No. 19-16066

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 Free Speech Coalition, Free Speech Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, Poll Watchers, Policy Analysis Center, The Heller Foundation, and Restoring Liberty Action Committee in Support of Plaintiffs-Appellants and Reversal

JOSEPH W. MILLER
JOSEPH MILLER LAW OFFICES, LLC
P.O. Box 83440
Fairbanks, AK 99708
Attorney for Amicus Curiae
Restoring Liberty Action Committee

GARY G. KREEP
932 D Street, Suite 1
Ramona, CA 92065
Attorney for Amicus Curiae
Poll Watchers

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

September 13, 2019
*Attorney of Record

DISCLOSURE STATEMENT

The *amici curiae* herein, Free Speech Coalition, Free Speech Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, Poll Watchers, Policy Analysis Center, The Heller Foundation, and Restoring Liberty Action Committee, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A). These *amici curiae*, other than Restoring Liberty Action Committee, are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. Restoring Liberty Action Committee is not a publicly traded corporation, nor does it have a parent company which is a publicly traded corporation.

The *amici curiae* are represented herein by Herbert W. Titus, who is counsel of record, William J. Olson, Jeremiah L. Morgan, and Robert J. Olson, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. *Amicus* Restoring Liberty Action Committee also is represented herein by Joseph W. Miller of Joseph Miller Law Offices, LLC, P.O. Box 83440, Fairbanks, Alaska 99708. *Amicus* Poll Watchers also is represented

herein by Gary G. Kreep of Poll Watchers, 932 D Street, Suite 1, Ramona, California 92065.

s/Herbert W. Titus
Herbert W. Titus

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INTEREST OF *AMICI CURIAE*[1]

Free Speech Coalition, Free Speech Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, Poll Watchers, Policy Analysis Center, and The Heller Foundation are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Restoring Liberty Action Committee is an educational organization. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

Several of these *amici* filed an *amicus curiae* brief in this case four years ago:

- Jewel v. NSA, No. 15-16133, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.* (Aug. 17, 2015).

[1] Both parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

Several of these *amici* also filed *amicus curiae* briefs in other similar federal Fourth Amendment cases, including the following:

- United States v. Antoine Jones, 565 U.S. 400 (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);

- Clapper v. Amnesty International USA, 568 U.S. 398 (2013); http://lawandfreedom.com/site/constitutional/ClappervAmnestyIntl_Amicus.pdf (Sept. 24, 2012);

- Cotterman v. United States, 571 U.S. 1156 (2014); http://lawandfreedom.com/site/constitutional/Cotterman_v_US_Amicus.pdf (Sept. 9, 2013);

- United States v. Wurie, (consolidated with Riley v. California) 573 U.S. 373 (2014); http://www.lawandfreedom.com/site/constitutional/Wurie%20DDCF%20Amicus%20Brief.pdf (Apr. 9, 2014);

- Wikimedia v. National Security Agency, 857 F.3d 193 (4th Cir. 2017); http://lawandfreedom.com/wordpress/wp-content/uploads/2016/02/Wikimedia-amicus-brief.pdf (Feb. 24, 2016); and

- Carpenter v. United States, 138 S. Ct. 2206 (2018); http://lawandfreedom.com/wordpress/wp-content/uploads/2017/08/Carpenter-amicus-brief.pdf (Aug. 14, 2017).

ARGUMENT

I. THE APPELLANTS HAVE STANDING TO SUE BECAUSE THEY HAVE SUFFERED A FOURTH AMENDMENT INJURY.

Appellants brought suit, *inter alia*, to stop three different types of secret mass surveillance programs operated directly or indirectly by agencies of the federal government — programs which have lawlessly scooped up Internet and telephone communications and records of Americans for years. However, the district court dismissed appellants' Fourth Amendment claims in 2015 for lack of standing and national security reasons, reaffirming that dismissal in its April 25, 2019 order. *See* Appellants' Br. at 64. To understand why the district court's dismissal of the Fourth Amendment claims was wrong, it is imperative to understand what exactly the government is doing with appellants' Internet communications.

