No. 17-3238

In the
United States Court of Appeals
for the Tenth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WALTER E. ACKERMAN,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Kansas, No. 13-cr-10176-01-EFM

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Defendant-Appellant and Reversal

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JOSEPH W. MILLER
Fairbanks, AK 99708
Co-counsel for Amicus Curiae RLAC

MARK FITZGIBBONS
Manassas, VA 20110
Co-counsel for Amici Curiae
FSC & FSDEF

HERBERT W. TITUS*
JEREMIAH L. MORGAN
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
Counsel for Amici Curiae

*Attorney of Record

April 13, 2018

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), it is hereby certified that the *amici curiae*, Downsize DC Foundation, DownsizeDC.org, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund are nonstock, nonprofit corporations having no parent corporation, and that there is no publicly held corporation owning any portion of, or having any financial interest in any of them. Restoring Liberty Action Committee is an educational organization.

/s/ Herbert W. Titus
HERBERT W. TITUS
Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae*, Downsize DC Foundation, DownsizeDC.org, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners Foundation, Gun Owners of America, Inc., 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. Restoring Liberty Action Committee is an educational organization.

Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. Central to that endeavor are efforts to protect the "unalienable Rights" recognized in and secured by the Bill of Rights. The instant case raises critical, contemporary questions regarding application of the Fourth Amendment to private digital communications (specifically, emails and email attachments). Some of these *amici* filed an *amicus* brief[2] in this case in the district court on April 10, 2017.

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[1] All parties have consented to the filing of this brief *amicus curiae*. 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.

[2] Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, U.S. District Court for the District of Kansas (Apr. 10, 2017).

Importantly, the Tenth Circuit expressly remanded the case to the district court to consider those questions in accordance with the textual and historic property basis of the Fourth Amendment recently reestablished by United States v. Jones, 565 U.S. 400 (2012) — a case in which all of these *amici* participated by filing *amicus* briefs at both the petition and the merits stages.[3] The property question posed here is whether the government's search of one's email for the purpose of obtaining information about private communication constitutes a physical intrusion (a trespass) on a constitutionally protected person, house, paper, or effect, thereby requiring a warrant and probable cause.

It is an unfortunate truth that the scope of Fourth Amendment rights is often defined in cases involving the commission of serious crimes. For example, United States v. Jones involved drug-related crimes. Nevertheless, these *amici curiae* are committed to protecting the constitutional rights of all against a government that operates in an increasingly intrusive and lawless fashion, and to stand by those constitutional protections irrespective of the nature of the

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[3] *See* Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Respondent (merits) (Oct. 3, 2011) http://www.lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf. *See also* Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* in Support of Neither Party (petition) (May 16, 2011), http://www.lawandfreedom.com/site/constitutional/USvJones_amicus.pdf.

underlying criminal charge. Here, the outer bounds of that principle are being tested, as these *amici* find those who trade in child pornography to be absolutely reprehensible. But allowing Defendant's heinous acts to excuse a warrantless search of private email communications would do violence to the Fourth Amendment protections which must be available to all Americans.[4] In short, the government's surveillance of private email in this case provides the Court with an important opportunity, and the responsibility, to apply profound Fourth Amendment principles to protect Americans against unconstitutional searches and seizures, necessitating the filing of this *amicus curiae* brief.

STATEMENT OF THE CASE

On April 22, 2013, Walter Ackerman attempted to send an email apparently containing four child pornography images. U.S. v. Ackerman, 2014 U.S. Dist. LEXIS 89243, *8 (D. Kan. 2014). AOL, Ackerman's Internet Service Provider ("ISP"), intercepted that email and scanned its attachments, one

[4] The Fourth Amendment protects "The right of the people…." As the Supreme Court stated in District of Columbia v. Heller, 554 U.S. 570 (2008), in all seven "provisions of the Constitution that mention 'the people,' the term unambiguously refers to **all** members of the political community, not an unspecified subset." *Id*. at 580 (emphasis added).

of which was flagged as possibly[5] containing "identified" child pornography.[6] U.S. v. Ackerman, 831 F.3d 1292, 1294 (8th Cir. 2016). AOL suspended Ackerman's Internet service, and then forwarded Ackerman's email to the National Center for Missing and Exploited Children ("NCMEC"). *Id.* NCMEC enjoys "law enforcement powers [well] beyond those enjoyed by private citizens" (*id.* at 1296), receives most of its funding from the federal government (2014 U.S. Dist. LEXIS 89243, *6), and essentially functions as an arm of federal law enforcement (*see* 831 F.3d at 1297-98).[7]

