exigent circumstances are defined as:

"Those circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons,

[1] U.S. Constitution, 4th Amendment

[2] "What Does the Furth Amendment Mean?" United States Courts. January 20, 2024. https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-0.

the destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."[3]

It has long been established by the federal courts that officers **must** act based on what they know at the time; that speculation could lead to a person's death:

But a warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Fires or dead bodies are reported to police by cranks where no fires or bodies are to be found. Acting in response to reports of "dead bodies," the police may find the "bodies" to be common drunks, diabetics in shock, or distressed cardiac patients. But the business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response. A myriad of circumstances could fall within the terms "exigent circumstances" referred to in Miller v. United States, supra, e.g., smoke coming out a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within.[4]

The language of the opinion is unusually strong stating that "the need to protect or preserve life or avoid serious injury is **justification** for what would be otherwise illegal absent an exigency or emergency."

Later, in the opinion the court states:

The appraisal of exigent circumstances surrounding execution of search warrants or forcible entries without a search warrant presents difficult and delicate problems. These cases do not arise in the calm which pervades a courtroom or library. They are rarely if ever seen by courts except in cases where criminal activity has been uncovered by the challenged police actions. They are not matters resolved by meditation and reflection of the participants. The events are likely to be emotion-charged, filled with tension, and frequently attended by grave risks. Neither the Constitution, statutes nor judicial decisions have made the home inviolable in an absolute sense. Collectively they have surrounded the home with great protection but protection which is qualified by the needs of ordered liberty in a civilized society.[5]

In short, an officer or officers conduct is justified when there is a believe that a person is at risk of serious bodily harm or death. Law enforcement has duty to respond. The two cases cited in my testimony lay out the guidelines for exigent circumstances.

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[3] United States v. McConney - 728 F.2d 1195, 1199 (9th Cir.) (1984)
[4] Wayne v. United States, 318 F.2d 205 (D.C. Cir. 1963)
[5] Ibid

Law enforcement officers rely on the courts long-standing definition of exigent circumstances. The Kelsey Smith Act simply codifies those decisions.

As is always the case, technology moves faster than the law. Court cases provide "case law" until state legislatures and/or Congress can catch up via the more laborious and time-consuming legislative process.

In *United States v. Gilliam* law enforcement became involved when Gilliam took Jasmin from Maryland to New York to work as a prostitute for him there, and Jasmin's foster mother reported her missing. The Maryland State Police requested that the provider, Sprint, provide location information for Gilliam's cell phone, without a warrant, based on an exigent situation involving immediate death or serious bodily injury. Sprint supplied the information which was relayed to the NYPD. The NYPD was able to locate Jasmin and Gilliam. Gilliam was convicted of sex trafficking of a minor by force, fraud, or coercion and of transporting a minor in interstate commerce for purposes of prostitution and sentenced to 240 months' imprisonment.[6]

This case is important because it references the federal law that applies to these types of situations – The Stored Communication Act, specifically 18 U.S.C. § 2702(c)(4):

18 U.S. Code § 2702 – Voluntary disclosure of customer communications or records

(c)Exceptions for Disclosure of Customer Records. —A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))—

(4) to a governmental entity**, if the provider**, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.

This provision is problematic for law enforcement because of who is making the determination if the situation is an emergency (exigent circumstance). I will discuss that after finishing my review of federal case law.

In 2018, *Carpenter v. United States,* was a landmark case concerning government access to wireless device location. Prior to this case, cell site location information (CSLI) was considered a business record and under federal law was accessible to law enforcement under the "third party doctrine." Information released to a business was accessible without a warrant since the person had released that information to the business to complete a transaction or other business action.

The *Carpenter* case found that "a detailed chronicle of a person's physical presence compiled every day, every moment, over several years" implicates privacy concerns that surpass the third-party doctrine.[7] The acquisition of the long-term CSLI data was a search under the Fourth Amendment. In fact, the Government was able to obtain 12,898 location points cataloging Carpenter's movements over 127 days—an average of 101 data points per day. This type of location collection is obviously intrusive and unreasonable.

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[6] United States v. Gilliam - No. 15-387 (2nd Cir. 2016)

[7] Carpenter v. United States, 585 U.S. ___ (2018)

However, as with *Gilliam,* the court found that *Carpenter* is a narrow decision. They specifically point out that they do not opine on "real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval)."[8]

They also did not "disturb" settled case law in *Smith* and *Miller* (cases that dealt with "conventional surveillance techniques and tools).

Many cite *Carpenter* as a complete nullification of access to wireless location data. Those that do so, conveniently leave out the court's analysis of exigent circumstances.

