No. 15-16133

In the
United States Court of Appeals for the Ninth Circuit

CAROLYN JEWEL, *ET AL.*,
Plaintiffs-Appellants,
v.
NATIONAL SECURITY AGENCY, *ET AL.*,
Defendants-Appellees.

On Appeal from the
United States District Court for
the Northern District of California

Brief *Amicus Curiae* of U.S. Justice Foundation, Gun Owners of America, Inc., Gun Owners Foundation, Arizona State Chapter of the Association of American Physicians and Surgeons, Free Speech Coalition, Free Speech Defense and Education Fund, The Lincoln Institute for Research and Education, Downsize DC Foundation, The Abraham Lincoln Foundation for Public Policy Research, Inc., Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Appellants and Reversal

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DISCLOSURE STATEMENT

The *amici curiae* herein, U.S. Justice Foundation, Gun Owners of America, Inc., Gun Owners Foundation, Arizona State Chapter of the Association of American Physicians and Surgeons, Free Speech Coalition, Free Speech Defense and Education Fund, The Lincoln Institute for Research and Education, Downsize DC Foundation, The Abraham Lincoln Foundation for Public Policy Research, Inc., Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c). These *amici curiae*, other than Institute on the Constitution, are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. Institute on the Constitution is not a publicly traded corporation, nor does it have a parent company which is a publicly traded corporation.

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INTEREST OF *AMICI CURIAE*[1]

U.S. Justice Foundation, Gun Owners of America, Inc., Gun Owners Foundation, The Lincoln Institute for Research and Education, Arizona State Chapter of the Association of American Physicians and Surgeons, Free Speech Coalition, Free Speech Defense and Education Fund, Downsize DC Foundation, The Abraham Lincoln Foundation for Public Policy Research, Inc., Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Institute on the Constitution is an educational organization. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law. Several of these *amici* have filed *amicus curiae* briefs in other federal Fourth Amendment cases, including the following:

- United States v. Antoine Jones, 565 U.S. ___, 181 L.Ed.2d 911 (2012) Petition Stage: http://lawandfreedom.com/site/constitutional/USvJones_amicus.pdf (May 16, 2011); Merits Stage: http://lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf (Oct. 3, 2011);

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[1] The Appellants have consented, and the Government does not object, 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.

- Clapper v. Amnesty International USA, 568 U.S. ___, 185 L.Ed.2d 264 (2013); http://lawandfreedom.com/site/constitutional/ClappervAmnesty Intl_Amicus.pdf (Sept. 24, 2012);

- Cotterman v. United States, 187 L.Ed.2d 833 (2014); http://lawand freedom.com/site/constitutional/Cotterman_v_US_Amicus.pdf (Sept. 9, 2013);

- United States v. Wurie, (consolidated with Riley v. California) 573 U.S. ___, 189 L.Ed.2d 430 (2014); http://www.lawandfreedom.com/site/ constitutional/Wurie%20DDCF%20Amicus%20Brief.pdf (Apr. 9, 2014);

- Heien v. North Carolina, 574 U.S. ___, 190 L.Ed.2d 475 (2014); http://www.lawandfreedom.com/site/constitutional/Heien%20GOF%20ami cus%20brief.pdf (June 16, 2014);

- Rodriguez v. United States, 575 U.S. ___, 191 L.Ed.2d 492 (2015); http://www.lawandfreedom.com/site/constitutional/Rodriguez%20USJF%2 0Amicus%20Brief.pdf (Nov. 24, 2014); and

- City of Los Angeles v. Patel, 576 U.S. ___, 192 L.Ed.2d 435 (2015); http://www.lawandfreedom.com/site/firearms/Patel%20GOA%20Amicus %20Brief.pdf (Jan. 30, 2015).