When NCMEC received AOL's report, an NCMEC employee opened Ackerman's email and all four attachments to determine if they "appeared to be"

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[5] AOL employed a hash value search of Ackerman's attachment that led only to a suspicion that it was child pornography. Even the AOL witness in district court made sure to point out that it was only "[a]lleged child pornography." Tr. at 84, l. 4.

[6] AOL maintains a database of "hash values," which are "string[s] of characters" that are unique to each picture — essentially, the picture's digital fingerprint. 831 F.3d at 1294.

[7] Federal law requires ISPs to report to NCMEC any child pornography concerning which it "obtains actual knowledge." 18 U.S.C. § 2258A(a). It is debatable whether a "hash value" match constitutes "actual knowledge," as opposed to mere suspicion, and thus debatable whether AOL was actually required to report Ackerman's email. Federal law expressly states that ISPs are not required to monitor their users. 18 U.S.C. § 2258A(f). Rather, AOL takes it upon itself to monitor its customers communications.

child pornography, and if verified to be such, to alert law enforcement. 831 F.3d at 1294. One month later, law enforcement obtained a warrant to search Ackerman's home. 2014 U.S. Dist. LEXIS 89243, *10. Ackerman was charged with possession and distribution of child pornography and, after the district court denied his motion to suppress the evidence, Ackerman pled guilty, reserving his right to appeal the constitutionality of the search of his email and attachments. 831 F.3d at 1294.

In denying Ackerman's motion to suppress in 2014, the district court "assume[d], without deciding, that Defendant has a reasonable expectation of privacy in his email." 2104 U.S. Dist. LEXIS at *11. Rather, it focused on whether AOL and NCMEC were state actors, concluding that they were not, and thus, that the Fourth Amendment did not apply to their actions.

On an earlier appeal in this case to this Court, Ackerman focused on the issue as to whether NCMEC was a state actor. His opening brief in that appeal did not "discuss[] expectations of privacy and the good-faith exception to the exclusionary rule … because the district court did not address them in its Order denying the motion to suppress." Ackerman Opening Brief, No. 14-3265 (Apr. 28, 2015) at 4 n.3.

This Court determined that (i) the NCMEC was acting as an arm of government when it opened the email attachment (*id*. at 1298), (ii) the NCMEC "review" of Ackerman's email almost certainly was a Fourth Amendment search (*id*. at 1304), (iii) it was highly likely that Ackerman had a reasonable expectation of privacy in his email (*id*. at 1306), and further (iv) that Ackerman may have a successful Fourth Amendment property claim under U.S. v. Jones, 132 S.Ct. 945 (2012). *Id*. at 1307-08.

With respect to Jones, this Court aptly stated:

> that government conduct can constitute a Fourth Amendment search *either* when it infringes on a reasonable expectation of privacy *or* when it involves a physical intrusion (a trespass) on a constitutionally protected space or thing ("persons, houses, papers, and effects") for the purpose of obtaining information. [*Id*. at 1307.]

In particular, this Court called the parties' attention to the property rights of Ackerman giving rise to a claim that:

> the warrantless opening and examination of (presumptively) private correspondence … could have contained much beside potential contraband for all anyone knew. And that seems pretty clearly to qualify as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment…. Of course, the framers were concerned with the protection of physical rather than virtual correspondence. But a more obvious analogy from principle to new technology is hard to imagine…. [*Id*. at 1307-08.]

On remand to the district court, the government largely ignored this Court's reference to Jones, addressing the issue in a single footnote focusing only on Ackerman's "standing" to raise the issue in light of the fact that Ackerman had no standing to bring a Fourth Amendment claim because "he neither controlled nor had constructive or actual possession of the email and images at the time of the purported intrusion…." U.S. Supplemental Response (Feb. 7, 2017) at 10 n.38.