Two of these surveillance programs — "bulk acquisition of … phone records from major telephone companies" and "bulk collection of [Internet] metadata" — are said to have been discontinued (Appellants' Br. at 6). The other program which is still said to be ongoing is the mass data collection of upstream communications as they traverse the major backbone of the Internet, conducted under the auspices of Section 702 of the Foreign Intelligence

Surveillance Act. These three surveillance programs have several factors in common:

- they operated in dragnet — not targeted — fashion, designed to seize massive amounts of privately owned data;
- they seized private and personal data about the communications of Americans;
- they neither sought nor obtained consent from the owners of the data;
- they were conducted without a judicially issued search warrant;
- they occurred with no showing of probable cause; and
- the data seized were then available for search, and searched, by government agencies and by contractors working for government agencies, without notice to the persons whose rights were violated.

Thus, for all these reasons, all three secret government programs violated the Fourth Amendment.

Although, for obvious reasons, the government has resisted the disclosure of details and even the existence of these lawless government programs, much has become known. Whistleblowers who participated in these programs became so concerned about the breach of faith by the government with the People and have exposed much which was at first denied, but later shown to be true, about the methods and sources of the government's dragnet surveillance of Internet

activity. The government's own July 2014 Privacy and Civil Liberties Oversight Board (PCLOB) Report[2] confirms that, in searching Internet communications, "'the government has no ability to examine or otherwise make use of this larger body of communications, except to promptly determine whether any of them contain a tasked selector.'"[3] In order to determine "whether any [communications] contain a tasked selector," the government or its agents must first seize and then search all available Internet communications.

The PCLOB Report describes this coercive process by which the government seizes this information in some detail: "The [private sector] provider is compelled to assist the government in **acquiring** communications across these circuits.... Internet transactions are first **filtered** to eliminate potential domestic transactions, and then are **screened** to capture only transactions containing a tasked selector." PCLOB Report at 37 (emphasis added). Viewed from the Fourth Amendment vantage point, the verb "acquired"

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[2] Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (July 2, 2014) (ER 393) at 111, n.476.

[3] The government describes "selectors" as "communications identifiers such as email addresses and phone numbers." Appellants' Br. at 38.

should be understood to be the equivalent of "seized," while the verbs "filtered" and "screened" describe a "search."

The PCLOB Report of July 2, 2014, issued 17 months after the Supreme Court's decision in Clapper v. Amnesty International, 568 U.S. 398 (2013), constituted an admission of the existence of the NSA's upstream collection program. The Report is certainly not a model of clarity, giving rise to some ambiguities which the Department of Justice has used to full advantage. Nonetheless, that Report reveals facts sufficient to demonstrate the type of concrete harm that establishes standing:

- The NSA's acquisition of data occurs "with the compelled assistance … of the providers that control the telecommunications backbone over which communications transit." PCLOB Report at 35.

- Raw upstream collection[4] resides in NSA systems, where it is "subject to the NSA's minimization procedures." *Id*. (The NSA conducts similar upstream collection of "telephone communications." *Id*. at 36.)

- The NSA instructs private companies providing the "Internet background" to search for "to," "from," and "about" a tasked

[4] In a declassified report, the government defines what it means by "raw data." "Raw data is data that has not been evaluated for foreign intelligence or processed to handle [U.S. person's] identities pursuant to the minimization procedures." NSA Inspector General, "Implementation of §215 of the USA PATRIOT Act and §702 of the FISA Amendments Act of 2008," (Feb. 20, 2015) at 75 n.52.

> selector. *Id*. "An 'about' communication is one in which the tasked selector is referenced within the acquired Internet transaction, but the target is not necessarily a participant in the communication…." *Id*. at 37. The Report stated that according to a "still-classified September 2008 opinion, the FISC agreed with the government's conclusion" that such searches are authorized by statute because "the government's target when it acquires an 'about' communication is not the sender or recipients [based] upon language in a congressional report." *Id*.