STATEMENT OF THE CASE

This case began in 2008, and has a lengthy and relatively complicated procedural history. On January 21, 2010, the U.S. District Court for the Northern District of California granted the Government's motion to dismiss, claiming that the Plaintiffs in their allegations had not established a sufficient concrete and particularized injury, and thus did not have standing for any of their claims, and dismissed all counts. *See* Jewel v. NSA, 2010 U.S. Dist. LEXIS 5110 (N.D. Cal. 2010).

On December 29, 2011, the U.S. Court of Appeals for the Ninth Circuit reversed, finding that the Plaintiffs had alleged sufficient facts to show they had standing to sue on both statutory and constitutional grounds. Jewel v. NSA, 673 F.3d 902 (9th Cir. 2011). The court of appeals remanded the case to the district court to apply the correct standard for standing, and to decide whether the "state secrets doctrine" could be used to preclude litigation of Fourth Amendment claims, and to hear the case on the merits, if appropriate.

A second round of briefing ensued in the district court, supporting and opposing respective cross-motions for summary judgment. On July 23, 2013, the district court issued another opinion, agreeing with the Plaintiffs that the

Government's state secrets defense does not apply to the statutory claims. However, the court then granted the Government's motion to dismiss the statutory claims on the basis of sovereign immunity under the Foreign Intelligence Surveillance Act. The court reserved ruling on the constitutional issues raised by Plaintiffs (Counts 1-3 only). *See* Jewel v. NSA, 965 F. Supp. 2d 1090 (N.D. Cal. 2013).

Thereafter, there was a third round of briefing in the district court, again involving cross-motions for summary judgment. On February 10, 2015, the district court denied Plaintiffs' Fourth Amendment claims for lack of sufficient evidence to prove standing as a factual matter, and granted the Government's motion for summary judgment. *See* Jewel v. NSA, 2015 U.S. Dist. LEXIS 16200 (N.D. Cal. 2015). On May 20, 2015, the district court issued an order granting Plaintiffs' motion for entry of final judgment on their Fourth Amendment claims. The Plaintiffs then appealed that final judgment.

ARGUMENT

I. The Court of Appeals Held that the Government's Seizure of Data Would Establish Plaintiffs' Standing, but on Remand the District Court Erroneously Required the Plaintiffs to Prove a Search as Well.

In 2010, the district court granted the Government's Motion to Dismiss, holding that the Plaintiffs did not have standing, having failed to "**allege**[] an injury that is sufficiently particular to those plaintiffs…." 2010 U.S. Dist. LEXIS 5110, *3 (emphasis added). On appeal in 2011, this Court reversed, finding that the Plaintiffs' complaint "me[t] the constitutional standing requirement of concrete injury." 673 F.3d 902, 905. Specifically, the Court noted that "Jewel alleged that the '[c]ommunications of Plaintiffs and class members have been and continue to be **illegally acquired** by Defendants using surveillance devices attached to AT&T's network.'" *Id.* at 906 (emphasis added). To accomplish this, Plaintiffs alleged that "AT&T, in collaboration with the National Security Agency ("NSA"), **diverted** all of her internet traffic into 'SG3 Secure Rooms' in AT&T facilities across the country…." *Id.* (emphasis added). Additionally, Plaintiffs alleged that "defendants operated a 'dragnet **collection**' of communications records by 'continuously … **obtain[ing]** the disclosure of all information in AT&T's major databases of stored telephone and

Internet records.'" *Id*. (emphasis added). Thus, the Court held that Plaintiffs' allegations, as a whole, were sufficient to establish standing, having stated in their Complaint a Fourth Amendment **seizure** of their data.

After remand and proceedings in which the Plaintiffs were allowed no discovery (Appellants' Opening Brief ("App. Br.") at 31), the district court granted the Government's Motion for Summary Judgment in February of 2015, deciding that "Plaintiffs have failed to establish a sufficient **factual** basis to find they have standing to sue under the Fourth Amendment…." 2015 U.S. Dist. LEXIS 16200 at *7 (emphasis added). This decision was predicated on finding that Plaintiffs' **evidence** "is insufficient to establish that the Upstream collection process operates in the manner in which Plaintiffs allege it does." *Id*. at *17. The district court determined, based on evidence to which Plaintiffs were not privy, "that the Plaintiffs' version of the significant operational details of the Upstream collection process is substantially inaccurate." *Id*. at *18.