In contrast, Ackerman fully briefed the district court on the Jones trespass theory, in full compliance with this Court's prior decision in this case. *See* Defendant's Brief on Remand (Apr. 10, 2017) at 2-9. In its reply, however, the government muddied the waters, claiming that Jones does not apply to this case and even asserting that the Tenth Circuit never said Jones applies. *See* U.S. Reply to Defendant's Brief on Remand (May 8, 2017) at 9-14. Instead, the government again claimed that Ackerman did not have "standing" to apply a property-based Fourth Amendment argument because he would not have had standing to sue for trespass to chattels under modern tort law. *Id*. at 14-18.

Although this Court previously stated that "we cannot see how we might ignore *Jones's* potential impact on our case" (831 F.3d at 1307), the district

court did exactly that, ruling that "Defendant did not have an objectively reasonable expectation of privacy in his email and the four attachments. Thus, NCMEC's search did not violate his Fourth Amendment rights." Memo. and Order (Oct. 30, 2017) at 2. In short, the district court wholly ignored the property trespass theory, despite this Court's strong invitation to address and resolve it on remand. *See* Aplt. Br. at 13.

ARGUMENT

I. THE DISTRICT COURT OPINION WAS BASED ON AN ERRONEOUS LEGAL PREMISE.

The district court ruling below rests solely and entirely upon the now erroneous legal premise that — as stated in United States v. Ruiz, 664 F.3d 833, 838 (10th Cir. 2012) — "'[a] search **only** violates an individual's Fourth Amendment rights if he or she has a legitimate expectation of privacy in the area searched.'" United States v. Ackerman, 2017 U.S. Dist. LEXIS 178925 at *7, n. 9 (emphasis added). Although this statement may have been "the law" in this Circuit on January 10, 2012 (when Ruiz was decided), 13 days later, on January 23, 2012, it ceased to be the law when the U.S. Supreme Court directly rejected the Government's contention that a Fourth Amendment search occurred only if

the Government intruded upon a person's "'reasonable expectation of privacy.'" *See* United States v. Jones, 565 U.S. 400, 406 (2012).

In Jones, the Government asserted "that no search occurred … since Jones had no 'reasonable expectation of privacy' in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible by all." *Id.* In response, the Court declined to "address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the [reasonable expectation of privacy] formulation." *Id.*

Instead, the Court ruled that whether a Fourth Amendment search had taken place depended initially on whether the search conducted constituted a "government trespass upon the areas ('persons, houses, papers, and effects') [the Fourth Amendment] enumerates." *Id.* The Jones Court acknowledged that "[o]ur later cases … have deviated from that exclusively property-based approach"; nevertheless, the Court maintained that one's "privacy expectation" was never intended as the constitutional touchstone of every Fourth Amendment search. *See id.* at 404-11. To the contrary, the Court explained that the "reasonable-expectation-of-privacy test has been *added to*, **not** *substituted for*,

the common law trespassory test." *Id.* at 409 (bold added). In effect, however, substitution is precisely what the district court did when it found that "Defendant did not have an objectively reasonable expectation of **privacy** in his email and [t]hus, [the Government] did not violate his Fourth Amendment rights." Ackerman at *2-*3 (emphasis added). At no point did the district court examine whether the defendant's interest in "his email" was constitutionally protected property interest in his "person[], house[], paper[], or effect[]," as required by Jones. *See* Jones at 404-05. Instead, the district court examined Defendant's interest in his email solely to determine if the AOL licensing conditions and uses comported with Defendant's "objectively reasonable expectation of privacy." *See* Ackerman at *7-*11. This was clear error.

Presented with the issue raised by Jones both by this Court's earlier opinion and by Mr. Ackerman's briefs, the district court chose to ignore the U.S. Supreme Court's opinion in Jones, not only in open disregard of the holding in that watershed case, but in open rebellion against the Supreme Court's reiteration of the Jones holding a year later in Florida v. Jardines, 569 U.S. 1 (2013), that the "reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment…." *Id.* at 11

(italics original). Thus, according to the U.S. Supreme Court, the Fourth Amendment's "baseline" is "property rights," as reflected in the Amendment's text of "persons, houses, papers and effects," not "privacy expectations" as reflected in the district court's opinion below. *See* Jardines at 5.

