No. 25-112

IN THE
Supreme Court of the United States

OKELLO T. CHATRIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Brief *Amicus Curiae* of America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, and Conservative Legal Def. and Ed. Fund in Support of Petitioner

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

JOHN I. HARRIS III
SCHULMAN, LEROY & BENNETT, P.C.
3310 West End Avenue
Suite 460
Nashville, TN 37203

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for *Amici Curiae*

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INTEREST OF THE *AMICI CURIAE*[1]

Amici America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating 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.

Some of these *amici* filed *amicus* briefs with this Court in other Fourth Amendment cases involving principles applicable here. *See United States v. Jones*, No. 10-1259, Brief *Amicus Curiae* of Gun Owners of America, Inc., et al. (on petition, May 16, 2011) and Brief *Amicus Curiae* of Gun Owners of America, Inc., et al. (on merits, Oct. 3, 2011); *United States v. Wurie*, No. 13-212, Brief *Amicus Curiae* of Downsize DC Foundation, et al. (on merits, Apr. 9, 2014); and *Carpenter v. United States*, No. 16-402, Brief *Amicus Curiae* of USJF, et al. (on merits, Aug. 14, 2017).

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[1] It is hereby certified 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.

STATEMENT OF THE CASE

In 2019, the Call Federal Credit Union in Midlothian, Virginia was robbed of some $195,000. *United States v. Chatrie*, 590 F. Supp. 3d 901, 905 (E.D. Va. 2022) ("*Chatrie I*"). After exhausting other leads, a detective sought and obtained a warrant from a Virginia State Circuit Court magistrate, which was served on Google, for "geofencing" location records of all cell phones found in a 300-meter circle around the bank before and after the robbery. *Id.* at 917-18. Eventually, a detective narrowed his search to a group including the Petitioner, Okello Chatrie. *Id.* at 924. Chatrie was arrested, indicted, and tried in the district court for the Eastern District of Virginia for two crimes related to the robbery. *Id.* He filed a motion to suppress the evidence gained from the geofencing search. *Id.*

The district court found that the geofencing warrant constituted a "search" under the Fourth Amendment. *Id.* at 926-27. The court concluded that "the warrant lacked any semblance of ... particularized probable cause to search each of its ... targets." *Id.* at 927. However, in part because there were few court decisions delineating the reasonableness of geofencing searches, the court found that the "good faith" exception to the exclusionary rule applied, and denied the motion to suppress. *Id.* at 937-38.

A Fourth Circuit panel upheld the denial of the motion to suppress, but on different grounds. *U.S. v. Chatrie*, 107 F.4th 319 (4th Cir. July 9, 2024) ("*Chatrie II*"). The panel ruled that the search pursuant to the

geofencing warrant did not actually constitute a Fourth Amendment search because Chatrie "voluntarily exposed this information to Google." *Id.* at 322. Accordingly, he "did not have a reasonable expectation of privacy in the two hours' worth of Location History data...." *Id.* at 330. No meaningful consideration was given to Petitioner's property interest in his own data. Dissenting, Judge Wynn argued that such broad geofencing warrants are "uncomfortably akin to the sort of 'reviled' general warrants used by English authorities that the Framers intended the Fourth Amendment to forbid." *Id.* at 353 (Wynn, J., dissenting).

After granting en banc review, the Fourth Circuit affirmed in a *per curiam* opinion, accompanied by eight concurring opinions and one dissent. *U.S. v. Chatrie*, 136 F.4th 100 (4th Cir. Apr. 30, 2025) ("*Chatrie III*"). Chief Judge Diaz concurred, but only on the finding of the "good faith" exception, not on the finding that no search had occurred. *Id.* at 101. (Diaz, C.J., concurring). Judge Wynn, who had dissented from the panel decision, concurred on the application of the good faith exception, but argued that a Fourth Amendment search had occurred, and that "it would be a grave misjudgment to conflate an individual's limited disclosure to Google with an open invitation to the state" to search. *Id.* at 127 (Wynn, J., concurring).[2]

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[2] In a footnote, Judge Wynn added that "this case involved a Fourth Amendment search — and that we should say so — [however] the conditions for application of the good-faith exception to the exclusionary rule are met here." *Id.* at 115, n.1 (Wynn, J., concurring).

Judge Gregory dissented, also believing the court should have addressed whether a search had occurred, rather than proceeding directly to the issue of the "good faith" exception. He stated: "I am ... vehemently opposed to the notion that new technology erodes the protections and principles of our Constitution." *Id.* at 160 (Gregory, J., dissenting). He argued that the geofencing search "glaringly infringed on the Fourth Amendment." *Id.* at 157. He concluded, "[t]he people's rights against unreasonable searches and seizures cannot ... bend to accommodate the volatility of technology. Rather, new technologies must bend to accomplish the vitality of the protections guaranteed to the people under the Fourth Amendment." *Id.* at 161. Most of his dissent addressed why he believes "the good faith exception is inapplicable in this case." *Id.* at 157.

