No. 16-402

IN THE

Supreme Court of the United States

TIMOTHY IVORY CARPENTER, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

Brief *Amicus Curiae* of United States Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Citizens United, Citizens United Foundation, Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, The Heller Foundation, and Policy Analysis Center in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

U.S. Justice Foundation, Gun Owners Foundation, Citizens United Foundation, Downsize DC Foundation, Conservative Legal Defense and Education Fund, The Heller Foundation, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc., Citizens United, and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4).

These legal and policy educational organizations were established, *inter alia*, for purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Many of these *amici* also filed *amicus* briefs in other Fourth Amendment cases involving cell site location information ("CSLI"), including two briefs in United States v. Graham, and one in United States v. Zodhiates:

- United States v. Graham, U.S. Court of Appeals for the Fourth Circuit (Jan. 22, 2016) (Brief *amicus curiae* of DownsizeDC.org, *et al.*).

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- Graham v. United States, U.S. Supreme Court (Nov. 3, 2016) (Brief *amicus curiae* of U.S. Justice Foundation, *et al.*).

- United States v. Zodhiates, U.S. Court of Appeals for the Second Circuit (July 5, 2017) (Brief *amicus curiae* of Downsize DC Foundation, *et al.*).

Additionally, these *amici* filed *amicus* briefs in the U.S. Supreme Court in United States v. Jones, 132 S.Ct. 945 (2012), at both the petition stage and the merits stage:

- Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* in Support of Neither Party, On Petition for Writ of Certiorari (May 16, 2011).

- Brief *Amicus Curiae* of Gun Owners of America, *et al.*, in Support of Respondent, On Writ of Certiorari (Oct. 3, 2011).

SUMMARY OF ARGUMENT

The decision of the Sixth Circuit demonstrates once again that old habits die hard. Despite this Court's clear and unambiguous revitalization of the textual and historic property basis of the Fourth Amendment in United States v. Jones, and again in Florida v. Jardines, the Sixth Circuit fell back upon the familiar "reasonable expectation of property" created out of whole cloth in Katz v. United States. Inverting this Court's two-step process to evaluate

Fourth Amendment challenges, the court below failed to properly evaluate whether defendants had a property interest in its CSLI, and concluded only that they had no protected privacy interest.

Had the court below conducted a proper analysis, it would have found that defendants had two types of interests that are protected from Fourth Amendment searches and seizures. First, the warrantless search of their CSLI violated the defendants' property right in their persons. At the time of the ratification of the Fourth Amendment, it was generally understood that each person had a protected property interest not just in the things he owned, but first, as the Fourth Amendment text makes clear, in his "person." As made clear by giants like Blackstone and Locke, his right to his person encompassed his right to the labor of his body, his freedom of movement, and his right to communicate with and interact with others.

Second, the warrantless search of defendants' CSLI intruded on protected "papers" and "effects," especially when that data revealed to the government what this Court in Riley v. California described as "the privacies of life." That location data was of the same nature as, even though somewhat less precise than, the GPS data collected about Antoine Jones, deemed to be protected by this Court in 2008. It makes no difference whatsoever that this information did not include the "content" of those communications, for disclosure of location data clearly chills associational and expressive freedoms, in addition to violating the Fourth Amendment.

Lastly, as both this Court and Petitioner's brief have noted, cellular phones have become integral and indispensable to full participation in American society. The government contends that defendants' transmission of CSLI was "voluntary," and its collection by cell phone providers was for the "business purposes" of their cellular providers. However, the government certainly cannot rely on supposed voluntary submission of data to a cell phone provider when it was the federal government that designed the very system of cell phone use that now exists. For nearly a century, the Federal Communications Commission has been given, and exercised, sweeping powers over the nation's airwaves, designating various radio frequencies for specific uses by specific users. Justice Douglas famously described the airwaves as "the common heritage of all the people," yet the FCC has sold cellular frequencies to the cellular providers, and prohibited Americans from using them unless via those government gatekeepers. Now, rather than those frequencies being freely accessible by "all the people," Americans instead must deal with the cellular companies who control them, and the FCC protects these monopolies from competing and emerging technologies. What's more, it was Congress that initially made the push for the creation of location information, and required cellular companies to collect it under certain circumstances.

Indeed, in order to communicate in today's modern world, defendants were forced onto government-controlled airwaves, on a government-approved cellular network, using government-mandated technology, transmitting government-

required location data. Under such a system of pervasive control, the Orwellian tracking of Americans cannot be justified on a theory which presumes voluntary action and consent. Legalization of constitutional violations does not make them constitutional.

ARGUMENT

I. THE COURT BELOW ERRONEOUSLY UTILIZED PRIVACY INSTEAD OF PROPERTY AS THE FOURTH AMENDMENT BASELINE.

A. United States v. Jones Restored the Fourth Amendment Property Principle.

As advocates and judges, we would do well to remind ourselves that the Fourth Amendment guarantee of "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" was written and ratified in the days of Sir William Blackstone's Commentaries on the Laws of England, a century before Louis D. Brandeis' celebrated Harvard Law Review essay on "The Right to Privacy"[2] was published. In Blackstone's time, as this Court recognized in United States v. Jones, 565 U.S. 400 (2012), the common law backdrop to the Fourth Amendment was Lord Camden's declaration in the 1765 case of Entick v. Carrington that "our law holds

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[2] S.D. Warren and L.D. Brandeis, "The Right to Privacy," HARV. L.REV., vol. IV, no. 5 (Dec. 15, 1890).

the property of every man [to be] sacred." *Id.* at 95 Eng. Rep. 807, 817 (C.P. 1765). Yet, as Justice Scalia observed in Jones, in the 21st century, the Fourth Amendment's "close connection to property" was in danger of being overrun by a judicially invented test connecting the Amendment only to "privacy," not property. *Id.* at 405-08.