II. THE ISSUE OF ACKERMAN'S STANDING TO BRING A TORT CLAIM IS A RED HERRING.

On remand, the government initially attempted to use standing to bring a tort claim to constrict the Fourth Amendment's protection of private property — and this Court's understanding of United States v. Jones — characterizing this Court's prior discussion of Jones as follows:

> To the extent that the Tenth Circuit's opinion suggests that review of the copy of the email and images submitted to NCMEC might be considered a **trespass to chattels** under the framework of … *Jones*, **Ackerman would lack standing** to bring such a claim because he neither controlled nor had constructive or actual **possession** of the email and images at the time of the purported intrusion…. [U.S. Supplemental Response (Feb. 7, 2017) at 10 n.38 (emphasis added).]

The government's supplemental response provided no other explanation or analysis in support of its assumption that Ackerman had no property interest in his own emails.

As Blackstone observed in his Commentaries, some property "is not capable of being under the absolute dominion of any proprietor." Multiple persons can have an interest in the same property:

> As in case of *bailment*, or delivery of goods to another person for a particular use … there is no absolute property in either the bailor or the bailee … for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away…. [2 Blackstone's Commentaries at 395-96.]

Applying this lesson in the common law of bailment to the email contract between AOL and Defendant, Defendant has secured access to the Internet enabling him to enhance his communicative activities in both volume and expediency, while AOL has laid down certain conditions limiting Defendant's email use. Both have property rights, one against the other, as well as rights against a third party who would undermine those contracted-for services. Therefore, both would be "entitled to an action" designed to protect the property interests established by their email contractual agreement.

In the Government's reply, however, it contended that Ackerman must have standing to bring a trespass claim **in a tort case** in order for him to be able to raise a property and trespass-based Fourth Amendment violation. *See* U.S.

Reply (May 8, 2017) at 14. The Government failed to demonstrate how a civil plaintiff's tort standing limits a criminal defendant's ability to raise a claim of a Fourth Amendment violation. Instead, it jumped headlong into an analysis of the issue it raised — whether Ackerman himself had standing to bring a tort claim: "The existence of a sufficient possessory interest is essential to a claim for trespass to chattels, under modern tort law and at common law." *Id*.

The Government cited to Jones's language regarding standing, but most of those citations involved the Court distinguishing cases where a defendant did **not** have a possessory interest at the time of the governmental trespass. Nevertheless, the Supreme Court expressly disclaimed any expression of the law on that matter: "We therefore do not consider the Fourth Amendment significance of Jones's [ownership] status." Jones at 404 n.2.

Some of the confusion of the standing issue seems tied to a brief reference in this Court's earlier opinion in this case, which noted that the holding of United States v. Jacobsen, 466 U.S. 109 (1984), has been cast in doubt by Jones, and noted that common law trespass had a lower threshold than modern tort law. Ackerman at 1307. This Court then cited Justice Alito's **concurring** opinion in Jones, which discussed application of tort law. But it was the five-member

majority of Jones that is controlling, and that majority expressly rejected the concurrence's rejection of any recognition of an alternative Fourth Amendment based on the original understanding of common law trespass to property.

Standing for purposes of a motion to suppress evidence in a criminal context is a much different, simpler concept than plaintiff tort standing. In support of its standing argument, the Government's reply below discusses the Ninth Circuit ruling in Lyall v. City of Los Angeles, 807 F.3d 1178 (9th Cir. 2015), which applied Jones.[8] In answering the question of who may raise a claim of an unlawful search or seizure, Lyall applied a different Supreme Court Jones case:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. [Jones v. United States, 362 U.S. 257, 261 (1960).]

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[8] To be sure, Lyall did consider the standing of several groups of individuals who claimed that their Fourth Amendment rights had been violated. One group of individuals were guests who had no possessory interest at the location, while another group had received permission from the owner of the property to host an event there. The Ninth Circuit held that the former group asserted no ownership interest, and thus had no claim under a Jones trespass test, while the latter group did have a claim under Jones.

Ackerman met this standard. He created and owned the email (even if he was dispossessed of it), and a search occurred. It was beyond doubt to this Court that Ackerman had "standing" to bring a Fourth Amendment claim, including one based on Jones's property-based trespass test. "[W]hether we analyze the 'search' question through the lens of … *Jacobsen* and *Katz* … or through the lens of the traditional trespass test suggested by *Jones*, they yield the same (and pretty intuitive) result: NCMEC conducted a '**search**' when it opened and examined **Mr. Ackerman's** email." Ackerman at 1308 (emphasis added).

