No. 12-4659

In the
United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
AARON GRAHAM AND ERIC JORDAN,
Defendants-Appellants.

On Appeal from the
United States District Court for
the District of Maryland, Northern Division

Brief *Amicus Curiae* of DownsizeDC.org, Downsize DC Foundation, United States Justice Foundation, Gun Owners of America, Inc., Gun Owners Foundation, Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Defendants-Appellants on Rehearing *En Banc*

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INTEREST OF *AMICI CURIAE*

DownsizeDC.org, Downsize DC Foundation, United States Justice Foundation, Gun Owners of America, Inc., Gun Owners Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Institute on the Constitution is an educational organization. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.[1]

ARGUMENT

I. THE PANEL FAILED TO CONSIDER PROPERTY PRINCIPLES.

This case involves a court order based upon reasonable suspicion — rather than a warrant based upon probable cause — which was used to obtain the cell site location information ("CSLI") for two cellular phones belonging to armed robbery suspects. United States v. Graham, 796 F.3d 332, 340-41 (4th Cir. 2015). The panel erroneously assumed that the only Fourth Amendment interest at stake is whether the Defendants "have an objectively reasonable expectation of privacy" in their "historical CSLI for an extended period of time." *See id.* at 345-49. To be

[1] *Amici* requested and received the consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

sure, the panel reached the right decision — that the Fourth Amendment was violated — but for the wrong reason. Completely missing from the panel opinion is what U.S. v. Jones, 132 S.Ct. 945 (2013), teaches is the baseline Fourth Amendment inquiry — whether Defendants have a Fourth Amendment property interest in historical records of the location of their persons. *Id.* at 949-950. According to Jones, whatever privacy interest Defendants have in their CSLI is a fall-back, to be assessed only after the court has found no protectable property interest. *See, e.g.,* Florida v. Jardines, 133 S.Ct. 1409, 1417 (2013). These principles were not followed here. The panel did not consider the property rights baseline, looking instead only at secondary notions of privacy.[2]

In looking only at privacy interests,[3] the panel attempted to confine the Jones

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[2] Indeed, it appears that the panel even attempts to turn Jones into a privacy case. *See* Graham, 796 F.3d at 347-48. The panel claims that "[i]n two concurring opinions [in Jones], five Justices confronted the Katz [privacy question]...." *Id.* at 347. The panel ignores the fact that Justice Sotomayor did not join Justice Alito's concurring opinion (which would have made his the majority opinion), but rather joined Justice Scalia's opinion, making it the majority opinion. Jones at 947.

[3] Based on the reasonable expectation of privacy test, the decision of the panel is open-ended. It states its holding to be a "search under the Fourth Amendment when it obtains and inspects a cell phone users historical CSLI for an extended period of time." Graham 796 F.3d at 344-45. How extended the period of time remains uncertain. *See id.* at 350, n.8. Similar questions were raised in Jones, but readily dispatched by Justice Scalia on the basis of the Fourth Amendment property-principle, which relegated such arbitrary line drawing questions to the judicial wastebasket. Jones at 953-54.

decision as simply an application of the common law rule of trespass. Thus, the panel opinion shrinks Jones to its bare-boned facts: "that the government's installation of the GPS device on the suspect's vehicle constituted a search under the traditional trespass-based theory of Fourth Amendment protection, bypassing the reasonable-expectation-of-privacy analysis established in Katz." Graham, 796 F.3d at 347. But Jones itself refuted this idea, noting that the Fourth Amendment property principle cannot be captured by an "'18th-century tort law'" test. *Id.* at 953. Rather, as Justice Scalia explained:

> What we apply is an 18th-century **guarantee** against unreasonable searches, which we believe must provide at *a minimum* the degree of protection it afforded when it was adopted. [*Id.* (emphasis added).]

Stated another way, the trespassory test in Jones does not encapsulate the Fourth Amendment guarantee. The panel here, like Justice Alito's concurrence in Jones, mistakenly takes the interpretive test used in Jones, announcing it to be the Fourth Amendment principle of Jones. But the Fourth Amendment's protection cannot be reduced to a single judicially-adopted interpretive test, such as common-law trespass, even though that test may be sufficient to resolve "easy" cases such as Jones and Jardines. *See id.,* 133 S.Ct. at 1417. Jones did much more than simply apply a tort-based trespassory test. It restored the Fourth Amendment's property baseline to its original historic primacy, quoting Lord Camden's seminal opinion

in Entick v. Carrington, 95 Eng. Rep. 807 (C. P. 1765), that "'[O]ur law holds the property of every man [to be] sacred....'" Jones at 949.

II. THE PROPERTY RIGHT INVOLVED HERE IS IN ONE'S "PERSON."

The key question in this case is whether Defendants have a Fourth Amendment property right in CLSI information which they themselves generate by use of their cell phones. It is no accident that the list of protected interests under the Fourth Amendment begins with "person," as one's person is foremost among his property interests. Today, most would associate "person" with a so-called "right of privacy." But at the time the Fourth Amendment was ratified, the word "person" had a very different meaning and connotation, paralleling 17th-century property theories of John Locke:[4]

> every Man has a Property in his own Person. This no Body has any Right to but himself. The Labor of his Body and the Work of his Hands ... are properly his. [J. Locke, Second Treatise of Government, para. 27 (facsimile ed.), reprinted in J. Locke, Two Treatises of Government, pp. 287-88 (P. Laslett, ed., Cambridge Univ. Press: 2002).]