Indeed, birthed by this Court in 1967 in Katz v. United States, 389 U.S. 347 (1967), the critical issue whether a search or seizure has taken place came to depend upon whether one had a "reasonable expectation of privacy" — as if the underlying principle of the Fourth Amendment was to be found in future Justice Brandeis' "deep-seated abhorrence of the invasions of social privacy."[3] But the touchstone of the Fourth Amendment is not Brandeis' preoccupation with a "right to be let alone" — a respite from the hustle and bustle of daily life. Rather, the Amendment reflects Blackstone's affirmation of the duty of civil society to protect the people's active and full participation in the nation's economic life according to the "absolute right, inherent in every Englishman ... that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of

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[3] Letter from L.D. Brandeis to S.D. Warren (Apr. 8, 1905), p. 303 in *Letters of Louis Brandeis, 1870-1907: Urban Reformer,* Vol. 1 (Urofsky & Levy eds. 1971) as cited in Dorothy J. Glancy, "The Invention of the Right to Privacy," 21 ARIZ. L. REV. 1, 6 (1979) ("The right to privacy is, as a legal concept, a fairly recent invention. It dates back to a law review article published in December of 1890 by two young Boston lawyers, Samuel Warren and Louis Brandeis.").

the land" — a right that cannot be compromised by civil government.

> So great ... is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. [1 Blackstone's Commentaries at 134-35.]

In Jones, the Supreme Court recharted its Fourth Amendment path, reasserting that the original text was plainly designed to protect private property, not privacy.[4] *See* Jones at 404-08. *See also* Florida v. Jardines, 133 S.Ct. 1409, 1414, 1417 (2013). Thus, the Court consigned the reasonable-expectation-of-privacy test to a secondary role, not the *sine qua non* as to whether there was a Fourth Amendment search. Jones at 406. In sum, the Court ruled in Jones, the privacy test functioned only as an add-on, but not a substitute for, the common law property rights of the people in their persons, houses, papers, and effects, as reflected in the private property principles, such as those stated in Blackstone's Commentaries. *See* Jardines at 1414-15.

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[4] *See generally* H. Titus & W. Olson, "*United States v. Jones*: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE J. OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Spring 2012).

B. The Sixth Circuit Elevated the Judicially Created Privacy Test Over the Fourth Amendment's Property Principles.

Although the court below acknowledged this Court's return to the Fourth Amendment's founding private property principle, it did so half-heartedly, conceding that the property principle applied only to a limited class of "government trespasses." United States v. Carpenter, 819 F.3d 880, 886 (6th Cir. 2016). However, the court claimed the Supreme Court has moved "beyond a property-based understanding of the Fourth Amendment, to protect certain expectations of privacy as well." *Id.* Consequently, the court below erroneously assumed that the only Fourth Amendment interest at stake is whether the Defendants have "asserted [a] privacy interest in information related to personal communications." *Id.* at 886. *See also id.* at 888-90. Unsurprisingly then, the court simply announced that the "defendants **of course** lack any property interest in cell-site records created and maintained by their wireless carriers." *Id.* at 888 (emphasis added). Having limited the scope of the Defendants' privacy interest to the "content" of their communications, the court below dismissed without discussion any claimed property interest that the Defendants might have in the "information that facilitate[s] ... the communication." *See id.* at 887.

The lower court's only mention of property rights is confusingly intermixed with its discussion of privacy rights. The court asserted that "defendants ... lack any **property interest**" and then — after conducting an entirely **privacy**-based analysis — concluded that

"[t]hus ... defendants have no such ... **expectation of privacy** ... in the locational information here." *Id.* at 888 (emphasis added). Having posited that the cell phone user has no property interest in the CSLI independent of any reasonable expectation of privacy in "location information," the court below would, of course, find no violation of the Fourth Amendment. *Id.* at 888.

Even the lower court's privacy reasoning, used to decide the property issue, is suspect. Relying on Smith v. Maryland, 442 U.S. 735 (1979), the Sixth Circuit claims that a cell phone user "must know" or "should know" that his CSLI is being conveyed to third persons and thus available to others. That is not the same as "'voluntarily convey[ing]'" that information under Smith. *Id.* at 888. But, more importantly, what a person "must know" or "should know" about a service provider's action is wholly irrelevant to a proper property analysis. Rather, a person's knowledge about the realities of modern society has everything to do with whether he has a "reasonable expectation of privacy." Indeed, Smith cannot be "binding precedent," having been decided at the height of this Court's experiment with privacy at a time that the Fourth Amendment's property "baseline" was being completely ignored. A privacy-based decision simply cannot resolve a post-Jones Fourth Amendment property case.

The court below decided that, because Defendants had no protected privacy interest in the information that facilitates a communication, they "could not claim that 'his "property" was invaded' by the State's

actions." *See* Carpenter at 887. This was clear error. Treating the baseline Fourth Amendment inquiry to be one of privacy, the court below violated the property baseline teaching of Jones and Jardines. According to Jones, whatever privacy interest Defendants may have in their CSLI is a fall-back, to be assessed only when, and if, the court has found no protectable property interest. *See, e.g.,* Florida v. Jardines at 1417. These principles were not followed below.

The court below would have us understand that the Jones decision is simply an application of the common law rule of trespass. Thus, the court below would shrink Jones to its bare-boned facts. *See* Carpenter at 888-89. But Jones itself refuted this idea, noting that the Fourth Amendment property principle cannot be captured by an "'18th-century tort law'" test. Jones at 411. 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.* (bold added; italics original).]