The majority in Jones stated, "The concurrence begins by accusing us of applying '18th-century tort law.' That is a distortion." *Id*. at 411 (citation omitted). The Government now attempts to assert that some distortion in this case, and it should be rejected.

III. FEDERAL COURTS MUST ACCEPT THAT THE JONES DECISION RETURNED FOURTH AMENDMENT JURISPRUDENCE TO ITS PROPERTY FOUNDATION.

Fourth Amendment Supreme Court jurisprudence has undergone significant swings since that Amendment's ratification as part of the Bill of Rights on December 15, 1791. As explained in Section I, *supra*, the most recent

course correction occurred in a 2012 landmark Supreme Court case entirely disregarded by the district court.

Unlike prior changes in direction in which the Supreme Court moved away from the text and original meaning of the Fourth Amendment, the Court's Jones decision was designed to reverse that trend and return the federal judiciary to the plan articulated by the framers. Sadly, the history of the Fourth Amendment, even as it was understood prior to 1967, has been lost on those who graduated from law school in the last half-century, who obviously make up the vast bulk of currently active lawyers, law professors, judges, and even elected officials. However, the outcome of this case may well depend on whether this Court fully understands and appreciates what the district court ignored — the significance of what the High Court did in the Jones case, as well as in its re-affirmation the very next year in Florida v. Jardines, 569 U.S. 1 (2013).

A. The Initial and Long-Established Understanding of the Fourth Amendment.

The Fourth Amendment contains two separate clauses, and states that:

> 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.

The framers' belief that the liberty of the people would rise or fall on the protections identified and protected in Fourth Amendment cannot be overstated. In his Treatise on Constitutional Limitations, renowned constitutional scholar Thomas Cooley ranked the Fourth Amendment guarantee of "citizen immunity in his home against the prying eyes of the Government, and protection in person, property, and papers against even the process of law" **next in importance to the constitutional ban on personal slavery**. Thomas Cooley, A Treatise on Constitutional Limitations, 365 (5th ed., The Lawbook Exchange:1883).

The Supreme Court described the Fourth Amendment's prohibition against "unreasonable searches and seizures" as being the direct outgrowth of an abusive government practice:

> of issuing **writs of assistance** to the revenue officers, empowering them, in their discretion, to search suspected places **for smuggled goods**, which James Otis pronounced **"the worst instrument of arbitrary power, the most destructive of English liberty,** and the fundamental principles of law, that ever was found in an English law book." [Boyd v. United States, 116 U.S. 616, 625 (1886) (emphasis added).]

While today's invasive searches are often described as modern writs of assistance, in truth they are much worse. In the founding era, the dread writs of assistance were limited to searches "for smuggled goods." They did not

authorize the seizing of an individual's private papers and communications, as now has become common under modern Fourth Amendment jurisprudence. It was understood for a hundred years that even with a warrant, the government had no authority to search and seize private papers under the Court's long-held "mere evidence rule" first comprehensively articulated in a seminal case — Boyd v. United States, *supra*.

B. The Fourth Amendment's Property Foundation Is Incorporated in the Mere Evidence Rule.

The first component of the Fourth Amendment limits the government as follows: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…." From the ratification of the Constitution until 1967, the mere evidence rule provided that searches for items in which the government did not have a superior property interest were "unreasonable" *per se*, and could not be cured even by a warrant which met Fourth Amendment standards. Under that rule, even search warrants:

> may **not** be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure **evidence** to be used against him in a criminal or penal proceeding, but that they may be resorted to **only when a primary right** to such search and seizure may be found in the interest which the public or

> the complainant may have **in the property** to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. [Gouled v. United States, 255 U.S. 298, 309 (1921) (emphasis added).]
>
> The Fourth Amendment made a clear distinction between:
>
> [i] merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand,
> [ii] those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.[9] [Warden v. Hayden, 387 U.S. 294, 296 (1967).]

The government could only search for and seize property in which it had a superior property right:

> The Fourth Amendment ruling in *Gouled* was based upon the dual, related premises that historically the right to search for and seize **property** depended upon the assertion by the Government of a **valid claim of superior interest**, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals. The common law of search and seizure after *Entick* v. *Carrington*, 19 How. St. Tr. 1029, reflected Lord Camden's view, derived no doubt from the political thought of his time, that the "great end, for which men entered into society, was to secure their property." [*Id*. at 303 (emphasis added).]