However, to establish standing, Plaintiffs should not have been required to allege exactly how the seizure of data or the subsequent search of that data occurs. The remand by the Court of Appeals required Plaintiffs to demonstrate that there had been a **seizure** of their data — that is, that the Government has

"**acquired**" their communications.[2] The district court stated "the record suggests that AT&T currently aids the Government in the collection of information transported over the Internet," citing the AT&T Transparency Reports. *Id*. at *14. Thus, the district court seemed to conclude that Plaintiffs' communications were "captured" (*id*. at *16) but only disagreed that those communications were "actually processed." *Id*. at *18. And in their July 25, 2014 Motion for Partial Summary Judgment, Plaintiffs "challenge[] the constitutionality of … the wholesale **seizure** of the stream of Internet communications…."[3] However, the district court ignored the unconstitutional warrantless seizure and focused on whether Plaintiffs had proved whether those records, which had been seized, were subsequently searched. 2015 U.S. Dist. LEXIS 16200 at *17-19.

Indeed, on numerous occasions in the prior appearance of this case before this Court, this Court described the Government's seizure of the data, using property terms like, "**obtaining**," "**receive**," "**acquired**," "**continue to**

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[2] *See* App. Br. at 16 ("Plaintiffs' evidence demonstrates that at least some of their Internet communications are copied, which is all that plaintiffs need show to establish an injury and give them standing….").

[3] Plaintiffs Carolyn Jewel, Erik Knutzen, and Joice Walton's Notice of Motion and Motion for Partial Summary Judgement, Doc. #261, July 25, 2014 (emphasis added).

acquire," and "**acquire**." 673 F.3d at 906, 910 (emphasis added). This Court did not require Plaintiffs to demonstrate what the Government **does after** it acquires the data to establish standing to bring a challenge under the Fourth Amendment.

On remand, however, the district court appeared to base its decision only on what the government **did after** it acquired Plaintiffs' data. Thus, the district court faulted Plaintiffs for being unable to "establish the **content**, **function**, or **purpose**" of the data collection, and that they could "only speculate about what data were actually **processed** … [or] **interfere[d with]** … and by whom." *Id.* at *17-18 (emphasis added). Instead of employing such words as "acquire" and "obtain" as this Court did, the district court used markedly different verbs — "**filter**," "**search**," "**scan**," and "**copy**" — to describe the Government's actions. *Id.* at *9-10 (emphasis added). Hence, the district court required Plaintiffs to prove that "Defendants receive copies of their Internet communications, then filter the universe of collected communications … and then search the remaining communications…." 2015 U.S. Dist. LEXIS 16200 at *8.

When the district court eventually addressed what this Court **actually** required Plaintiffs to prove to establish standing — that their data have been

"**acquired**" — it concluded that "[t]he record suggests that AT&T currently aids the Government in the collection of information transported over the Internet. (*See* AT&T Transparency Report dated 2014.)" *Id*. at *14. And the public disclosure by AT&T only confirmed what the Government's Privacy and Civil Liberties Oversight Board also made clear, that the first step of the Upstream collection program is for the government to "**acquire** communications that are transiting through circuits that are used to facilitate Internet communications…. The provider is compelled to assist the government in **acquiring** communications across these circuits." "Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act," Privacy and Civil Liberties Oversight Board, July 2, 2014, at 36-37 (emphasis added).[4] AT&T has publicly disclosed and the Government has boldly admitted that the Internet traffic of AT&T customers has been **seized**, whether by the Government directly, or indirectly by coercion of a third party telecommunications company.[5]

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[4] https://www.pclob.gov/library/702-Report.pdf.