Stated another way, the trespassory test applied in Jones does not wholly encapsulate the Fourth Amendment guarantee. However, the court below, like Justice Alito's concurrence in Jones, mistakenly takes the interpretive trespassory test applied 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, as reflected in Lord Camden's seminal opinion in Entick v. Carrington, *supra*, and in Blackstone's Commentaries. Nothing short of a textual analysis of the Amendment's property terms — "persons, houses, papers, and effects" — is sufficient. *See, e.g.,* Jones at 404 ("It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment."). *See also* Jardines at 1414-15 ("[T]he identity of home and what Blackstone called the 'curtilage or homestall,' for the 'house protects and privileges all its branches and appurtenants.").

II. THE WARRANTLESS SEARCH VIOLATED DEFENDANTS' FOURTH AMENDMENT PROPERTY RIGHTS IN THEIR PERSONS.

The key Fourth Amendment question in this case is whether Defendants have a Fourth Amendment property right in CSLI information which they themselves generated by use of their cell phones. *See* Carpenter at 885-86. According to the court below, the "cell-site data," although generated by Defendants' movements, "took the form of business records created and maintained by the defendants' wireless carriers." *Id.* at 885-86. Thus, the lower court dismissively declared that "defendants of course lack any property

interest in [such] cell-site records." *Id.* at 888 (emphasis added). Why is this so? Have the cell phone users no recognizable interest protected by the Fourth Amendment in a record of their movements and communications? If defendants had not purchased cell phones and contracted with cell phone providers, there would have been no "cell-site records" of any type either "created" or "maintained" by the service provider, and the location of each call would not have been recorded but for the making or receiving of such calls by defendants.

According to Blackstone, one of the three absolute rights of a "person" includes the "power of loco-motion, of changing situation, or removing one's **person** to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 Blackstone at 130. Another right of personhood includes the "free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." *Id.* at 134. Both of these rights — of movement and commerce[5] — are rights of persons as recognized by the common law and thus are protected by the Fourth Amendment which identifies one's person as foremost among the property interests of the people. Today, many would associate "persons" with only a "right of privacy." But at the time the Fourth Amendment was ratified, the word "person" had a very different

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[5] Webster's 1828 dictionary defines "commerce" as "an interchange or mutual change of goods ... property of any kind, between ... individuals ... by purchase and sale; trade; traffick."

meaning and connotation, paralleling 17th-century property theories of John Locke:[6]

> 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).]

Further, 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:

> 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 (Houghton Mifflin Harcourt: 2010).]

Applying these principles here, the modern day cell phone enhances one's freedom of movement, and multiplies one's opportunities to communicate. Both movement and communication are key elements of the property in one's own person, and both are expanded

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

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 ... 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). Under the reasonable-expectation-of-privacy test, however, such "ubiquitous" use appears to be a reason to narrow Fourth Amendment protections, as the more cell phones are used, the more it can be expected that the government will use them to spy on Americans.[7]

Although 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*. Therefore, access by the government to such information, without a warrant and probable

[7] The effect of a privacy-based test is that people are discouraged from "cultural and economic participation." Indeed, privacy requires a person to withdraw unto himself from society and make an attempt to keep his activities secret from the world's prying eyes. A property inquiry, however, embraces a person as an active participant in society, by putting limits on the government's ability to interfere with that participation.

cause, is a search of one's person in violation of the Fourth Amendment.

III. THE WARRANTLESS SEARCH OF THE CSLI DATA VIOLATED DEFENDANTS' FOURTH AMENDMENT PROPERTY RIGHTS IN THEIR PAPERS AND EFFECTS.

As ably argued in his opening brief, Petitioner has demonstrated that the warrantless search for, and seizure of, his CSLI information violates his Fourth Amendment protected property rights in his "papers and effects." *See* Brief for Petitioner ("Pet. Br.") at 32-35. These *amici* agree. *Amici* would add to the authorities cited by Petitioner the observation of Professor John Cribbet that "[o]nly as the individual has specific, and to a limited extent exclusive, rights over a thing, does he have that liberty of action which is vitally necessary to the preservation of a free society." J. Cribbett, Principles of the Law of Property at 7 (Foundation Press, 2d edition:1975).

The Court must now determine whether what the Sixth Circuit terms "Cell Phone Location Information" constitutes property protected under Fourth Amendment's protection of "persons, houses, papers, and effects." Although Cell Phone Location Information did not exist a few decades ago, it should be beyond question that the Fourth Amendment does not protect only tangible "papers and effects" as they existed when the Amendment was written. Indeed, Justice Scalia rejected as "bordering on the frivolous" the notion that "only those arms in existence in the 18th century are protected by the Second Amendment,"

and further pointing out that "the Fourth Amendment applies to modern forms of search [citing Kyllo v. United States, 533 U.S. 27, 35-36 (2001)]." District of Columbia v. Heller, 554 U.S. 570, 582 (2008).