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[9] It is understood this case involves contraband, but this case involves a warrantless search.

So unquestioned was this property rule that it was not until 1863 that there even was any law in England or the United States:

> which authorized the search and seizure of a man's **private papers** … for the purpose of using them in **evidence** against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. **Even the … obnoxious writs of assistance … did not go as far as this**…. [Boyd at 622-23 (emphasis added).]

C. The Court's Abandonment of the Mere Evidence Rule.

Although the mere evidence rule had been eroded by a series of Supreme Court decisions allowing for searches of, for example, highly regulated businesses, its end did not fully come until 1967. In Warden v. Hayden, 387 U.S. 294 (1967), Justice William J. Brennan — writing for a bare majority of five justices — claimed dissatisfaction with the "fictional and procedural barriers rest[ing] on property concepts," and jettisoned the time-honored rule that a search for **"mere evidence**" was *per se* "unreasonable." *Id*. at 304 (emphasis added). Justice Brennan claimed that the distinction between (i) "mere evidence" and (ii) "instrumentalities [of crime], fruits of crime, or contraband" was "**based on premises no longer accepted** as rules governing the application of the Fourth Amendment." *Id*. at 300-01 (emphasis added).

Discarding the notion that the Fourth Amendment requires the government to demonstrate that it has a "superior property interest" (Hayden at 303-304) in the thing to be seized, Justice Brennan promised that his new privacy rationale would free the Fourth Amendment from "irrational," (*id*. at 302) "discredited," (*id*. at 306) and "confus[ing]" (*id*. at 309) decisions of the past, and thereby would provide for a more meaningful protection of "the principal object of the Fourth Amendment [—] the protection of privacy rather than property." *Id.* at 304.

Concurring in the result, but not in the reasoning, Justice Fortas (joined by Chief Justice Earl Warren) stated that he "cannot join in the majority's broad — and … totally unnecessary — repudiation of the so-called 'mere evidence' rule." *Id.* at 310 (Fortas, J., concurring):

> I fear that in **gratuitously striking down the "mere evidence" rule**, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court today **needlessly destroys, root and branch, a basic part of liberty's heritage**. [*Id.* (Fortas, J., concurring) (emphasis added).]

D. The Court's Adoption of the Reasonable Expectation of Privacy Test.

Only six months after Warden v. Hayden was decided, the Supreme Court in Katz v. United States, 399 U.S. 347 (1967), further severed the Fourth Amendment from its property roots when it established the "reasonable expectation of privacy test" that governed many types of Fourth Amendment challenges until Jones was decided in January 2012. Hayden at 360, 362 (Harlan, J., concurring).

E. The Return to the Fourth Amendment's Foundational Property Principle in Jones.

In Jones, the property question was the second issue on which *certiorari* was granted. The Government's opening brief trivialized the matter of the installation of the tracking device as neither a search nor a seizure — a meaningless interference with Jones's "possessory interest in [his] vehicle."[10] The Government mentioned the word "property" twice in its four-page analysis.[11] Jones's Brief for Respondent stressed his common-law right to

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[10] United States v. Jones, Brief for the United States at 39 (Aug. 11, 2011).

[11] *See id.* at 42-46.

exclude others from any interference with his possessory interest.[12] The Government replied:

> While the GPS device was in place, respondent remained free to use his vehicle however he wanted. He went where he wanted, he transported anyone and anything he wanted, and none of the operational systems of the vehicle were affected in any way.[13]

Despite this one exchange, and Jones's discussion of property interests generally, Jones's property claim did not play a major role in either party's merits brief. Rather, both parties were understandably preoccupied with winning their case under established Supreme Court Fourth Amendment jurisprudence — whether the GPS tracking device infringed upon Jones's reasonable expectation of privacy.

It came as no surprise that, at oral argument, counsel for the Government began with a citation to Katz v. United States, stating "that visual and beeper surveillance of a vehicle traveling on the public roadways infringed no Fourth Amendment expectation of privacy."[14] What was surprising, however, was how

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[12] United States v. Jones, Brief for Respondent at 47-48 (Sept. 26, 2011).