[5] To be sure, the Report claims that "the government acquires only those communications involving that particular selector." But as Plaintiffs point out, the Government uses the word "**acquires**" not as it is ordinarily used to mean the **acquisition** of all information, but only the post-search **retention** of certain information. *See* Plaintiffs' Motion for Partial Summary Judgment at 8. While the Government might only retain records pertaining to some persons, it seizes

The district court erred in ignoring that the Plaintiffs had actually demonstrated the seizure which this Court required to establish standing.[6]

In finding plaintiffs' evidence of a seizure of their communications insufficient to establish standing, the district court apparently limits the Fourth Amendment to provide protection only for privacy rights. If privacy were the Amendment's only concern, the district court's ruling could at least be understandable, as the privacy of plaintiffs' communications would principally be invaded when they were searched and inspected by the government. However, the district court's implicit view that the Fourth Amendment does not protect the seizure of plaintiffs' communications completely ignores the Fourth Amendment's central protection of property. For this reason, the district court ruling is at odds with the sea change in Fourth Amendment jurisprudence

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records pertaining to everyone. The Government's claim that it later searched only for certain communications does not save its seizure from being a Fourth Amendment violation (*see* Section II, below).

[6] *See* App. Br. at 24.

initiated by United States v. Jones, 565 U.S. ___, 132 S.Ct. 949 (2012),[7] as discussed in Section II, *infr*a.

II. The NSA Technological Mass Surveillance System Constitutes an Unreasonable Search and Seizure Per Se.

A. Plaintiffs Have a License to Use AT&T's Fiberoptic System.

Plaintiffs and class representatives Jewel, Knutzen, and Walton are AT&T Internet service subscribers. App. Br. at 3. They rely on the Internet for the sending and receipt of emails, both personal and professional and within and outside the United States. They also rely on the Internet for web browsing and social media, both domestically and abroad. *Id.* at 3-4. Plaintiff Jewel, a novelist, communicates online with fans and members of the publishing industry, and uses the Internet to conduct research settings for her fiction. *See* Plaintiffs' Motion for Partial Summary Judgment ("Pl. Motion Summ.") at 9-10. Additionally, Plaintiff Knutzen, a writer, blogs regularly on "urban homesteading," and Plaintiff Walton is a recording artist who promotes her own music on her website and through social media and email. *Id.* at 10.

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[7] *See generally* H. Titus & W. Olson, "United States v. Jones: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE UNIV. SCHOOL OF LAW, J.OF LAW, TECHNOLOGY & THE INTERNET, Vol. 3, No. 2 (Spring 2012). http://lawandfreedom.com/site/publications/Case%20Western%20Law%20Review.pdf.

AT&T offers the public using its cell phone service a standard written two-year renewable service agreement posted on the Internet which provides for automatic renewal thereafter on a month-to-month basis.[8] Pursuant to this agreement, AT&T provides individuals such as Plaintiffs access to the "high-capacity, long-distance fiber-optic cables controlled by … AT&T." App. Br. at 4. In effect, this and other similar agreements governs Plaintiffs' access to the "communications stream transiting the Internet backbone [that] includes all varieties of Internet activities, including email, live chat, and Internet telephone and video calls, as well as activities such as web browsing, video watching, and search queries and results." *Id.* at 5. In essence, such agreements confer upon individuals a license to use AT&T's high-capacity, long-distance fiber-optic cables to, among other things, "purchase goods and services … from AT&T and third parties," as well as to take advantage of location-based services, "using location technology such as Global Positioning Satellite ('GPS'), wireless network location, or other location technology." *See* AT&T Service Agreement, paras. 4 and 5. Like a "license … to do an act or series of acts upon the land of

[8] *See* http://www.att.com/equipment/legal/service-agreement.jsp?q_termsKey=postpaidServiceAgreement&q_termsName=Service+Agreement.

another,"[9] the AT&T service contract confers upon the Plaintiffs a "personal, revocable privilege" to send communications via AT&T's fiber-optic cable system without vesting in Plaintiffs any legal interest in that system.[10] Plaintiffs have been deterred from taking full advantage of their particular license with the advent of the NSA's "bulk, untargeted seizure of the Internet communications of millions of innocent Americans, including [themselves]." Pl. Motion Summ. at 1.