The Court's determination as to papers and effects is informed by what Warren and Brandeis, more than a century ago, termed "the growth of the legal conception of property." "The Right to Privacy," *supra*. Curiously, that very Harvard Law Review article, which is the touchstone for modern discussion of privacy rights, provides extensive analysis of property law, specifically how the law had come to protect new types of property, to the point where, even in 1890, "'property' has grown to comprise every form of possession — intangible, as well as tangible." *Id.*

In the last decade, this Court has recognized the Fourth Amendment's protection of data stored on cell phones, and even more vast amounts of data accessible via those cell phones, in the context of a search incident to arrest because, as Chief Justice Roberts summarized, of "all they contain and all they may reveal [about] 'the privacies of life....'" Riley v. California, 134 S.Ct. 2473, 2494-95 (2014). And, in Jones, this Court has demonstrated that the Fourth Amendment's "close connection to property" protects against a trespass leading to the collection of location information about an individual. Jones at 405. The question now is whether one of those subsets of data about "the privacies of life" generated by the individuals, yet held in the hands of a cell phone vendor, will be protected as fully as one's "papers and effects" were at common law.

The Sixth Circuit's opinion implies that its decision would have been different if the information seized from the cell phone provider was the "content of a communication" which it said is "protected under the Fourth Amendment," rather than "information necessary to convey it" which it terms "routing information is not" protected. Carpenter at 883-84. The major case on which the Sixth Circuit relied that was outcome determinative was Smith v. Maryland, 442 U.S. 735 (1979), which was a privacy-based case that antedated the Jones resurrection of the property basis of the Fourth Amendment.[8] Moreover, the Sixth Circuit's disregard for the disclosure of location data antedated the Jones court's identification of the manifold dangers of disclosing Global Positioning System ("GPS") data which provides a "comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." Jones at 415. Indeed, in describing the dangers of somewhat more pinpoint GPS data, Justice Scalia asserted:

> because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain **abusive law enforcement practices**: "limited police resources and

[8] The only other Supreme Court case cited was Ex parte Jackson, 96 U.S. 727 (1878), which found no warrant was required for a government agent to read the information set out on the outside of a mailed envelope — a very different situation indeed.

> community hostility." [*Id*. at 415-16 (citations omitted) (emphasis added).]

And, lastly, Justice Scalia described the damaging effect of government surveillance and the way in which it undermines a constitutional republic:

> Awareness that the government may be watching **chills associational and expressive freedoms**. And the government's unrestrained power to assemble data that reveal private aspects of identity is **susceptible to abuse**.... [Such data] may "**alter the relationship** between citizen and government in a way that is **inimical to democratic society**." [*Id*. (emphasis added).]

Totalitarian societies do not respect the property of their people, taking what they want, from whomever they want, whenever they want.[9] In that regard, they resemble the animal world where there is neither understanding of nor respect for ownership rights — only fear of consequences. Only mankind, created in the image of God, and subject to the timeless commandments prohibiting stealing (Eighth Commandment, Exodus 20:15; *see also* Exodus 22:3; Leviticus 19:13; Mark 10:19) and coveting (Tenth Commandment, Exodus 20:17; *see also* Proverbs 30:8-9) recognize that each person has the right to own and control his own property. Particularly in

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[9] God warned the children of Israel about the lawless acts to which they would be subjected if they chose to be ruled by a king. *See* I Samuel 8:10-22.

constitutional republics, no government, especially one of limited, enumerated powers, may seize private property, including private and personal data, without doing violence to the covenant relationship between citizen and state.[10] That covenant is described in our nation's charter, which affirms that the very purpose of government is to secure the people's God-given rights. *See* Declaration of Independence. Indeed, only with a robust right to property, not only in oneself, but in one's possessions, can one be truly free.

The Petitioner's brief clearly demonstrates defendants' exclusive right to control disposition of his cell phone location information as part of his "customer proprietary network information" under the federal Telecommunications Act. Pet. Br. at 33-34. That analysis supports two conclusions. First, it should make no difference to the resolution of this case on property principles that the location information created by Carpenter's cell phone was held by his cell

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[10] Contrary to the nation's founding principles, the Federal Government often has demonstrated that it has no respect for the sanctity of private communications and other forms of data, asserting whatever power that it needs to assert to access them. It has demonstrated its willingness to use its regulatory powers to coerce compliance, or threaten service providers with severe sanctions, thus making those providers complicit in Fourth Amendment violations. For example, the encrypted email provider Lavabit was forced to shut down rather than violate the rights of its customers when its founder Ladar Levison refused to install government surveillance equipment on his company's network and surrender encryption keys as the Federal Government demanded. *See* L. Levison, "Secrets, lies and Snowden's email: Why I was forced to shut down Lavabit," *The Guardian* (May 20, 2014).

phone provider.[11] The relationship between Carpenter and that provider should properly be understood to be one of bailor-bailee. As Justice Scalia explained in Jones, even if "Jones was not the owner [of the Jeep Cherokee] he had at least the property rights of a bailee" which were sufficient to assert his Fourth Amendment defense. Jones at 404 n.2. Second, since a person's CSLI cannot be accessed legally by any individual person, as Petitioner clearly demonstrates (Pet. Br. at 33-34), such information cannot be informally seized simply because the seizure is at the request of a government agent. Justice Scalia explained in the sequel to United States v. Jones that "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" Florida v. Jardines, 133 S.Ct. 1409, 1416 (2013) (citations omitted).

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[11] Justice Sotomayor's concurring opinion in Jones warned against rote application of this court's third party privacy doctrine. *See* Jones at 417-18 (Sotomayor, J. concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties [citing Smith]. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.... I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.").

IV. THE GOVERNMENT SCHEME OF BROADCAST REGULATION HAS CONDITIONED ONE'S FULL PARTICIPATION IN MODERN SOCIETY UPON FORFEITURE OF FOURTH AMENDMENT RIGHTS.

As this Court recently noted, in order to be a full participant in American society, one must possess a cellular phone: "modern cell phones ... 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." Riley at 2484. To that, Petitioner adds that "[c]ell phones are indispensable to participation in modern society — often required for employment, relied on for personal safety, and increasingly becoming essential medical treatment tools." Pet. Br. at 12, 40-42.