[13] United States v. Jones, Reply Brief of Petitioner United States at 18.

[14] Transcript, Oral Argument United States v. Jones (Tr.), p. 3, ll. 11-12, 20-23 (No, 10-1259: Nov. 8, 2011) http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf.

quickly the property question came into play. Just minutes after Government counsel had come to the podium, Justice Scalia interrupted with a revealing historical "prologue" to a simple question:

> When … wiretapping first came before this Court, we held that it was not a violation of the Fourth Amendment because the Fourth Amendment says that the … "the people shall be secured in their persons, houses, papers and effects against unreasonable searches and seizures; and wiretapping just picked up conversations. That's not persons, houses, papers and effects.
>
> Later on, we reversed ourselves and, as you mentioned, **Katz** established the new criterion, which is, is there an invasion of **privacy**? Does … obtaining information that a person had a reasonable expectation to be kept private? I think **that was wrong**. **I don't think** that was the **original meaning** of the Fourth Amendment. But nonetheless it's been around for so long, we are not going to overrule that.
>
> However, it is one thing to **add** that privacy concept to the Fourth Amendment as it originally existed and it is quite something else to use that concept to **narrow** the Fourth Amendment from what it originally meant. And it seems to me that when that device is installed against the will of the owner of the car on the car, that is unquestionably a **trespass** and thereby rendering the owner of the car not secure in his effects … against an unreasonable search and seizure. It is attached to the car against his will, and it is a search because what it obtains is the location of that car from there forward. Now, why … isn't that correct? Do you deny that it's a trespass?[15]

Government's counsel readily admitted that "[i]t may be a technical trespass," but that "the Fourth Amendment is to protect privacy interests and

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[15] Tr., p. 6, l. 8 - p. 7, l. 12 (emphasis added).

meaningful interferences with possessory interests, not to cover all technical trespasses."[16] To which Justice Scalia responded: "So … privacy rationale doesn't expand [the Fourth Amendment] but narrows it in some respects."[17] Fudging the question, government counsel replied: "It changes it."[18]

In his opinion for the Court, after quoting the Fourth Amendment, Justice Scalia observed:

> The text of the Fourth Amendment reflects its **close connection to property**, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. [Jones at 405 (emphasis added).]

Immediately preceding this textual analysis, Justice Scalia appealed to history, citing Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765), as quoted in Boyd v. United States, and as affirmed in Brower v. County of Inyo, 489 U.S. 593 (1989). Justice Scalia declared Entick to be a "'monument of English freedom' … with regard to … the significance of property rights in search-and-seizure analysis…" (*id*. at 405) quoting from that decision to say:

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[16] Tr., p. 7, ll. 13-14; p. 8, ll. 9-13.

[17] Tr. p. 8, ll. 16-18.

[18] Tr. p. 8, l. 19.

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread on his neighbor's ground, he must justify it by law. Entick, *supra,* at 817. [*Id*.]

Sticking with the modern "reasonable expectation of privacy" rationale, four justices found in favor of Jones because "a reasonable person would not have anticipated" the "degree of intrusion" found here — "four weeks …track[ing] every movement that respondent made in the vehicle he was driving." *Id*. at 430. The minority concurring justices candidly recognized that they could not draw a firm line when GPS tracking would cross over the constitutional privacy line, and acknowledged that their test was "not without … difficulties," "involv[ing] a degree of circularity," which tempted "judges … to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks." *Id.* at 427.

What appeared to unite the four concurring justices was not a preference for the *Katz* test, but their anathema toward the private property-based majority opinion, accusing their colleagues of "decid[ing] this case based upon 18th-century tort law" for conduct that might have given rise to "a suit for trespass to

chattels." *Id*. at 418-19. This sharp critique was met head-on by Justice Scalia's majority opinion:

> That is a distortion. 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.** The concurrence does not share that belief. It would apply *exclusively Katz's* **reasonable-expectation-of-privacy test**, even when that **eliminates rights that previously existed.** [*Id*. at 411 (emphasis added).]

This exchange reveals that the five-member majority did not subscribe to its opinion solely to dispose of the case before them (as the concurring opinion did), but to take a first step to restore the Court's Fourth Amendment jurisprudence to its textual and historic foundation — a foundation rooted in the common law of private property. On this point, Justice Scalia and his four colleagues were adamant.