B. Foremost, the Fourth Amendment Protects Private Property.

Plaintiffs acknowledge that "[t]he 'reasonable expectation of privacy test' is the alternative test for the scope of Fourth Amendment protections" (App. Br. at 33, n. 46), but principally argue that their communications over the Internet are protected because they are self-evidently "papers" and "effects" protected by the Fourth Amendment, as stated by the Supreme Court in United States v. Jones, 565 U.S. ___, 132 S.Ct. 949 (2012). *See* App. Br. at 32.

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[9] *See* John E. Cribbet, Principles of the Law of Property 346-47 (Foundation Press: 2d ed.1975).

[10] To their hurt, Plaintiffs entrusted their communications to AT&T reasonably expecting AT&T to protect their property and privacy interests, only to find out later that AT&T betrayed that trust. *See* "AT&T Helped U.S. to Spy on Internet on a Vast Scale," *The New York Times* (Aug. 15, 2015).

As Justice Scalia quite rightly observed in Jones, the original object of the Fourth Amendment was to protect private property. Indeed, relying on the venerable opinion of Lord Camden in Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765), Justice Scalia emphasized the overarching "significance of property rights in search-and-seizure analysis." Jones, 132 S.Ct. at 949. Then, accentuating this point, Justice Scalia wrote:

> 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, 132 S.Ct. at 949.]

C. The NSA Digital Dragnet Violates the Property Principle.

Plaintiffs have cited Hearst v. Black, 87 F.2d 68, 71 (D.C. Cir. 1936), to support their contention that the Fourth Amendment "protects plaintiffs' Internet communications while in transit" from "a dragnet seizure of private telegraph messages," because of the "sender's possessory and privacy rights" in those communications. App. Br. at 33. Indeed, the Hearst precedent's utilization of the property principle is even stronger now that the property principle has been restored to primacy by Jones. *See* App. Br. at 33.

First, in Hearst, the U.S. Court of Appeals for the District of Columbia expressly noted that the "possessory and privacy rights" upon which it relied were rooted in "a **property right** in letters and other writings [which] antedate[s] the Constitution [being] inherent in a free government." *Id.*, 87 F.2d at 70 (emphasis added).

Second, the Hearst Court stated that "the nature and extent of [the writer's] **property** interest" limits the rights of the recipient of the letters to that of a "trustee, or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character." *Id.* at 70-71 (emphasis added).

Third, the D.C. Circuit ruled that "[t]he general **property**, and the general rights incident to **property**, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business." *Id.* at 71 (emphasis added).

Fourth, the D.C. Circuit concluded, "[a] fortiori, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion." *Id.*

Thus, the court of appeals concluded:

> The existence of a right in the author over his letters, even though private and without worth as literature, is established on principle and authority. The right is **property** in its essential features. It is, therefore, entitled to all the protection which the constitution and laws give to **property**. [*Id.* at 71 (emphasis added).]

Applying these property principles, the Hearst Court ruled that a Special Senate Committee and the Federal Communication Commission ("FCC") could be enjoined from enforcing a blanket subpoena duces tecum demanding that telegraph companies in the City of Washington deliver to the Committee all communications, *i.e.*, telegraph messages transmitted through the offices of such companies doing business in the City:

> In principle … we think that a dragnet seizure of private telegraph messages … whether made by persons professing to act under color of authority from the government or by persons acting as individuals, is a **trespass** which a court of equity has power to enjoin.… "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." [*Id.* citing FTC v. American Tobacco Co., 264 U.S. 298 (1924) (emphasis added).]