Privacy analysis conducted by the court below treats CSLI as though it were created by cell phone providers without involvement of the customers and without involvement by government. Section II, *supra*, discusses how this data is created and paid for by the customer. This section discusses the government's role in designing the very system of cell phone use and control that it now argues justifies its ready access to every person's private papers and effects.

The federal government has created a pervasive regulatory system to control the airwaves, with cellular companies who maintain this country's wireless network serving as government gatekeepers. These companies maintain monopolistic access to

cellular radio frequencies. Writing in concurrence in CBS v. Democratic Nat'l Committee, 412 U.S. 94 (1973), Justice Douglas noted that "the airspace ... is the common heritage of all the people." *Id.* at 162. However, when it comes to cellular frequencies, that "common heritage" has been sold to the highest bidders, and now cannot be used by ordinary Americans without engaging with the cellular providers who control the bandwidth pursuant to close government supervision. *See* ABC, Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014).

The defendants in this case, like all Americans, are caught in a government-designed web, under which they may communicate over distance on no frequency other than government-approved cellular frequencies — and are prohibited in doing even that without going through a government gatekeeper wireless provider. Thus, to participate in modern society, defendants were all but required to contract with government-sanctioned vendors such as MetroPCS and T-Mobile to obtain cellular service.

Moreover, it was the federal government that initially made a push for the creation of CSLI, forcing cellular phone manufacturers to include hardware so that phones could be tracked, and forcing cellular providers to begin collecting such data upon government demand.[12]

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[12] As Petitioner's Brief points out, even turning off a phone's "location services" "has no impact at all upon cellular service providers' ability to log and retain the phone's location." *Id.* at 42.

Thus, in order to communicate in today's modern world, defendants were forced onto government-controlled airwaves, on a government-approved cellular network, using government-mandated technology, transmitting government-required location data. And now the Sixth Circuit has claimed that, because defendants "must know" or "should know" they were being tracked, they in essence had "voluntarily conveyed" their location to the cell phone companies who — completely independently and of their own volition — decided to collect and retain that information purely for their own business purposes. Carpenter at 888. The lower court's decision is factually and legally indefensible.

A. The FCC Pervasively Regulates the Cellular Spectrum.

Over a century ago, and four months after the sinking of the Titanic, the Radio Act of 1912 was enacted to establish a commission that would designate which airwaves would be for public use and which airwaves would be reserved for the various commercial users who needed them.[13] Thereafter, the Communications Act of 1934 created the Federal Communications Commission ("FCC"), and gave it sweeping authority to "regulat[e] ... communication by wire and radio...." Pub. L. No. 73-416, Sec. 1.

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[13] *See* M. Lasar, "How the Titanic disaster pushed Uncle Sam to 'rule the air,'" ARS Technica (Jul. 7, 2011), https://arstechnica.com/tech-policy/2011/07/did-the-titanic-disaster-let-uncle-sam-take-over-the-airwaves/.

As far back as the 1920's, the "National Radio Conferences ... divided ... the entire radio spectrum ... into numerous bands, each allocated to a particular kind of service." National Broadcasting Co. v. United States, 319 U.S. 190, 211 (1943). Since then, this Court has assumed that "the radio spectrum **simply is not large enough to accommodate everybody**," and that "[t]he facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest."[14] *Id.* at 213,

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[14] This overly broad statement reflected a lack of knowledge of the radio spectrum, significant portions of which were largely unknown and still emerging in 1934. The Court's statement may have some truth when it came to the "amplitude modulation" ("AM") radio frequencies at issue in National Broadcasting Co. — which can travel hundreds of miles — but it is demonstrably false in other circumstances.

Consider, for example, the human voice, which "operates" by "transmitting" sound waves at a frequency range of about 70-400 Hz. http://goo.gl/D7YRLU. In a crowded room full of people, if everyone started talking at the same time, no one would be able to hear anything (http://goo.gl/j2sXgZ), much the same way this Court lamented of the early days of broadcast radio that, "[w]ith everybody on the air, nobody could be heard." National Broadcasting Co. at 212. Fortunately, however, the power of the human voice to "transmit" is limited to about 10 watts (http://goo.gl/EMvMWe), and thus has a finite range. In most circumstances, a person "transmitting" speech at a typical speaking level can only be heard within a limited number of feet. That is why multiple conversations can occur within the same room, even though the "broadcasters" are all using the same spectrum of frequencies.

Similarly, unlike AM radio waves, both (i) the range and (ii) the transmitting power of cellular phones are limited, which means that significant overlap in frequency use is possible even within the same town or city. *See* Section IV.B, *infra.* With more mobile phones in the world than there are people, so far there has

217 (emphasis added).

Almost three quarters of a century ago, this Court presumed that there was "'widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.'" National Broadcasting Co. at 220. Some years later, the Court moved the basis for airwave regulation from monopoly to scarcity, claiming that "[i]t quickly became apparent that broadcast frequencies constituted a **scarce resource** whose use could be regulated and rationalized only by the Government."[15] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969) (emphasis added).

This scheme of complete government control of the entire radio spectrum assumed "that Government can control the broadcasters because their channels are in the public domain in the sense that they use the airspace that is the common heritage of all the

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been enough room to accommodate everyone. *See* http://goo.gl/wr2qTB.