Thus, the NSA's initial search of all communications is not limited simply to the "to" and "from" of a communication — which the government has unpersuasively contended are the equivalent of just looking at the addresses on a piece of mail, leaving "the body of the message" intact. PCLOB Report at 37. On the contrary, the NSA also searches the contents of all communications for what it euphemistically calls "about" communications — *i.e.*, not simply communications "from" John Doe or "to" John Doe, but also communications that talk "about" John Doe. *See id.* at 37, 119-24. In other words, at NSA's direction, computers are — or at least can be — reading every word of every communication.[5] Indeed, as the PCLOB report explained, the federal

[5] The secure NSA-controlled room at AT&T's Folsom Street Facility "also contains a Narus Sematic Traffic Analyzer capable of searching the **contents of communications**." Appellants' Br. at 40 (emphasis added).

government operates as though the Fourth Amendment has no application to digital communications:

> **Nothing comparable is permitted** as a legal matter or possible as a practical matter with respect to analogous but more **traditional forms of communication**. From a legal standpoint, under the Fourth Amendment **the government may not**, without a warrant, **open and read letters** sent through the mail in order to acquire those that contain particular information. Likewise, **the government cannot listen to telephone conversations**, without probable cause about one of the callers or about the telephone, in order to keep recordings of those conversations that contain particular content. And without the ability to engage in inspection of this sort, nothing akin to "about" collection could feasibly occur with respect to such traditional forms of communication. **Digital** communications like email, however, enable one, as a technological matter, to **examine** the **contents of all transmissions** passing through collection devices and acquire those, for instance, that contain a tasked selector **anywhere within them**. [PCLOB Report at 122 (footnotes omitted) (emphasis added).]

The district court thus far has utterly failed to acknowledge the fact or significance of these intrusive activities, closing its eyes to well-established facts, such as when the court asserted that "[t]he underlying premise that AT&T worked in the capacity of an agent for Defendants is without factual or substantive evidentiary support." Jewel v. NSA, Order Granting Defendants' Motion for Summary Judgment (Apr. 25, 2019) at 17.

The PCLOB Report denies that the FBI or the CIA have access to certain raw upstream data that is collected, with the NSA maintaining control over that data. However, for Fourth Amendment purposes, it makes no difference if the seizure of data and its search is performed by one alphabet agency or another — both are part of the same federal government, all of which is denied the power to do what the government has done.

All of the publicly available information, combined with the fact that the appellants used telecommunications services which were subject to the "sharing" arrangement with the NSA, sufficiently establish that the appellants suffered an injury, namely, a violation of rights protected by the Fourth Amendment. *See* Appellants' Br., Section IV ("the undisputed evidence shows their Fourth Amendment rights have been violated").

II. APPELLANTS HAVE ASSERTED A VALID FOURTH AMENDMENT CLAIM BASED ON A MASSIVE INTRUSION OF POSSESSORY INTERESTS.

In their opening brief, Appellants have emphasized their Fourth Amendment claim that the government's interception of their Internet communications violated their personal "privacies of life." *See* Appellants' Br.

at 70-73, 76-77. Appellants rely on two recent U.S. Supreme Court opinions[6] striking down government intrusions upon Internet communications, which that Court found had unconstitutionally invaded Fourth Amendment "protected privacy interests in Internet browsing[,] explain[ing] how the breadth and depth of a person's digital information gives a wide-ranging picture of a person's most private thoughts and actions — even beyond what a general search of their home might reveal." *Id.* at 73.

But personal privacy interests are not the only basis of Appellants' Fourth Amendment claims. Appellants have also asserted a violation of their Fourth Amendment-protected property rights — which they describe specifically as being a "possessory" right in their "Internet communications while in transit." *Id.* at 73. Appellants go on to catalogue a number of violations of their "possessory interests," including the "[c]opying" of Appellants' communications, by which Appellants claim the government has "exercise[d] dominion and control" over their "possessory interests in their communications." *Id.* at 74.

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[6] *See* Riley v. California, 573 U.S. 373 (2014); Carpenter v. United States, 138 S. Ct. 2206 (2018).