"One well-recognized exception applies when '"the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.' " Kentucky v. King, 563 U. S. 452, 460 (2011) (quoting Mincey v. Arizona, 437 U. S. 385, 394 (1978)). Such exigencies include the need to pursue a fleeing suspect, ***protect individuals who are threatened with imminent harm****, or prevent the imminent destruction of evidence. 563 U. S., at 460, and n. 3.*

Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.[9]

The last federal case I will mention is *United States v. Hammond.* In this case real time location information was accessed by law enforcement to locate a suspect who was on a robbery spree, The court found the real-time CSLI collection was not a search. It did not rise to the months of data collected as in the *Carpenter* case. It was an exigent circumstance as Hammond was committing a spree of violent crimes with a firearm placing persons at risk of serious bodily harm or death.

Hammond was a U.S. Federal Court Seventh Circuit case in 2021. It is important to note this occurred after the *Carpenter* decision. In 2022, Hammond appealed the decision to the U.S. Supreme Court, which denied hearing the case. It is clear the U.S. Supreme Court saw no issue with the exigent circumstances and the use of location data in this situation – following the guidelines of *Carpenter*.[10]

As stated earlier in my testimony there is federal law in place that applies to the states, but only to those states that have not adopted the Kelsey Smith Act. There are two key points to consider when operating under the federal law:

1) The wireless provider is the entity that decides if the circumstances are an emergency (exigent), and:
2) The information can be released to a "governmental entity."

If you are concerned about government access to data, this law should cause you concern. The definition of governmental entity under the law means "a department or agency of the United States or any State or political subdivision thereof."

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[8] Carpenter v. United States, 585 U.S. ___ (2018)
[9] Ibid
[10] United States v. Hammond, United States Court of Appeals for the Seventh Circuit, Apr 26, 2021
996 F.3d 374 (7th Cir. 2021)

Any governmental entity can request the location information of a wireless device under **18 U.S. Code § 2702 – Voluntary disclosure of customer communications or records.** The scope of agencies that could access your location if a wireless provider decides you are in an emergency is staggering. It could be anyone from the President of the United States to a local school board official.

Enter the Kelsey Smith Act. As stated before, it codifies court decisions, eliminating doubt as to what an exigent circumstance is – and limiting the use of the Act to only those circumstances.

Second, it changes who makes the decision on what is an emergency to law enforcement. Men and women who are extensively trained to recognize and respond to such situation instead of a wireless provider. When Kelsey went missing our wireless provider, Verizon, refused to release the location of Kelsey's device. Instead, they offered to change our calling plan. A wireless company customer service representative is not trained to evaluate the nuances of an exigent circumstance, especially at 2 AM on a Sunday morning.

Third, it limits the scope of which governmental entity can access the information to law enforcement and only law enforcement. Limiting the scope of access is extremely important providing certainty that only those who have a need to know the location of a device are receiving that information.

HB 316 provides certainty for law enforcement officers as well as wireless providers. Companies are sometimes reticent to act when there is risk of litigation. HB 316 eliminates that risk by providing immunity from litigation when providing information to law enforcement.

This language has resulted in wide support for the Kelsey Smith Act from the wireless industry. In fact, CTIA is the lobbying organization for the wireless industry, and they have consistently supported the Kelsey Smith Act issuing statements of support on their website.[11]

HB 316 also provides an information repository for law enforcement to assist in making a request for location information if needed. In Kansas, for example, our repository is kept at our Amber Alert Desk. It is manned 24/7 and can provide emergency contact information of any wireless provider who does business in Kansas to law enforcement.

Since 2009, thirty states have adopted the Kelsey Smith Act, or the language of the Kelsey Smith Act. Kansas was the first and legislators there named the legislation in Kelsey's memory. It is not something that my wife, Missey, or I asked for. Some states have continued doing so and it is an honor to have life saving legislation named after her. More importantly is the difference this law will provide. Lives will be saved. We receive information from around the country from agencies that tell us of instances they have successfully used the Act to bring people home to loved ones alive.

I provide training around the country at law enforcement training conferences on use of the Kelsey Smith Act as well as policy considerations for law enforcement agencies. I have presented at the National Sheriffs Association, the International Association of Chiefs of Police Technology Conference, and the Dallas Crimes Against Children Conference to list a few. Law enforcement officers in states both

[11] Kelly Cole, Senior Vice President, Government Affairs. CTIA. January 21, 2024. "CTIA Statement on Reintroduction of the Kelsey Smith Act ." https://www.ctia.org/news/statement-on-reintroduction-of-the-kelsey-smith-act

with the Act and without attend the training. I learn as much from them about the issues they face as well as the success stories of they have achieved with the Act as they do from my training.

HB 316 is good public policy. I would ask that this committee advance this bill favorably for passage.

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