[15] Others disagreed, believing "[t]he fallacy of this argument is obvious. The number of broadcasting frequencies is limited; so is the number of concert halls; so is the amount of oil or wheat or diamonds; so is the acreage of land on the surface of the globe. There is no material element or value that exists in unlimited quantity. ... Contrary to the 'argument from scarcity,' if you want to make a 'limited' resource available to the whole people, make it private property and throw it on a free, open market." A. Rand, "The Property Status of Airwaves," The Objectivist Newsletter, vol. 3, no. 4, p. 1 (Apr. 1964).

people."[16] CBS v. Democratic Nat'l Committee at 162 (Douglas, J., concurring). "In managing the spectrum, FCC and NTIA[17] have largely used a 'command-and-control' approach, which dictates how each segment of the radio spectrum can be used and who can use it."[18] Today, the summary tables alone showing the FCC's allocations of the radio spectrum encompass a whopping 176 pages — hardly order from chaos.[19]

Unfortunately, much like Soviet central planners were known to wind up with too many size 15 shoes, the FCC ended up having no idea how much bandwidth to allocate to particular uses. Thus, pursuant to Congressional action in the form of the 2012 National Broadband Plan, in 2016 the FCC began

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[16] Ayn Rand took issue with this claim as well, noting that "'public property' is a collectivist fiction, since the public as a whole can neither use nor dispose of its 'property,' that 'property' will always be taken over by some political 'elite,' by a small clique which will then rule the public — a public of literal, dispossessed proletarians." "The Property Status of Airwaves" at 3.

[17] The FCC "administers spectrum for non-Federal use," while the National Telecommunications and Information Administration "is an operating unit of the Department of Commerce, administers spectrum for Federal use." https://www.fcc.gov/engineering-technology/policy-and-rules-division/general/radio-spectrum-allocation

[18] "Spectrum Management: Better Knowledge Needed to Take Advantage of Technologies That May Improve Spectrum Efficiency," Government Accountability Office, GAO-04-666 ("GAO") (May 2004), p.5 http://www.gao.gov/new.items/d04666.pdf.

[19] *See* https://transition.fcc.gov/oet/spectrum/table/fcctable.pdf.

a "broadcast incentive auction," whereby "TV broadcasters will sell their licensed airwaves — known as spectrum — to make room for wireless service providers, with the FCC acting as the middleman to determine prices and organize the handover."[20] This "market-esque" step was made necessary by the so-called "spectrum crunch" — which reflected the FCC's failure to properly "allocate" adequate bandwidth to the wireless market in the first place.[21] *Id.* Having "[d]ecades ago ...freely g[iven] away spectrum" to uses such as broadcast TV, it was now necessary to create a "huge pay day" for TV spectrum holders who will pass portions of their bandwidth to wireless use. *Id.*

Having justified its foray into central planning of the airwaves on the theory that there would not be enough radio spectrum to go around, in reality today's shortages have been caused not by a finite radio spectrum — but by the FCC's bandwidth

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[20] C. Lecher, "How the FCC's massive airwaves auction will change America — and your phone service," The Verge (Apr. 21, 2016), https://www.theverge.com/2016/4/21/11481454/fcc-broadcast-incentive-auction-explained.

[21] In 2004, the GAO noted that "the disadvantages of the command-and-control approach have become increasingly apparent. For example, in October 2001, the FCC Chairman noted that it is becoming difficult for government officials to determine the best use for spectrum and to repeatedly adjust allocations and assignments of spectrum to accommodate new spectrum needs and new services. The President has similarly noted that the existing legal and policy framework for spectrum management has not kept pace with the dramatic changes in technology and spectrum use and can discourage the introduction of new technologies." GAO at 7.

mismanagement.[22] And, as with most government failures, additional intervention is always needed to solve past shortcomings, perpetuating a vicious cycle. And, as is also typical, in the case of wireless bandwidth, the American public will bear the brunt of the government's failure,[23] while the federal government stands to reap billions of dollars from its own decisions.[24]

B. Contrary to the Government Claim, the Cellular Network Is "Large Enough to Accommodate Everybody."

As Petitioner explains, "[i]n order to access the cellular network, cell phones must connect to nearby cell towers (known as 'cell sites.')." Pet. Brief at 3. In truth, cellular phones are handheld radios, albeit with

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[22] D. Goldman, "Sorry, America: Your wireless airwaves are full," CNN Money (Feb. 21, 2012), http://money.cnn.com/2012/02/21/technology/spectrum_ crunch/index.htm (noting the large increase in demand for cellular traffic, but also that "[a]nother catalyst is the way the U.S. government allocated spectrum.").

[23] "For the situation to improve, carriers — and, therefore, their customers — will have to pay more." Goldman at 2.

[24] "Of the nearly $20 billion raised [from the FCC's bandwidth auction], **more than $6 billion will go to reduce the U.S. deficit**, more than $10 billion will go to broadcasters that chose to relinquish spectrum rights, and up to $1.75 billion for other broadcasters that incur costs in changing channels." (emphasis added). D. Shepardson, "FCC spectrum auction bidding ends at $19.6 billion," Reuters (Feb. 10, 2017), http://www.reuters.com/article/us-usa-wireless-auction- idUSKBN15P2QF.

staggering capabilities.[25] Indeed, all of the information transmitted to and from a cellular phone — phone calls, text messages, internet browsing, video, pictures, apps, etc. — is transmitted via radio waves. And all of this occurs over frequencies that have been designated by the FCC for commercial use by wireless providers.