There is no material difference between the unconstitutional "dragnet seizure" conducted by the Special Senate Committee and the FCC banned by the Court of Appeals in Hearst, and the NSA "digital dragnet" at issue here. *See* Ex Parte Jackson, 96 U.S. 727, 733 (1877). To be sure, in Hearst, the telegraphed communications were not surreptitiously intercepted in transit, as here, but

subpoenaed after arrival and in readable form. *See id.* at 68-69. But, as the Hearst court pointed out, "[t]elegraph messages do not lose their privacy and become public property when the sender communicates them confidentially to the telegraph company." *Id.* at 70. Rather, the sender's property interest in his communication begins with the placing of his order to send a telegram and extends throughout the transit process by which the telegram is sent to the intended recipient.

This same rule should apply to Plaintiffs' electronic communications while transiting on the AT&T fiberoptic network. While it is true that the Government is not "physically occup[ing] [the] private property" of the Plaintiffs, as was the case in United States v. Jones, it is nonetheless trespassing upon Plaintiffs' license by surreptitiously intercepting and copying Plaintiffs' Internet communications. While the seizure and search of Plaintiffs' property may not be visible to the naked eye, the Government's invasion is no less a trespass[11] on

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[11] *See* Martin v. Reynolds Metals Co., 221 Ore. 86, 93-94, 342 P.2d 790, 793-94 (1959), for a thoughtful analogy as to why electronic communications constitute property:

> The view recognizing a trespassory invasion where there is no "thing" which can be seen with the naked eye undoubtedly runs counter to the definition of trespass expressed in some quarters. 1 Restatement, Torts § 158, Comment h (1934); Prosser, Torts § 13 (2d Ed 1955). It is quite possible that in an earlier day when science

Plaintiffs' license to use the AT&T fiberoptic system than the Government use of a subpoena to pry telegrams out of the hands of their recipients. *See* Kyllo v. United States, 533 U.S. 27, 34-36 (2001). Although the Kyllo ruling itself was based upon privacy principles, the Jones Court affirmed that the Fourth Amendment protection afforded Kyllo was commensurate with the Amendment's original property principle. Jones at 949-50. *See also* Florida v. Jardines, 569 U.S. 1, 133 S.Ct. 1409, 1418 (2013) (Kagan, J., concurring). Indeed, as the

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> had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released. In fact, the now famous equation $E = mc^2$ has taught us that mass and energy are equivalents and that our concept of "things" must be reframed. If these observations on science in relation to the law of trespass should appear theoretical and unreal in the abstract, they become very practical and real to the possessor of land when the unseen force cracks the foundation of his house. The force is just as real if it is chemical in nature and must be awakened by the intervention of another agency before it does harm.
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> If, then, we must look to the character of the instrumentality which is used in making an intrusion upon another's land we prefer to emphasize the object's energy or force rather than its size. Viewed in this way we may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.

Supreme Court ruled in Jones, "the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." Jones at 952. *Ses also* Jardines at 1417.

In a 5-to-4 decision, however, the Supreme Court refused to apply the founding property principle to a wiretap on a person's telephone line on the sole ground that the Fourth Amendment protected **only** "material things." Olmstead v. United States, 277 U.S. 438 (1928). While this Court has overruled Olmstead, it did so on the ground that it was inconsistent with this Court's Fourth Amendment privacy doctrine.[12] However, the Olmstead ruling constituted an egregious violation of the Fourth Amendment's property principles. When subjected to a historical and textual property analysis, Olmstead was surely wrong to have concluded that the Fourth Amendment protects only "material things."[13]

As Justice Butler pointed out in his Olmstead dissent:

> Telephones are used generally for transmission of messages concerning official, social, business and personal affairs including communications that are private and privileged — those between physician and patient, lawyer and client, parent and child, husband

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[12] *See* United States v. Knotts, 460 U.S. 276, 280 (1983).