Having established the property principle as the basic standard by which claims of search and seizure under the Fourth Amendment are to be measured, Justice Scalia turned to the role that the Katz reasonable-expectation-of-privacy test was to play in the future. First, he noted what that test cannot do, namely, "narrow the Fourth Amendment's scope." Jones at 408. Next, he explained

why: "The Katz reasonable-expectation-of-privacy test has been *added* to, not *substituted* for, the common-law trespassory test."[19] Jones at 409.

In her separate concurrence, Justice Sotomayor (who also joined wholeheartedly with the majority) emphasized the doctrinal significance of the majority's fresh textual and historic commitment:

> Justice Alito's approach, which discounts altogether the constitutional relevance of the Government's physical intrusion on Jones' Jeep, erodes that longstanding protection for **privacy expectations inherent in items of property** that people possess or control…. By contrast, the **trespassory test** applied in the majority's opinion reflects an **irreducible constitutional minimum**: When the government physically invades personal property to gather information, a search occurs. [Jones at 414 (emphasis added).]

F. The Judicial Duty.

Fresh upon his return as Chief Prosecutor at the Nuremburg Trials and highly sensitive to the manner in which the German people had lost their liberties, Associate Justice Robert Jackson penned his famous dissent in a Fourth Amendment case which he believed had allowed those rights to be eroded.

> These, I protest, are not mere second-class rights but **belong in the catalog of indispensable freedoms**. Among deprivations of rights, none is so effective in **cowing a population, crushing the**

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[19] Justice Sotomayor characterized the majority's approach as follows: "*Katz's* reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it." *Id.* at 414.

> **spirit of the individual and putting terror in every heart.** Uncontrolled search and seizure is **one of the first and most effective weapons in the arsenal of every arbitrary government**. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that **the human personality deteriorates and dignity and self-reliance disappear** where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police. [Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting) (emphasis added).]

After setting out the significance of the right to a free people, Justice Jackson then explained why it is the unique responsibility of the judiciary to keep government within the bounds of the Fourth Amendment:

> But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, **there is no enforcement outside of court**. [*Id*. at 181.]

These *amici* urge this Court to take up and discharge that unique responsibility and to use the power that Justice Jackson identified: "Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty."[20] *Id*. at 181.

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[20] This section of the *amicus* brief draws significantly from a law review article by two of the counsel for *amici*. H. Titus & W. Olson, "United States v. Jones: Reviving the Property Foundation of the Fourth Amendment," 3 CASE W. RES. J.L. TECH. & INTERNET 243 (2012).

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

/s/ Herbert W. Titus

HERBERT W. TITUS*
JEREMIAH L. MORGAN
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
Attorneys for Amici Curiae

JOSEPH W. MILLER
Fairbanks, AK 99708
Attorney for Amicus Curiae RLAC

MARK FITZGIBBONS
Manassas, VA 20110
Attorney for Amici Curiae
FSC & FSDEF

*Attorney of Record
April 13, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Downsize DC Foundation, *et al.*, in Support of Defendant-Appellant and Reversal complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 6,486 words, excluding the parts of the brief exempted by Rule 32(f).

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 18.0.0.200 in 14-point CG Times.

/s/ Herbert W. Titus

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Herbert W. Titus
Attorney for *Amici Curiae*

Dated: April 13, 2018

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Downsize DC Foundation, *et al.*, in Support of Defendant-Appellant and Reversal, was made, this 13th day of April 2018, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ Herbert W. Titus

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Herbert W. Titus
Attorney for *Amici Curiae*

CERTIFICATE OF DIGITAL SUBMISSION

I HEREBY CERTIFY that with respect to the foregoing Brief *Amicus Curiae* of Downsize DC Foundation, *et al.*, in Support of Defendant-Appellant and Reversal, all required privacy redactions have been made, and that the hard copies being submitted to the clerk's office are exact copies of the electronic version. I FURTHER CERTIFY that the digital submission of this document has been scanned for viruses with scanning program Symantec Endpoint Protection, version 14, most recently updated on April 12, 2018, and according to the program, the file is free from viruses.

/s/ Herbert W. Titus
HERBERT W. TITUS
Attorney for *Amici Curiae*