Locke reasoned that "being the Master of himself, and the Proprietor of his own Person, and the Actions ... of it," a man has "in himself the great Foundation of Property...." *Id.* at para. 44. Stanford University historian and Pulitzer Prize winner Jack Rakove explains that:

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[4] *See, e.g.,* B. Bailyn, The Ideological Origins of the American Revolution at 26-31 (Cambridge, Mass, 1967).

> For Locke ... the concept of property encompassed not only the objects a person owned but also the ability, indeed the right to acquire them. [J. Rakove, Revolutionaries. A New History of the Invention of America at 78 (New York: 2010) (emphasis added).]

Applying these principles here, the modern day cell phone enhances one's freedom of movement, and multiplies his opportunities to communicate. Both movement and communication are key elements of the property in one's own person, and both are expanded by the "cellular network," wherein strategically placed transmission towers extend the ability of a person both to communicate, and also to access his "papers," wherever he happens to be. *See* Riley v. California, 134 S.Ct. 2473, 2485 (2014). In Riley, the Supreme Court observed that "modern cell phones which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of **human anatomy**." *Id.* at 2484 (emphasis added). And as the panel recognized, "for an increasing portion of our society, [a cell phone] has become essential to full cultural and economic participation" (Graham, 796 F.3d at 355-56) — the very things of which Locke spoke.

Under the reasonable-expectation-of-privacy test, however, such "ubiquitous" use appears to be a barrier that must be overcome, as the more cell phones are used, the more it can be expected that the government will use them to spy on Americans. But as the panel acknowledged, "People cannot be deemed to have

volunteered to forfeit expectations of privacy[5] by simply seeking active participation in society through use of their cell phones." *Id.*, 796 F.3d at 356. As Defendants put it, "[l]iving off the grid ... is not a prerequisite to enjoying the protection of the Fourth Amendment." Defendants'/Appellants' Supplemental En Banc Brief ("Def. Supp. Br."), at 11.

While it may be true that a forcible government search for CSLI generated by the Defendants may not resemble a traditional physical common law trespass on the person, such government intrusion nonetheless gobbles up the geographical information created by the cell phone user, which is created by the "labor of his body and the work of his hands" — and at his expense. *See* Locke, *supra*.

III. THERE WAS A PHYSICAL INTRUSION ON DEFENDANTS' PROPERTY.

The panel assumes that this case does not involve a physical intrusion into a tangible object, such as in Jones. But that assumption is factually incorrect. The panel believed that Jones does not apply here, because Jones stated that

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[5] Under a privacy inquiry, however, people are discouraged from "cultural and economic participation." Indeed, privacy is all about requiring a person to withdraw unto himself and make an attempt to keep his activities secret from the world's prying eyes. A property inquiry, however, embraces a person to be an active participant in society, by putting limits on the government's ability to interfere with that participation. As Defendants note in their supplemental brief, "[c]ell phone users have no choice but to create CSLI, unless they opt out of modern society." Def. Supp. Br. at 11.

"[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis." *Id.* at 347 (Jones at 953). But this is not a case "involving merely the transmission of electronic signals."

Indeed, Graham's CLSI was not discovered just aimlessly floating around in the nethersphere. Nor is this a case where the government intercepted a transmission from Graham's phone from which it determined his location. Rather, the government sought historical records of Graham's location, which were stored on a Sprint hard drive — a tangible object. That is no different than if it had been stored on a piece of paper. Here, the government did not obtain that CLSI directly, but forced Sprint to do its dirty work. A Sprint employee no doubt sat down at a tangible computer, typed into a tangible computer keyboard, and pulled and compiled data about Graham from a tangible array of hard drives. This is no different than if the employee had gone into a filing room and rifled through boxes of papers to find Graham's CLSI. In other words, "It is important to be clear about what occurred in this case: The Government physically [invaded] private property for the purpose of obtaining information." Jones at 949.

Moreover, for the court to require there to be a physical intrusion onto a tangible object that can be seen by the human eye, like there was in Jones, is an absurd distinction in our atomic age. As the Oregon Supreme Court has observed:

> It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through **unseen physical** instrumentalities into the requirement that a trespass can result only from a *direct* invasion. [Martin v. Reynolds Metals Co., 342 P.2d 790, 793 (1959) (emphasis added).]

For example, if the police place a person in handcuffs, his "person" clearly has been seized for Fourth Amendment purposes. If, however, the police use an Active Denial System (energy weapon) or a Long Range Acoustic Device, both of which involve "merely the transmission of ... signals," no one would argue that the police have not interfered with one's "person" for Fourth Amendment purposes, even though there was no seeable physical intrusion like there was in Jones.

Respectfully submitted,

/s/ Robert J. Olson

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* complies with the page limitation set forth by Rule 29(d) and this Court's order of November 18, 2015, because this brief contains seven and one-half pages, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point Times New Roman.

/s/ Robert J. Olson

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Dated: January 22, 2016

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of DownsizeDC.org, *et al.*, in Support of Defendants-Appellants on Rehearing *En Banc*, was made, this 22nd day of January, 2016, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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