As part of the FCC's modern allocation of the radio spectrum, it has decided on which bandwidth cellular communications may take place: "[t]he FCC also decides which frequencies of spectrum can be used for which purposes. For mobile phones, it has allocated spectrum generally between 700 MHz and 2.6 GHz."[26] Currently, cellular and wireless communications take place largely on the "824 – 849 and 869 – 894 MHz spectrum range" (the "Cellular" band) and "the 1850 – 1990 MHz spectrum range" (the "Broadband Personal Communications Service" band), with other smaller allocations in the "Advanced Wireless Service" band, the 700MHz band, etc.[27] All of these bands are within what is known as the "ultra-high frequency" ("UHF") spectrum, which is classified as frequencies between 300 MHz and 3GHz.[28]

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[25] *See* https://www.mat.ucsb.edu/~g.legrady/academic/courses/03w200a/projects/wireless/cell_technology.htm.

[26] *See* https://www.cnet.com/news/wireless-spectrum-what-it-is-and-why-you-should-care/.

[27] *See* https://www.fcc.gov/wireless/bureau-divisions/mobility-division/cellular-service.

[28] *See* http://www.arrl.org/files/file/Get%20Licensed/HRLM%201st/Corrections/2-17_rev.pdf.

Generally, UHF radio waves "travel almost entirely by line-of-sight propagation ... and ground reflection; unlike High Frequency ("HF") and Very High Frequency ("VHF"), there is little to no reflection from the ionosphere (skywave propagation), or ground wave."[29] Due to this line-of-sight characteristic, "**UHF transmission is limited** by the visual horizon to 30–40 miles ... and often to shorter distances by local terrain...." *Id.* In addition to the low range of cellular frequencies, cellular phones transmit with **relatively low power** — a few watts or less.[30] Even cellular towers (which retransmit signals) use comparatively low power transmitters. *Id.*

In sum, the UHF radio waves on which cellular technology operates allows for large amounts of data to be transmitted and received quickly, while the low range allows for significant "reuse" of frequencies — even across the same city — by multiple cell phones. However, what is a strength of the UHF band is also a weakness — since the range of UHF radio waves is inherently limited, this created the need for cellular towers and providers to retransmit signals over longer distances (across states, the country, and the world). In other words, the FCC regulatory scheme has made it necessary for public mobile communications to

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[29] *See* https://en.wikipedia.org/wiki/Ultra_high_frequency #Propagation_characteristics; *see also* The ARRL Ham Radio License Manual, American Radio Relay League, 3rd edition (May 15, 2014).

[30]. *See* https://www.mat.ucsb.edu/~g.legrady/academic/courses/ 03w200a/projects/wireless/cell_technology.htm.

utilize the current cellular network through wireless providers.

C. The FCC Has Made Cellular Providers Necessary and Helps Them Protect Their Turf from Competing Technologies.

Because cellular phones are radio transmitters and receivers, they are capable of communicating directly with one another at short range — such as across town — without involvement of the cellular network. In fact, in recent years Qualcomm has been experimenting with a system called "LTE Direct," whereby phones will act as two-way radios, and "will be able to 'talk' directly to other mobile devices and to beacons," so long as they are within a range of 500 meters.[31] Similarly, researchers in Australia have developed a system where a grid of interconnected cellular phones will be able to act as its own cellular network by receiving and re-transmitting signals sent by other phones in the network.[32]

At first blush, these new technologies sound like they soon could increase the freedom of a phone user by negating the need for cellular providers, but that is not the case. Unfortunately, because of the FCC and the federal government's monopoly of the radio

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[31] *See* https://www.technologyreview.com/s/530996/future-smartphones-wont-need-cell-towers-to-connect/.

[32] *See* D. Quick, "No mobile phone coverage? No worries, researchers put a tower in a phone," New Atlas (Jul 12, 2010), http://newatlas.com/serval-mobile-phone-network/15696/.

spectrum, "carriers will [still] control ... devices on their networks ... because [they] use[] the same radio spectrum as conventional cellular links" — spectrum over which the FCC has given the providers total control.[33]

The need for cellular providers also could be lessened is through the use of signal boosters. "Signal boosters are devices that hold great potential to improve wireless coverage to areas with poor signal levels."[34] Purchased and installed by any third party, signal boosters are essentially "mini cellular towers" that extend the range of a cell phone tower to locations with poor reception.[35]

However, as with direct phone-to-phone communication, it did not take long before "[c]arriers complained that these devices were operating in their exclusive space and disrupting their service."[36] In

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[33] T. Simonite, "Future Smartphones Won't Need Cell Towers to Connect," MIT Technology Review (Sep. 29, 2014), https://www.technologyreview.com/s/530996/future-smartphones-wont-need-cell-towers-to-connect/.

[34] *See* https://www.fcc.gov/rulemaking/10-4.

[35] *See* E. Falcon, "FCC Helped Create the Stingray Problem, Now it Needs to Fix It," Electronic Frontier Foundation ("EFF") (Oct. 6, 2016), https://www.eff.org/deeplinks/2016/08/fcc-created-stingray- problem-now-it-needs-fix-it?page=2.

[36] *See* EFF at 3.

2013, the FCC issued a 106-page Report and Order,[37] cracking down on the use of signal boosters, severely limiting their use, and requiring their registration with the provider on whose network they operate. *Id.* at 35. Although still permissible in some forms, the FCC's Order ensured that most wireless communications will continue to be transmitted through towers owned by cellular providers, where they can be most easily tracked.[38]

D. CSLI Is Not "Voluntarily Conveyed" to Wireless Providers, But Is Mandated by Government.

Nearly 20 years ago, in an article entitled "'E911' Turns Cell Phones Into Tracking Devices," *Wired Magazine* informed tech-savvy members of the public of a recent action by Congress.[39] As part of the Wireless Communications and Public Safety Act of 1999 ("9-1-1 Act"), Congress amended 47 U.S.C. § 222, "privacy of customer information," adding an exception for wireless carriers "to provide call location

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[37] *See* https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-21A1.pdf.