This Court granted certiorari to address the first question posed: "Whether the execution of the geofence warrant violated the Fourth Amendment."

STATEMENT

For most of the nation's history, the type of warrant at issue here, which empowers police to track a person's "papers and effects" to determine the historical whereabouts of every American in a search for "mere evidence," likely would have been considered *per se* "unreasonable." In this Court's initial Fourth Amendment decision, *Boyd v. United States*, 116 U.S. 616 (1886), a threshold question was addressed which has long since been forgotten: are the "papers" sought by the government subject to seizure at all? Under the

"mere evidence rule," searches were unreasonable *per se*, unless the government had a superior property interest in the property searched. In *Gouled v. United States*, 255 U.S. 298 (1921), this Court explained that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding...." *Id.* at 309.

Then, in *Warden v. Hayden*, 387 U.S. 294 (1967), this Court jettisoned longstanding Fourth Amendment jurisprudence based upon property rights in favor of what was then an emerging right of "privacy." Justice William J. Brennan — writing for a bare majority of five Justices — rejected the time-honored "mere evidence" rule due to his dissatisfaction with the "fictional and procedural barriers rest[ing] on property concepts." *Hayden* at 304. Justice Brennan claimed that the distinction between (i) "mere evidence" and (ii) "instrumentalities [of crime], fruits [of crime] and contraband" was "based on premises no longer accepted as rules governing the application of the Fourth Amendment." *Id.* at 300-01. Concurring on other grounds, Justice Fortas warned: "I fear that in gratuitously striking down the 'mere evidence' rule, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court today needlessly destroys, root and branch, a basic part of liberty's heritage." *Id.* at 312 (Fortas, J., concurring).

Shortly after *Hayden* delinked the Fourth Amendment from its property foundation, this Court decided *Katz v. United States*, 289 U.S. 347 (1967), where it expressly embraced the "reasonable expectation of privacy" test, which test has proven wholly inadequate to the task of protecting the American people against unreasonable searches and seizures.

It was not until *United States v. Jones,* 565 U.S. 400 (2012), that the property right was restored as the primary basis of the Fourth Amendment's protection.[3] Justice Scalia explained that "Fourth Amendment rights do not rise or fall with the *Katz* formulation.... *Katz* did not repudiate th[e] understanding" that the Fourth Amendment protects against "government trespass upon the areas ... it enumerates." *Jones* at 406-07. As Justice Sotomayor explained in concurrence, "*Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it." *Id.* at 414 (Sotomayor, J., concurring). Respect for the property principle underlying the Amendment's protection of "persons, houses, papers, and effects" was restored, although the mere evidence rule was not brought back. At issue here is whether Chatrie's property interests in his own digital "papers and effects" in the hands of a third party will be protected from a general warrant.

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[3] *See generally* Herbert Titus & William Olson, "United States v. Jones: Reviving the Property Foundation of the Fourth Amendment," *Case Western Reserve J. of Law, Tech. & The Internet*, vol. 3, no. 2 (Spring 2012).

SUMMARY OF ARGUMENT

Perhaps the primary evil which the Framers of the Fourth Amendment sought to address was the use of general warrants. The use of such warrants by agents of the Crown had been deeply offensive to the colonists in that they would authorize law enforcement to rummage through the homes and offices of targeted persons looking for evidence that some offense had been committed. As a result, the Fourth Amendment requires warrants be particularized in several respects, and this warrant could not have been more general. The application of the Amendment to Chatrie's "papers" and "effects" is made clear by a threshold determination that the "location data" each person generates with Google is protected even if held by Google. A warrant ordering Google to search millions of such data files, properly considered the property of its customers, to identify suspects and witnesses is the very opposite of particularized.

Although there some differences in the facts, application of this Court's decision in *Carpenter* with respect to cell-site location information should resolve the issue. The argument that the cell phone user opted-in to being tracked disregards the reality of cell phone use as explained in *Riley v. California.*

Since *United States v. Jones*, it is no longer permissible to consider only whether there was a search under the "reasonable expectation of privacy" test as done by several judges. Each Google user generates "location data" in which the user should be deemed to have a protected property interest. Any

intrusion into that data by the government through issuance of general warrant is a trespass.

Technology evolves, and this Court must make appropriate analogies to the type of protections that the framers of the Fourth Amendment provided. Modern police practices do not control here, nor do the internal rules that Google sets. If a geofence warrant operates as a general warrant, it is *per se* unconstitutional, and its use cannot be sanctioned by this Court.

ARGUMENT

I. MANY OF THE JUDGES BELOW RECOGNIZED FOURTH AMENDMENT VIOLATIONS ARISING FROM THE USE OF GEOFENCE WARRANTS.

Petitioner Chatrie based his motion to suppress location data obtained from Google using a geofence warrant on it lacking both probable cause and particularity.[4] *Chatrie I* at 927-36. After a thorough analysis of the warrant, the district court concluded "this particular Geofence Warrant is invalid." *Id*. at 927. Nevertheless, the district court denied the motion to suppress based on the **good-faith exception** to the Fourth Amendment. *Id*. at 936-41.