[13] *See* pp. 16-17 n.7, *supra*.

> and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. **The communications belong to the parties between whom they pass.** During their transmission the exclusive **use** of the wire **belongs** to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for **evidence**. As the communications passed, they were heard and taken down. [*Id.*, 277 U.S. at 487 (Butler, J., dissenting) (emphasis added). *See also* Berger v. New York, 388 U.S. 41, 64 (1967) (Douglas, J., concurring) ("my overriding objection to electronic surveillance [is] that it is a search for 'mere evidence'…").]

Indeed, as University of Michigan Professor James B. White has insightfully observed, there is nothing in the language of the Fourth Amendment that dictates the Olmstead Court's conclusion that words cannot be "seized," especially in light of "[a]nalogies from **property** law [whereby] words can be made the object of **property** [so that] the right to say or to write them can be bought and sold." J.B. White, "Judicial Criticism," 20 *GA. L. REV.* 835, 851-52 (1986) (emphasis added).

D. The Fourth Amendment's Prohibition against General Warrants Protects Persons and Their Property from Indiscriminate and Surreptitious Seizures and Searches.

Additionally, the NSA dragnet violates the Fourth Amendment prohibition against "the general search warrant." Sources of Our Liberties, 427 (R. Perry & J. Cooper, eds., rev. ed., ABA Foundation: 1978). In his 1761 attack on Writs

of Assistance, James Otis asserted that "one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."[14] *See* Sources at 305. Even to this day, the symbolism of a castle is powerful — privately owned property possessed to the exclusion of everyone else, strong walls, perhaps even a moat, evidencing the presence of another type of government behind those walls — the government of the family.[15] The civil government was not to trespass on the property of the family government except within remarkably narrow confines.

At the heart of the warrant requirement is the Fourth Amendment's complete ban on general warrants. As the Supreme Court observed in Weeks v. United States, 232 U.S. 383 (1914):

> Resistance to [general warrants and writs of assistance] established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be

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[14] James Otis, "Against Writs of Assistance" (Feb. 1761). http://www.nhinet.org/ccs/docs/writs.htm.

[15] The notion of the family as a type of government has deep roots. *See*, *e.g.*, Abraham Kuyper, "Lecture on Sphere Sovereignty" (Oct. 20, 1890). http://www.reformationalpublishingproject.com/pdf_books/Scanned_Books_PDF/SphereSovereignty_English.pdf.

> invaded by any general authority to search and seize his goods and papers. [*Id.*, 232 U.S. at 390.]

First, the prohibition against general warrants is designed to narrow the scope of any government search and seizure to only such private property to which it may lay a superior property or proprietary claim. *See* T. Cooley, A Treatise on Constitutional Limitations, pp. 371-72 (5th Ed. 1883). By outlawing general warrants, government officials would be stopped from engaging in the practice of rummaging through one's private property looking for incriminating information or evidence. *See* Boyd v. U.S., 116 U.S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence.…").

Second, absent special circumstances, the warrant requirement interposes a judicial officer between an executive officer and private property owner, commanding the executive officer **prior to a search** to demonstrate, by oath or affirmation, to the satisfaction of the judicial officer that the search is reasonable and that the executive officer has "probable cause" to seize a particularly described place to be searched, and a particularly described person or thing to be

seized. As Justice Stevens observed, "this restraint [is] a bulwark against police practices that prevail in totalitarian regimes." California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting).

It is, indeed, meant to be so. In his Treatise on Constitutional Limitations, Thomas Cooley summarized the primacy of a person's property rights over lawless entries upon those rights:

> [T]he law favors the **complete and undisturbed dominion** of every man over his own premises, and protects him therein with such jealousy that he may **defend his possession** against intruders.... [Thomas Cooley, A Treatise on Constitutional Limitations at 374 (5th ed. 1883) (emphasis added).]