[38] Meanwhile, though, the FCC has permitted the wide use by state and local governments and police agencies of "stingrays," or "cell site simulators," which trick cellular phones in a given area to connect to the false "tower" and transmit their location information to the government's prying eyes. *See* EFF at 1.

[39] C. Oakes, "'E911' Turns Cell Phones into Tracking Devices," Wired Magazine (Jan. 6 , 1998), https://www.wired.com/1998/01/e911-turns-cell-phones- into-tracking-devices/.

information concerning the user of a commercial mobile service ... in order to respond to the user's call for emergency services...."[40] Subsequent to the 9-1-1 Act, the FCC took the additional step of "requir[ing] wireless telephone carriers to provide 911 and E911 capability, where a Public Safety Answering Point (PSAP) requests it [to] provide an accurate location for 911 calls from wireless phones."[41] Phase I of the FCC's requirements forced wireless providers to provide "the location of the cell site or base station transmitting the call," while Phase II required even more precise location information be reported. *Id.*

As reported by *Wired*, as far back as 1998 the FCC's rules "ha[d] others calling for restrictions on how cell-locating information can be used." *Id.* It was reported that "[t]o provide this precise location information ... the Cellular Telecommunications Industry Association says different carriers will choose different methods of gathering location information, but all of them involve detecting the radio frequencies sent from the phone to service antennas." *Id.* Privacy advocates in vain called for "clear restrictions on the ability of law enforcement to tap into personal information on users, especially their whereabouts at any one time." *Id.*

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[40] *See* Pub. L. 106–81, Wireless Communications and Public Safety Act of 1999 (Oct. 26, 1999), https://www.congress.gov/106/plaws/publ81/PLAW- 106publ81.pdf.

[41] "911 and E911 Services", FCC, Jul. 31, 2017, https://www.fcc.gov/general/9-1-1-and-e9-1-1-services.

E. CSLI Records Are Required by the Government.

In this case, the Sixth Circuit concluded that MetroPCS and T-Mobile "made records, for billing and other business purposes." Carpenter at 886. That may be partially true, but more importantly than business purposes, wireless providers gather CSLI because federal law requires them to do so. The Sixth Circuit wholly ignores the significance of those federal mandates.

Instead, analogizing this case to Smith, where this Court held that the user of a land line telephone "voluntarily conveyed" to the phone company the number he was dialing, the court below asserted that the defendants in this case "must know" and "should know" that their phones "'expose[]' [their] location to the nearest cell tower and thus to the company that operates the tower." Carpenter at 888. Of course, the lower court could not directly claim that defendants here "voluntarily conveyed" their CSLI to their providers[42] — because, as the lower court is quick to claim, CSLI is "gathered" by the phone companies rather than "conveyed" by phone users. In likening this case to Smith, the Sixth Circuit has taken a case where someone knowingly took a voluntary action himself, and analogized it to a situation where that person "should know" that a third party is taking an

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[42] At the petition stage, the government, however, had no problem claiming making this assertion. *See* Brief for the United States in Opposition at 8.

action (at government direction) over which he has no control.

It was Congress and the FCC that pushed for the creation and collection of CSLI. The Sixth Circuit discussed only the current business purposes of wireless providers — without addressing the broader picture — giving an inaccurate concept of CSLI, what it is, why it is collected, and to whom it belongs. It would be unconscionable for a court to hold that a person has no Fourth Amendment right to keep the government from tracking his cell phone, when it is, in some part, federal law and regulation that requires the cell phone to be tracked. Legalization of constitutional violations does not make them constitutional.

F. Summary.

It is the federal government that has mandated cellular communication only take place on certain bands of frequencies — and that has prohibited similar communications on all other frequencies.[43] And it is

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[43] To be sure, there are certain narrow bands of frequencies that have been set aside for amateur radio use ("ham radio"). However in order to communicate on those frequencies, a person first must pass an FCC test, and his transmissions must comply with a host of stringent FCC regulations. For example, §97.113 of the FCC's rules governing amateur radio state that "No amateur station shall transmit ... messages encoded for the purpose of obscuring their meaning ..." The same FCC rule also governs what can be said, prohibiting the transmission of music, messages for material compensation or pecuniary gain, and any form of "broadcasting." And, most importantly, the FCC bans "Communications, on a regular basis, which could reasonably be furnished alternatively

the government that has selectively doled out those frequencies to its chosen gatekeepers, the wireless carriers, mandating that no one else (especially not private persons) may use the frequencies on their own. The government then has protected the "turf" of those wireless carriers, insulating them from competing and emerging technologies that have the potential to turn wireless providers into dinosaurs, and make the cellular network obsolete and unnecessary.

So as not to exist as hermits, self-ostracized from American society, defendants chose to obtain cellular phones and, having done so, were required to contract with one of the government's approved carriers. It was the government that then forced them to run their communications through these carriers, transmit to the carriers' towers, and divulge their location information. All this, the Sixth Circuit claims, was entirely voluntary and justified, ignoring the fact that the government designed the system which now allows it to engage in Orwellian surveillance of the American public, tracking every person with a cell phone virtually every minute of his life.

CONCLUSION

For the foregoing reasons, this Court should determine that warrantless search and seizure of CSLI violates the Fourth Amendment and reverse the judgment of the court below, as well as remand

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through other radio services" — presumably such as cellular phone calls.

Graham v. United States, No. 16-6308, to the Fourth Circuit, ordering that the decision below be vacated.

Respectfully submitted,

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