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[4] The geofence warrant was obtained from a Chesterfield (Virginia) County Circuit Court magistrate, but the prosecution of Petitioner occurred in the Eastern District of Virginia.

The Fourth Circuit panel agreed that the motion to suppress should have been denied, "but for a different reason: Chatrie did not have a **reasonable expectation of privacy** in two hours' worth of Location History data voluntarily exposed to Google." *Chatrie II* at 325 (emphasis added). Accordingly, the panel concluded: "the government **did not conduct a Fourth Amendment search** when it obtained two hours' worth of Chatrie's location information, since he **voluntarily exposed** this information to Google." *Id.* at 322 (emphasis added).

The Fourth Circuit en banc simply affirmed the district court denial of the motion to suppress without any opinion, but with eight concurrences and one dissent. Several of the judges below addressed the lawfulness of the search, the only issue now before this Court.

A. The District Court Decision.

The district court's decision highlighted several deficiencies in the warrant. The requirement that a warrant "be supported by probable cause," "demands that law enforcement possess 'a reasonable ground for belief of guilt ... *particularized* with respect to the person to be searched or seized.'" *Chatrie I* at 928 (citation omitted). This particular Geofence Warrant seeks "location information for *all* Google account owners" and thus "lacks sufficient probable cause ... particularized 'with respect to the person to be searched or seized.'" *Id.*

Google returned information in response to the warrant in three stages, but there was only one warrant which was supported by only one affidavit. The affidavit describes the place to be searched as "Google LLC" headquartered in Mountain View, California, and a radius of 150 meters around a particular latitude and longitude. The thing to be searched was its computer servers. The information sought was location data for each "device that was inside" a geographical area. "Anonymized" information would be provided first, and then, law enforcement would "attempt" — but would not be required — to narrow the search, before obtaining "'identifying account information/CSI for the accounts requested' by law enforcement." This information required to be provided included:

> user name and subscriber information to include date of birth if available, account type and account number, email addresses associated with the account, electronic devices associated with the account and their identifying make, model and other identifying numbers, telephone numbers associated with the account or to receive assistance with the account, and Google Voice phone numbers associated with the account. [*Id.* at 919, n.27.]

The warrant sought to search Google servers, but did not explain that a search would be required of each of millions of Google customer location files. Thus, in addition to the questions raised as to whether the magistrate made an independent review to determine whether probable cause existed, it appears he thought

he was authorizing a search of either (i) Google, or (ii) Google's servers, but not each of millions of individual location files housed at Google.

Also, one of the rationales apparently offered by the government was that the warrant may have identified not only potential suspects, but potential witnesses — a purpose for a warrant which the district court questioned. *Id*. at 929. The district court should have more than questioned any effort to justify the issuance of a warrant to identify witnesses who then could be interviewed. These *amici* are not aware of authority which would sanction the issuance of a warrant to identify all persons who may have been within blocks of a crime, so they could be interviewed to find out if they might have seen something. Perhaps the reason there is no known authority is that the geofence warrant is a new development, but warrants require probable cause that evidence of a crime will be found in a particular place or on a particular person. As this Court explained in *Carpenter v. United States*, 585 U.S. 296 (2018), location data is collected on both suspects and others.[5] If warrants are issued simply to large numbers of persons to gather investigative leads, then it would be impossible to distinguish them from general warrants.

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[5] *Carpenter* at 312 ("Critically, because location information is continually logged for all of the 400 million devices in the United **States — not just those belonging to persons who might happen to come under investigation** — this newfound tracking capacity runs against everyone. Unlike with the GPS device in *Jones*, **police need not even know in advance whether they want to follow a particular individual**, or when") (emphasis added).

The district court reasonably concluded: "the warrant lacked any semblance of such particularized probable cause to search each of its nineteen targets, and the magistrate thus lacked a substantial basis to conclude that the requisite probable cause existed." *Chatrie I* at 927. However, the district court did not believe that the detective's reliance on the geofence warrant was objectively unreasonable, thus qualifying for the good faith exception, and suppression of the evidence was not required. *Id.* at 937-38.

B. The Fourth Circuit Panel Decision.

The Fourth Circuit panel declined to apply this Court's decision in *Carpenter*, which barred the government's use of "cell-site location information" ("CSLI") in a criminal prosecution. In *Carpenter*, CSLI data was maintained by a third party cell phone provider, where here, the geofence data was maintained by a different third party, Google, a distinction which should make no difference. In *Carpenter*, the CSLI of a named individual was used to identify the whereabouts of a particular customer, while here the search was of the geolocation data of millions of persons, used to find the person or persons. In *Carpenter*, this Court rejected the government's assertion of the third-party doctrine, but here the Fourth Circuit accepted it.