Although Appellants do not give equal billing to the two interests — privacy and property/possessory — each is distinctly alleged. As for their privacy interests, Appellants have invoked the familiar Katz test of "reasonable expectation of privacy" to support the claims that their Fourth Amendment rights have been violated. *See, e.g., id.* at 75-76. As for their Fourth Amendment possessory claims, however, Appellants assert that the "'reasonable expectation of privacy test'" is the "alternative test," but not the only one, for detecting "Fourth Amendment protections." *See id.* at 72, n.21. Judging by the three citations to United States v. Jones, 565 U.S. 400, 406, 414 (2012), the primary property test is tied to "'government trespass upon the areas ("persons, houses, papers, and effects") it enumerates.'" Appellants' Br. at 71 (citing Jones).

In addition to citing Jones, wherein the Supreme Court re-established the property foundation of the Fourth Amendment, Appellants have also relied on the sequel to Jones — Florida v. Jardines, 569 U.S. 1 (2013) — invoking the historic "physical intrusion" doctrine, premised not upon privacy expectations, but upon trespassory interference with the specific property interests identified in and protected by the Fourth Amendment text:

> "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original

> meaning of the Fourth Amendment has undoubtedly occurred." *Florida v. Jardines,* 569 U.S. 1, 5 (2013) … *Jones,* 565 U.S. at 404-07 & n. 3. [Appellants' Br. at 75.]

As Appellants explain (Appellants' Br. at 72, n.21) by these two decisions — Jones and Jardines — the Supreme Court relegated the prevailing Katz test for privacy to secondary status, while restoring the primacy of the Fourth Amendment to its original textual protection of property. Writing for the majority in Jones, Justice Scalia proclaimed:

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

One year later, in Jardines, Justice Scalia, again writing for the majority, explained that "[t]he *Katz* reasonable-expectations test 'has been *added to,* not *substituted for,*' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas…." Jardines at 11. Under this restored view, the Fourth Amendment property rights principle becomes the "baseline" by which Fourth Amendment claims are initially

appraised, and only if found wanting were such claims to be governed by the privacy test.

But Fourth Amendment jurisprudence has not developed in the way that the justices anticipated. As dissenting Justice Neil Gorsuch observed last year in Carpenter, many litigants have largely bypassed the Fourth Amendment property principle in favor of a redesigned Katz privacy formula that, to date, has succeeded in two recent high-profile Supreme Court rulings. *See generally* Riley v. California; *see also* Carpenter at 2272 (Gorsuch, J., dissenting). In an unusual display of judicial pique, Justice Gorsuch exhorted:

> Litigants have had fair notice since [Jones and Jardines] that arguments like these may vindicate Fourth Amendment interests even where *Katz* arguments do not. Yet the arguments have gone unmade, leaving courts to the usual *Katz* handwaving. These omissions do not serve the development of a sound or fully protective Fourth Amendment jurisprudence. [Carpenter at 2272.]

This state of affairs has not, however, been the sole fault of the litigants. The Supreme Court has failed to lead by example, preferring to keep the Katz test, or some other version of it, alive despite its major shortcomings. *See* Carpenter at 2236-46 (Thomas, J., dissenting). Without more specific instruction, litigants will continue to be cautious, presenting both privacy and property claims, as Appellants have done herein. *See* Appellants' Br. at 71-76.

In their Carpenter dissents, both Justice Thomas and Justice Gorsuch have sought to close this gap by clarifying the distinct categories of property to which the Fourth Amendment applies. Calling for a return to the historic text of the amendment, Justice Thomas elaborated on the Jones Court's commitment to reconnect it to "security in property recognized by [John] Locke and the English legal tradition … that inspired the Fourth Amendment." Carpenter at 2239 (Thomas, J., dissenting). Of particular note, Justice Thomas singled out the four objects secured by the amendment's expressed terms: "persons, houses, papers, and effects." *Id.* at 2241. And, of particular relevance to the type of data and digital property involved here, Justice Thomas observed:

> For Locke, every individual had a property right "in his own person" and in anything he "removed from the common state [of] Nature" and "mixed his labour with…." Because property is "very unsecure" in the state of nature… individuals form governments to obtain "a secure enjoyment of their properties…." [Carpenter at 2239 (Thomas, J., dissenting).]