The "reasonable expectation of privacy" standard allowed erosions of the protections that the Founders had intended the Fourth Amendment to provide. After Jones, the property rights foundation of the Fourth Amendment has been restored, supplemented by the additional protection of privacy rights.

III. The State Secrets Doctrine Cannot Be Used to Cover Up What Most Likely Are Grave, Unprecedented, and Ongoing Constitutional Violations.

The district court's opinion bars Plaintiffs from asserting their claims of constitutional violations because to do so would require the Government to divulge alleged "state secrets." *Id.* at *19. Presumably, these "secrets" would

consist of particulars about how the Constitution was being violated — including exactly what communications are routinely seized and exactly how they are searched. But there would be no need for such secrecy about methods of search had the Government not already admitted that it seized the communications of both Plaintiffs and millions of other Americans. Indeed, the Government's purported need to keep secret the formula for its searches arises only after the unconstitutional seizure occurs.

Moreover, the district court did not use the state secrets doctrine in its traditional manner — to limit what evidence could be used — but rather to limit what claims could be brought.[16] *See* App. Br. at 54. Nor did the district court use the state secrets evidence, as instructed by 50 U.S.C. section 1806(f), to review all the evidence and decide the merits of the case but rather, again, only to review select documents and briefs and decide that the case could not even be litigated. *See* App. Br. at 48-49. Paradoxically, the larger and more serious the

[16] What's more, if evidence is excluded under the state secrets doctrine, it is thrown out of the case — no one can use it. Here, however, while the district court forbade Plaintiffs from being granted access to the secret evidence, the court was more than happy to use such evidence against them in throwing out their claims. *See* 2015 U.S. Dist. LEXIS 16200, *19. Had the district court disregarded the secret evidence (the only evidence the Government put on) as it should have, then the court would have had only Plaintiffs' evidence on which to rely. *See* App. Br. at 56.

constitutional violation, the more compelling the Government's need to hide its illegal behavior behind such a doctrine. If section 1806(f) is allowed to be used in this way, the Fourth Amendment ceases to be a law that constrains government, the Government having exalted itself above the Constitution.

The district court held that, although it might prefer to uphold the Constitution, it could not do so in this case. That result, the court noted, was "frustrat[ing]" but "**required** by the interests of national security." *Id.* at 20-21 (emphasis added). As C.S. Lewis noted, "there is no foretelling what may come to seem, or even to be, 'useful,' and '**necessity**' was always 'the tyrant's plea.'" C.S. Lewis, God in the Dock: Essays on Theology and Ethics, Wm. B. Eerdmans Publishing Co. (1972). It would amaze the framers of the Fourth Amendment that the Government could employ a doctrine not found in the Constitution known as "state secrets" to avoid compliance with the express constitutional prohibition on illegal searches and seizures. Secrecy as to the details about exactly how the violation was carried out cannot bar judicial scrutiny of the violation itself. *See* 2015 U.S. Dist. LEXIS 16200, *13.

In a similar type of case dealing with alleged constitutional violations on the one hand and government claims of classified documents, state secrets, and national security on the other hand, District Judge Colleen McMahon lamented:

> The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules — a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret. [New York Times Co. v. U.S. Dep't of Justice, 915 F. Supp. 2d 508, 515-16 (S.D.N.Y. 2013).]

Any "significant risk of potentially harmful effects any disclosures could have on national security" (2015 U.S. Dist. LEXIS 16200, *20) pales in comparison to the significant risk of allowing the Government to do violence to the People's property interest in their communications, do violence to the limits on the surveillance powers of the federal government, and thereby do violence to our written constitution. Indeed, if there is a credible national security interest to be pursued in this case, it is to preserve the security in our "persons, houses, papers, and effects" protected by the Fourth Amendment ban on unreasonable searches and seizures.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* complies with the word limitation set forth by Federal Rule 29(d), because this brief contains 5,580 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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

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Dated: August 17, 2015

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, in Support of Appellants and Reversal, was made, this 17th day of August 2015, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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