Despite the close similarities of this case to *Carpenter*, the Fourth Circuit provided two reasons to rule differently, asserting "Chatrie did not have a reasonable expectation of privacy" in his location data, even though Carpenter did. *Chatrie II* at 330. First,

in *Carpenter*, the CSLI provides law enforcement "an all-encompassing record of the holder's whereabouts" (*Carpenter* at 311) over a multi-day period, while here the geofence data was used to determine the holder's whereabouts over a multi-hour period. *See Chatrie II* at 330. Second, in *Carpenter*, the CSLI was collected without any affirmative act by the user, but here "Chatrie voluntarily exposed his location information to Google." *Chatrie II* at 331.

As to the panel's first reason, the length of an offense is generally not relevant to whether an offense occurred. The longer the offense continues only determines the magnitude of the violation. The only authority the panel cited for this proposition was a prior decision of that circuit in *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330 (4th Cir. 2021) (en banc). *Id.* at 329. Moreover, any such analysis would only apply to the *Katz* "reasonable expectation of privacy" test and not the *Jones* "property rights" test, which the panel mentioned but never analyzed. *Katz v. United States*, 389 U.S. 347, 360 (Harlan, J., concurring). As this Court stated in *Jones*, "the *Katz* reasonable-expectation-of-privacy test has been *added to,* not *substituted for*, the common-law tresspassory test." *Jones* at 409.

Moreover, if it is permissible for the government to obtain location data from a search of millions of Google users for even an hour or two, why could the government not obtain all of the cell phone users in a given area — such as those who were present during disturbances in Minneapolis — to track down each person to determine if they were engaged in illegal

activity, or perhaps witnessed illegal activity. The government apparently used geofence warrants to determine the identity of all persons at the Capitol on January 6, 2021 — including the grandmothers who were invited in by police and walked peacefully between velvet ropes.[6] Could the government use this power to determine who attended an anti-war rally or a church service disfavored by the government? Other than Google, no one would even know unless the data was revealed in a prosecution.

Lastly, the panel never discussed why the data generated by Google customers which was stored at Google was not the property of the Google users. Because such digital data should have been viewed as personal property, then its search should have been evaluated according to the *Jones* case, not just the *Katz* reasonable expectation of privacy test. The Fourth Amendment protects all property — even digital property. *See* Pet. Br. at 15-22 for a thorough discussion of why Google customers have a property interest in their location history.

The panel's second reason defies the realities of the use of a cell phone. The "affirmative act" to turn on geotracking is accomplished by the normal use of the phone for the functions for which it was sold and purchased. This feature is turned on by the simple act of using Google Maps, but even if the fine print of a Google opt-in screen advises users of Google Maps that

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[6] *See generally* Margot Cleveland, "If Big Brother And Big Tech Can Team Up To Violate Political Opponents' Privacy Over J6, They Can Do The Same To You," *The Federalist* (Nov. 30, 2022).

their location information is being tracked, that would convey only that the information is used to get directions, not to track the user. The panel rejected these considerations with the dismissive comment that "Google provides users with ample notice...." *Chatrie II* at 331. There was no information about how many Google users knew their location history data was held in the Google "Sensorvault" *(id.* at 323), or how many knew they could delete tracking information after it was collected. The scope of the Fourth Amendment should not be determined by the terms of a dense "user agreement" never read by any customer of Google.

Based on these two factors, the panel found *Carpenter* did not control and relied on the "third-party doctrine" to find that the data created by Chatrie's phone belonged exclusively to Google, and that he had no reasonable expectation of privacy, and therefore there was no search.

C. Judge Wynn's Panel Dissent.

The panel was dismissive of the dissent which sought to apply both *Carpenter* and *Jones* here, stating: "The dissent then puts a pot on the fire, combines these ingredients, and *voila*! — finds that the police conducted a search here." *Chatrie II* at 333. The dissent was significantly longer than the panel opinion, as it provided a helpful tracing of the development of Fourth Amendment law.

The dissent described the rationale of this Court in *Carpenter* as acknowledging "that the third-party doctrine is an increasingly tenuous barometer for

measuring an individual's privacy expectations in the digital era." *Chatrie II* at 344 (Wynn, J., dissenting). In view of that deficiency, "the Court laid the foundation for a new, multifactor test to be used to determine whether a government intrusion using digital technologies constitutes a search." *Id.* All the while, the dissent understood this Court was focused on "one overarching principle: the need to maintain historical Fourth Amendment protections against expanding police surveillance capabilities." *Id.* at 346.