This notion that an individual human being's physical person is a property right endures, as is evidenced by Pope John Paul II who pointed out that:

> besides the earth, man's principal resource is *man himself*. His intelligence enables him to discover the earth's productive potential and the many different ways in which human needs can be satisfied. [Pope John Paul II's Encyclical Letter *Centesimus Annus* (1991), paragraph 32.]

Thus, the Fourth Amendment text focuses on the relationship between the item searched and the person against whom the search is directed. Clearly, the digital property being seized and searched by the government was created by Appellants even if the search is conducted remotely from the Appellants' homes or offices. But their property interests extend beyond their "persons" and their "houses" to include their "papers" and "effects," a fact which, according to Justice Gorsuch, requires a diligent, but not novel, judicial effort to apply an 18th-century document to our technological age:

> What's left of the Fourth Amendment? Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game. Countless Internet companies maintain records about us, and increasingly, *for* us. Even our most private documents — those that, in other eras, we would have locked safely in a desk draw or destroyed — now reside on third party servers. [Carpenter at 2262 (Gorsuch, J., dissenting).]

To what should a Fourth Amendment claim, Justice Gorsuch asked, be tied — to a lawyer's "appeal to a judge's personal sensibilities about the 'reasonableness' of your expectations or privacy"? Rather, he concluded, such a constitutional claim should be "tied to the law." *Id.* at 2267. To illustrate this point, Justice Gorsuch reminds us that "Fourth Amendment protections for your papers and

effects do not automatically disappear just because you share them with third parties." *Id.* at 2268.

Indeed, the Justice found a common law predicate to apply the Fourth Amendment to the remote storage of digital information. Justice Gorsuch drew a clearly applicable analogy to the common law of bailments, where an owner places an item in a third party's possession, but the title remains in the possession of the original owner. *Id.* at 2268-2271. So is the case here. Appellants properly assert a possessory interest in their Internet communications, even though such communications are stored remotely, by agreement. As in the law of bailment applicable to tangible property, by their use of the Internet, Appellants have not lost all of their property rights to those communications which are intangible property. Even though they may not have exclusive possession of the contents of those communications, they do not lose property rights in the contents of those communications even though they may no longer have sole and exclusive possession. *See* John Cribbet, Principles of the Law of Property (Foundation Press: 2d ed. 1975) at 12-16. Rather, the transfer of personal property is not transfer of ownership, but a transfer of possession for a particular purpose, one of which is storage, thereby creating a common law

bailment. *Id.* at 83. As Justice Gorsuch has written, "even though there is no formal agreement between the property's owner and its possessor, the possessor will become a constructive bailee when justice so requires." Carpenter at 2270 (Gorsuch, J., dissenting).

There should be no question that there is a Fourth Amendment property interest in Internet communications. In Riley v. California, the Supreme Court recognized the significant Fourth Amendment interests in digital information carried by nearly every American in their cell phones. The Court described both the quantity of information available in the storage of cell phones ("a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house") as well as the quality of that information ("A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form…."). *Id.* at 396-97.

Riley also recognized the increasing reliance by mobile devices (and many other devices) on "cloud computing," which the Court described in an overly simplistic fashion as "the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself." *Id.* at 397. Cloud

computing and storage relied on by ever-present mobile devices raises the obvious threat that the information in a cell phone that the Court recognized as protected in Riley is being routinely violated by the upstream surveillance which intercepts the contents of cloud-stored, privately owned information.[7]

III. THE FOURTH AMENDMENT'S PROHIBITION AGAINST GENERAL WARRANTS PROTECTS PERSONS AND THEIR PROPERTY FROM INDISCRIMINATE GOVERNMENT SEARCHES AND SEIZURES.