The first factor was "the depth" or "the comprehensiveness of the intrusion...." *Id.* at 348. (Wynn, J., dissenting). Judge Wynn explained that: "the intrusion into Chatrie's Location History was even more comprehensive than the intrusion in *Carpenter* because Location History is collected more often and is more precise than CSLI as described in *Carpenter*." *Id.*

The second factor was "the breadth" of the intrusion. Here, the geofence data "empower[ed] police to time travel for each intrusion. Thus, each user has 'effectively been tailed' since they activated Location History." *Id.* at 352 (Wynn, J., dissenting). Further, "geofence intrusions permit police to **rummage through** the historical data of an unlimited number of individuals, *none* of whom the police previously identified nor suspected of any wrongdoing." *Id.* (bold added). Describing geofence warrants as "fishing expeditions," he explained that: "even when police do obtain a warrant for a geofence, such a warrant is uncomfortably **akin to the sort of 'reviled' general**

warrants[7] used by English authorities that the Framers intended the Fourth Amendment to forbid." *Id*. at 353 (Wynn, J., dissenting) (bold added).

The third factor was "near-perfect surveillance," which was a test met here. *Id.* Judge Wynn found that the shorter duration of the intrusion here was of little importance, as *Carpenter* did not base its decision on time periods. Moreover, here, the tracking "could have followed users through dozens of non-public spaces, including residences, religious spaces, and senior living facilities." *Id*. at 355 (Wynn, J., dissenting).

The fourth factor was "ease of access," and this factor, too, favored application of the rule in *Carpenter*. Both CSLI and geofencing searches can be conducted with "'the click of a button.'" *Id*.

As to the fifth factor, Judge Wynn found *Carpenter* unclear about the issue of "voluntariness," that being added only as an afterthought at the end of the opinion. If it was a mandatory factor to be considered, the decision to share location information with Google was not "meaningfully voluntary" and not enough "to

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[7] For a description of "general warrants," Judge Wynn cited this Court's decision in *Steagald v. United States*, 451 U.S. 204 (1981), which stated: "The general warrant specified only an offense ... and left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched." *Steagald* at 220. He added that the majority would also "eliminate[] the warrant requirement [so] police do not even need to 'specif[y] ... an offense' before they can conduct a geofence intrusion." *Chatrie II* at 353 (Wynn, J., dissenting).

sway the balance of the factor-based test." *Id*. at 356 (Wynn, J., dissenting). The ability of a user to delete history is "easier said than done." *Id*. at 359. Americans may entrust information to technology companies, but not necessarily to the State.

The dissent added a factor drawn from Justice Sotomayor's opinion in *Jones* — "'the relationship between citizen and government in a way that is inimical to democratic society.'" *Jones* at 416 (Sotomayor, J., concurring). Citizens "may feel inhibited from exercising their associational and expressive freedoms, such as the right to peacefully protest and the ability of journalists to gather information confidentially and effectively, knowing 'that the Government may be watching' them." *Chatrie II* at 372-73 (Wynn, J., dissenting). The dissent concluded, "Chatrie had a reasonable expectation of privacy in his Location History data, and the government conducted a search by accessing it." *Id*. at 361 (Wynn, J., dissenting).

D. The Fourth Circuit En Banc Decision.

As to the issue before this Court, the constitutionality of the search of geofencing data, nothing can be learned from the collective wisdom of the Fourth Circuit, which simply affirmed the district court judgment without any explanation. However, that one-word per curiam decision was accompanied by eight concurring opinions and one dissenting opinion, together spanning nearly 46 pages.

Judge Berner (joined by Judges Gregory, Wynn, Thacker, Benjamin, and Heytens in part) concluded that there was a constitutional violation here, but disagreed with the Fifth Circuit's *Smith* case that geofence warrants are categorically unconstitutional.[8] Here, they believed that "individuals do have a reasonable expectation of privacy in their non-*anonymous* Location History data." *Chatrie III* at 144 (Berner, J., concurring). Therefore, "law enforcement conducts a search when it obtains any amount of an individual's Location History data that is non-anonymous." *Id.* at 148. Additionally, this concurrence concluded that the second and third requests to Google were not supported by probable cause at the time the geofence warrant was issued. *Id.* at 153.

II. THE FOURTH AMENDMENT BARS GEOFENCE WARRANTS BECAUSE THEY ARE GENERAL WARRANTS.

Although the technology employed in responding to a geofence warrant is novel, it has attributes which make it a type of general warrant which the Fourth Amendment was designed to prevent. The district court referenced a brief but useful description of a general warrant — an "exploratory rummaging in a person's belongings." *Chatrie I* at 928, n.33 (citing *United States v. Dargan*, 738 F.3d 643, 647 (4th Cir. 2013)). At the en banc stage, Judge Wynn's

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[8] Judge Gregory also dissented in order to explain his view that the good faith exception was inapplicable here.

concurrence asserted that geofence intrusions are "uncomfortably akin to the 'reviled' general warrants that the Framers intended the Fourth Amendment to forbid." *Chatrie III* at 122, n.7 (Wynn, J., concurring).

The Fifth Circuit has recently noted that "the quintessential problem with [geofence] warrants is that they *never* include a specific user to be identified, only a temporal and geographic location where any given user *may* turn up post-search. That is constitutionally insufficient." *United States v. Smith*, 110 F.4th 817, 837 (5th Cir. 2024). Based on this characteristic, the Fifth Circuit ruled that "geofence warrants are general warrants categorically prohibited by the Fourth Amendment." *Id.* at 838.