Appellants assert that the government's upstream Internet interceptions of the private communications of Americans, together with its subsequent search and use of the seized data, constitute a profoundly serious Fourth Amendment violation (Appellants' Br. at 64-75). This constitutional claim is grounded not only on an interference with property rights and privacy interests (*see* discussion in Section II, *supra*), but also on a flagrant violation of what was the central

[7] In 2016, then-Tenth Circuit Judge Gorsuch viewed a government review of an email attachment without a warrant might be violate the property principles of the Fourth Amendment, noting that "many courts have already applied the common law's ancient trespass to chattels doctrine to electronic, not just written, communications." United States v. Ackerman, 831 F.3d 1292, 1308 (10th Cir. 2016).

reason that the Fourth Amendment was added to the Constitution in 1791.[8] As appellants have described the purpose of the Fourth Amendment:

> The Founders' special protection for **papers and effects** stems from their determination to prohibit the indiscriminate, suspicionless rummaging and seizure of papers that the English Crown had conducted using "**general warrants**"—warrants that failed to specify the papers that were sought, the person whose papers could be searched and seized, or the place to which the search was confined. *Carpenter*, 138 S. Ct. at 2213; *Riley v. California*, 573 U.S. 373, 403 (2014)…. [Appellants' Br. at 71 (emphasis added).]

The district court never reached the merits of these constitutional claims, resolving the case on threshold standing and national security grounds. Jewel at 18. The district court first concluded "that Plaintiffs have failed to proffer sufficient admissible evidence to indicate that records of their communications were among those affected by Defendants." *Id*. The district court hinted that the classified evidence it reviewed might not have established standing, but never stated that expressly. *Id*. However, the court went further to rule that, even if standing had been demonstrated, the case still would have been dismissed:

> In addition, having reviewed the classified portion of the record, the Court concludes that even if the public evidence proffered by

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[8] *See* Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) ("The Fourth Amendment was a response to the English Crown's use of general warrants, which often allowed royal officials to search and seize whatever and whomever they pleased while investigating crimes or affronts to the Crown.").

> Plaintiffs were sufficiently probative to establish standing, adjudication of the standing issue could not proceed without risking exceptionally grave damage to national security. The details of the alleged data collection process that are subject to the Defendants' assertion of the state secrets privilege are necessary to address Plaintiffs' theory of standing as well as to engage in a full and fair adjudication of Defendants' substantive defenses. [*Id*.]

Thus, the district court accepted the government's unstated theory of the case that, so long as its activities are undertaken in the pursuit of "national security," the government is excused from abiding by the Constitution. Although the district court was never so bold as to engraft an exception into the Fourth Amendment — which would render it inoperative whenever the government alleged a good reason to ignore it — that is the lesson of its decision. Without even one word of discussion of the U.S. Constitution, the district court rendered the government completely immune from constitutional challenge and feigned the impossibility of judicial redressability.[9] Such a theory tolerating lawlessness on

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[9] The district court's discussion of "Redressability," which followed its national security discussion, was similarly deferential to the government, claiming that "the Court cannot issue a judgment without exposing classified information." Jewel at 18. This claim makes no sense. If the government was proven to be engaged in activities violating appellants' Fourth Amendment rights, those unlawful activities could be enjoined through the issuance of a public order stating the scope of the injunction in general terms, with the details and the reasons for the injunction set out in a classified order — just as the court did here on standing.

the part of the government under the cloak of national security has been invoked so frequently in modern times as to sound normal, but it does violence to the Fourth Amendment and the protections it was designed to offer the American People.

A brief summary of the genesis of the Fourth Amendment published by the American Bar Association Foundation states:

> [t]he fourth amendment grew out of the use by British officials of **general warrants** to enforce the acts of trade and **to search for seditious publications**. Virginia was the first state to prohibit the use of such warrants. [Sources of Our Liberties at 427 (R. Perry & J. Cooper, eds., rev. ed., ABA Foundation: 1978) (emphasis added).]

If the Fourth Amendment was designed to prevent government's use of "general warrants" to "search for seditious publications," it should also prevent the government's completely unauthorized searches and seizures of data looking for modern actions of sedition[10] not even with the patina of legitimacy provided by a general warrant. To the extent that the NSA has deigned to explain its activities to the American people whom it surveils, the NSA's upstream data

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[10] "Sedition" in that era was described as "[a] factious commotion of the people, a tumultuous assembly of men rising in opposition to law or the administration of justice, and in disturbance of the public peace." Webster's Dictionary of the English Language (1828).

collection program is designed to deter, prevent, or punish acts of violence against the government and the public peace — which constitute acts of sedition.

Virginia's prohibition of the use of general warrants referred to in the ABA Foundation quotation above was set out in Section 10 of the Virginia Bill of Rights of June 12, 1776:

> That **general warrants**, whereby an officer or messenger may be commanded to **search suspected places without evidence of a fact committed**, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are **grievous and oppressive, and ought not to be granted**. [Sources at 312 (emphasis added).]

The district court had no problem with a modern form of "grievous and oppressive" searches and seizures. As with general warrants, the action of the government in "searching suspected places" to gather upstream Internet data occurs on a dragnet basis — "without evidence" that would justify the action. Even if it could somehow be argued that the search and seizure arose from a "general warrant," it was not one issued by a member of an independent judiciary. It would be one issued by the Director of the NSA or like official, on the supposed authority of the President under an Executive Order issued on October 4, 2001. *See* Jewel at 2.

One particular type of general search warrant, called a writ of assistance, was used in the colonies in the enforcement of the acts of trade to locate smuggled goods. Those writs authorized royal officers to search any house or ship and to seize goods at will. James Otis, who served as Advocate-General in the vice-admiralty court in Massachusetts, was called upon to defend their legality, but he had the integrity to resign his position instead. Hence, Otis chose to defend without fee the Boston merchants challenging those writs. His five-hour speech on the subject, delivered on February 24, 1761, included a rousing opening:

> I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand and villainy on the other as this Writ of Assistance is. It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book. [J. Otis, Against Writs of Assistance (Feb. 24, 1761).]

Otis did not prevail that day, but his speech was witnessed by John Adams, who famously observed that "[t]hen and there the Child Independence was born." Letter from John Adams to William Tudor, Sr. (Mar. 29, 1817). If so, then the colonists' hatred of writs of assistance — a form of general warrants and Otis' principled opposition — was **the** precipitating cause of our independence.

That birth led to the American Revolution, the formation of the nation, and the adoption of the Constitution under which all federal judges, including the district court judge below, exercise authority. Yet, thus far, the district court has been wholly insensitive to the need to protect the people from their government, the way that Otis protected the colonists from the writs of assistance. The district court has disregarded every proof offered of the existence of dragnet searches and seizures more expansive and intrusive than any general warrant issued in the 18th century that could ever have been imagined. The district court failed to fulfill its responsibility to decide a legitimate case or controversy designed to prevent further constitutional violations by the executive branch of government.

The "national security" defense which was offered by the government to provide cover to general warrants, and passively accepted by the district court, provides no excuse for unconstitutional acts whatsoever. The extensive showing by the appellants as to how the searches and seizures have been occurring for nearly two decades was dismissed as much ado about nothing. The district court did not even consider appellants' evidence sufficient to create a presumption — or at least shift the burden of going forward to the appellees — to explain exactly why it had created secret government offices (SG3 rooms) within

telecommunications facilities, and why it installed peering links onto fiber-optic cables to copy Internet traffic, if not to spy on the communications of American citizens and others. *See* Appellants' Brief Upstream Evidentiary Addendum.

Moreover, the prohibition against general warrants was 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 at 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).

The district court having failed to protect the appellants and the People, the duty now falls to this Court.

CONCLUSION

The judgment of the district court should be reversed and remanded with directions to enter summary judgment for Appellants on their Fourth Amendment claims.

Respectfully submitted,

/s/Herbert W. Titus

JOSEPH W. MILLER
JOSEPH MILLER LAW OFFICES, LLC
P.O. Box 83440
Fairbanks, AK 99708
Attorney for Amicus Curiae
Restoring Liberty Action Committee

GARY G. KREEP
932 D Street, Suite 1
Ramona, CA 92065
Attorney for Amicus Curiae Poll Watchers

HERBERT W. TITUS*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
Attorneys for Amici Curiae
*Attorney of Record
September 13, 2019

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Free Speech Coalition, *et al.*, in Support of Plaintiffs-Appellants and Reversal, was made, this 13th day of September 2019, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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