A. The Characteristics of a General Warrant Were Set during the Revolutionary Era.

One of the triggers for the American Revolution was the use of general warrants (or writs of assistance) in the colonies under the authority of the Crown. These general warrants were widely considered to be abusive, and they were perhaps the central type of warrant which the Framers designed the Fourth Amendment to prevent. These warrants often did not provide a particular description of the place to be searched or the persons or things to be seized, allowing almost unlimited, roving searches and seizures.[9] These warrants empowered agents of the crown, including customs officers, to "rummage" through

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[9] *See Marron v. United States*, 275 U.S. 192, 195-96 (1927).

private property to enforce revenue laws through "fishing expeditions" rather than targeted investigations.[10] In one of the most famous speeches of the Revolutionary Era, Massachusetts lawyer James Otis argued in 1761:

> 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 lawbook.[11]

Demonstrating the significance of the colonists' hatred of general warrants, John Adams, after witnessing Otis' speech, observed, "[t]hen and there the child Independence was born."[12] In Virginia, George Mason ensured that this protection against general warrants was placed into the Virginia Declaration of Rights:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact

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[10] *See Riley v. California*, 573 U.S. 373, 403 (2014).

[11] Jeff Ziegler, "A 'Flame of Fire' for Every Age: James Otis and the Writs of Assistance," *The Daily Economy* (Oct. 8, 2023).

[12] *Riley* at 403.

> committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted. [Virginia Declaration of Rights, Section 10 (1776).]

This Court has explained why these general warrants were despised. "The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws.... [T]hey placed 'the liberty of every man in the hands of every petty officer.'" *Stanford v. Texas*, 379 U.S. 476, 481 (1965).

Particularity in warrants was required to negate the abuses that occurred during the colonial period. In his scholarly history of the Fourth Amendment, legal scholar William J. Cuddihy explains:

> when Congress called for warrants "particularly describing" one "place," they wanted to restrict the resulting search not only to a single building, but, if possible, to a segment of it or to a unique area of space. [William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602-1791, (2009) at 742.]

The government's position must be that a search of all of the millions of customer location data files contained across all of the Google servers wherever located across the country is particularized. But a warrant requiring

that type of search applied to a paper rather than digital file is more analogous to a general search of all the buildings in Silicon Valley, than it would be to a search of a particular "segment" of a "single building."

B. A Geofence Warrant Is a General Warrant.

Petitioner correctly argues that the warrant requiring Google to search its vast trove of location data obtained from millions of users of Google services constituted a classic "general warrant." Pet. Br. at 32. "Because the warrant did not identify the 'place to be searched' with particularity but instead authorized the search of millions of distinct 'places,' it was an unconstitutional general warrant." *Id*. This is exactly how all such searches for location data operate and why they cannot be sanctioned by this Court.

The Fourth Amendment requires that warrants "**particularly** describ[e] the **place** to be searched, **and** the **persons or things** to be seized." Pet. Br. at 32 (emphasis added). Lawful warrants do just that. They authorize an official first to conduct a search of a "particular" place, and, secondly, authorize the seizure of the particular "persons or things" to be seized. In this case, having no idea who may have committed the crime, Detective Hylton asked the court to require Google to "search *every* user's account" — millions of accounts — to identify all those persons who were within the radius during the specified time. *Id*.

An analogy to a search occurring outside the digital world helps to demonstrate the inadequacy and unconstitutionality of the warrant issued here. If we assume that Detective Hylton knew Petitioner's identity, could he properly have sought a warrant to search every house in the vicinity of Midlothian, Virginia to discover if Petitioner was hiding there? Certainly not. Detective Hylton's not knowing Petitioner's identity does not somehow abolish the requirement that the search "particularly describe" the place to be searched, to permit the government's agent (Google) to rummage through the digital records of millions of Americans to narrow down its search.

C. Application of the Fourth Amendment to Digital Data.

The Fourth Amendment has suffered greatly in the modern digitized world, where virtually every move Americans make, every purchase, every call, every email, is subjected to tracking, scanning, sale to advertisers and, most concerning here, search and seizure by government. The data collected is centralized, but not in the hands of the individual whose behavior caused it to be generated. Thinking that this data belonged exclusively to the internet service provider, or the search engine, or the big tech company, the courts have struggled to protect the right against unreasonable search and seizure of these centralized records, due to judicial tests unrooted in the text or history of the Amendment itself. The decisions across circuits are all over the map. There is no reason not to treat the data in the hands of these "Big Tech" firms as being "property" which is owned, or

at least co-owned by the individual creating it. The individual whose behavior created the data is not even advised when the warrant is served on the Big Tech company.

After its decision in *Katz*, this Court focused exclusively on the issue of "reasonable expectation of privacy," forgetting the property protections of the Fourth Amendment. Decisions rendered after *Katz* and before *Jones* do not recognize all the protections offered by the Fourth Amendment. In an *amicus* brief filed in this Court by some of these *amici* in *Jones*, it was argued that: "[b]y 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."[13] These *amici* argued that the Fourth Amendment should be viewed through a lens of property rights, not limited to the *Katz* "expectation of privacy" test, which in practice had proven to provide little protection at all against the unreasonable searches and seizures the Fourth Amendment was designed to prevent.

These *amici* repeat that argument here. When one thinks of the data being sought as property, the ways that it is abused with a geofence warrant are clearly illustrated. However, they add that the courts' application of the Fourth Amendment's prohibitions against unreasonable searches and seizures has been

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[13] *U.S. v. Jones*, No. 10-1259, Brief *Amicus Curiae* of Gun Owners of America, Inc., et al. (Oct. 3, 2011) at 26.

hopelessly locked in a historic conception of property as a tangible object. The Framers, of course, could not conceive of bitcoin, cellular phones, the internet, or Google location data. But as this Court noted in *Jones*, "it is quite irrelevant whether there was an 18th-century analog. Whatever new methods of investigation may be devised, our task, at a minimum, is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment." *Jones* at 406, n.3.

As this Court made clear in *Rahimi*, the Second Amendment does not extend "only to muskets and sabers." *United States v. Rahimi*, 602 U.S. 680, 692 (2024). By the same logic, the Fourth Amendment's protection of "papers and effects" cannot only extend to letters written on paper with quill pens, but must cover electronic mail and text messages, as well as location data. This principle was identified in *Riley v. California.*

These *amici* argue that this Court should make clear that, just as the Fourth Amendment protected the Framers' property rights against unreasonable search and seizure of their personal papers, letters and correspondence, it likewise protects the property rights of today's Americans in their email, text messages, and location data. The mere fact that a citizen may share some of this data with Big Tech companies — including location data with Google to assist in navigation — does not waive that citizen's right to shield that intangible property from prying government eyes, barring a valid warrant. This Court should make clear that, at least *vis a vis* the

government, a citizen's digital footprint is the property of the citizen, the citizen's "effects," just as her written physical "papers" are, and that the Fourth Amendment protects both equally.

D. The Fourth Amendment Should Prohibit the Use of General Warrants to Search and Seize Digital Property.

George Washington University Law School Professor Andrew Ferguson has explained that this Court's "reasonable expectation of privacy" test was "confusing enough in a physical, analog world where people could at least intuitively understand the limits of human surveillance," but "becomes completely unmoored in a digital age with technologies providing superhuman surveillance powers that can literally see, hear, and sense things in new ways."[14]

> Geofence warrants present the exact sort of "general, exploratory rummaging" that the Fourth Amendment was designed to prevent.... While the *results* of a geofence warrant may be narrowly tailored, the *search* itself is not. A general warrant cannot be saved simply by arguing that, after the search has been performed, the information received was narrowly tailored to the crime being investigated. [*Smith* at 837.]

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[14] Andrew Ferguson, "Digital Rummaging," 101 *Wash. U. L. Rev.* 1473, 1499 (2024) (hereinafter "Ferguson").

Commentators and Justices of this Court have noted that the courts, including this Court, have repeatedly seen their Fourth Amendment caselaw outstripped by the pace of technology, leaving Fourth Amendment freedoms at risk. Professor Ferguson notes that "current Fourth Amendment [caselaw] offers little clarity," calling it "a muddled doctrine that does not address larger-scale surveillance harms created by digital technologies."[15] "[A]dvances in technology are rapidly outpacing the state of the law."[16]

As Catholic University Professor Mary Leary notes, "The problem is really who *owns* a person's 'digital dossier' or 'digital identity.'"[17] Although as between Google and a phone customer, the question may be a legislative one, as between the customer and the government, this Court can and should make clear that the question is a constitutional one. "At bottom, [this Court] must assur[e] preservation of that degree of privacy **against government** that existed when the Fourth Amendment was adopted." *Jones* at 406 (emphasis added) (internal quotation omitted). It is not always the case that a citizen consents to invasions

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[15] Ferguson at 1475.

[16] Carrie Leonetti, "Bigfoot: Data Mining, The Digital Footprint, and the Constitutionalization of Inconvenience," 15 *J. High Tech. L.* 260, 265 (2015).

[17] Mary Leary, "The Missed Opportunity of *United States v. Jones*: Commercial Erosion of Fourth Amendment Protection in a Post Google Earth World," *U. Pa. J. Const. L.* 331, 365 (Nov. 2012).

of his privacy by commercial third parties; in many cases, the consumer may have little understanding of the actual degree of privacy he has sacrificed. Regardless, even if a citizen consents to giving up privacy in a relationship with a private entity, the Fourth Amendment cannot countenance an assumption that this implies consent to share the same information with the government.

As Professor Ferguson notes, "at the time of the Founding, ideas, creations, and expressions (that might find their way into papers) were considered a form of property to be protected. Influenced by the ideas of John Locke who influenced James Madison's draft of the Fourth Amendment, papers were considered a form of 'dearest property.'"[18]

This Court recognizes as much in other, less important contexts. This Court has recognized the currency of the common law spousal privilege in federal criminal trials, stating that "the spousal privilege ... is justified because it 'furthers the important public interest in marital harmony'...." *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). This privilege is not even a constitutional one, but this Court recognizes the right of the people to share confidential information with other citizens without consenting to disclose it to government. The Fourth Amendment of our Bill of Rights demands much more deference.

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[18] Ferguson at 1517-18.

Professor Carrie Leonetti argues that a "property-based Fourth Amendment test should include intellectual and informational, as well as traditional categories of real and (tangible and intangible) personal property. It should prohibit not just warrantless physical intrusions, but technological intrusions, recognizing high-tech versions of trespass, nuisance, and conversion."[19] "Under this robust property-based test," Leonetti argues, "residents would have protection not only in their homes, their curtilage, and their tangible personal property for which they took steps deemed by courts to be sufficient to protect their expectations of privacy in them, but also in all of their real, personal, and intellectual property." *Id.* at 15. Thus:

> [p]hone records, bank records, commercial consumer data, the contents of cell phones and other electronic devices, a hacked or fraudulently accessed Facebook page ...: these could all be protected as private "property," for the invasion of which the police would need a warrant issued on probable cause (or circumstances amounting to an exception to the warrant requirement). [*Id.* at 16-17.]

The Fourth Amendment protects the "papers and effects" of citizens. Harvard Professor Maureen Brady notes that at least one contemporary dictionary includes intangible property such as commercial paper

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[19] Carrie Leonetti, "A Grand Compromise for the Fourth Amendment," 12 *J. Bus. & Tech. L.* 1, 12 (2016).

in its definition of "effects."[20] Jim Harper, a fellow at the American Enterprise Institute and former counsel for the Senate Committee on Government Affairs, argues persuasively:

> [t]he same information about each American's life that once resided in a desk drawer or simply in one's memory is now recorded on digital media. The subject matter held in digital documents and communications is at least as extensive and intimate as what is held on paper records, and probably much more so. Courts should treat digital representations of information as constitutional papers or digital effects that the Fourth Amendment secures.... Constitutional ... protections should not erode because the Framers failed to anticipate digital technologies.[21]

Courts of appeals have begun to recognize that the Fourth Amendment's protections for physical "papers," *i.e.,* written communication on physical paper, are

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[20] Maureen Brady, "The Lost 'Effects' of the Fourth Amendment: Giving Personal Property Due Protection," 125 *Yale L.J.* 946, 986 n.179 (Feb. 2016) (noting that Timothy Cunningham, Attachment, Bankruptcy, A New and Complete Law-Dictionary, or, General Abridgment of the Law (1764) "quot[es] in the definition for champarry the earlier directive of the Lord Commissioners providing rules for transfers and custody of 'sum[s] of money, tallies, orders, bonds, deposites, securities, and other effects'").

[21] Jim Harper, "Escaping Fourth Amendment Doctrine After *Jones*: Physics, Law, and Privacy Protection," *Cato Sup. Ct. Rev.* 219, 246 (2011-2012).

essentially worthless today unless applied to electronic communications that function as "electronic papers." This Court recognized in *Rahimi* that the Second Amendment is not limited to the protection of single-shot muskets just because these were the primary weapon available to the Framers. Likewise, a Fourth Amendment limited only to communications on physical "papers" would have little to no value in a world where the vast majority of communication occurs electronically, not via physical objects.

The Tenth Circuit has noted that "rummaging through private papers or effects would seem pretty obviously a 'search.' After all, if opening and reviewing 'physical' mail is generally a 'search' ... why not 'virtual' mail too?" *United States v. Ackerman*, 831 F.3d 1292, 1304 (10th Cir. 2016).

In her *Jones* concurrence, Justice Sotomayor pointed out the fact that the "reasonable expectation of privacy" test has not aged well in the digital world:

> [T]he premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties ... 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. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and

> medications they purchase to online retailers. [*Jones* at 417 (Sotomayor, J., concurring).]

Justice Sotomayor quite properly "doubt[s] that people would accept without complaint the warrantless disclosure to the government of a list of every Web site they had visited in the last week, or month, or year." *Id.* at 418. Regardless, even if the people would permit such an intrusion, the Fourth Amendment does not.

In practice, the "reasonable expectation of privacy" test, untethered from any root in the text and history of the Fourth Amendment, has proven utterly unable to preserve the Fourth Amendment's promise in the digital world. The problem was only worsened by the addition in the 1970s of the "third-party doctrine" of *Smith v. Maryland* and *United States v. Miller*.[22] With that step, this Court improperly permitted the government to search and seize any information a citizen shares with another, even if shared in confidence and with expectation that it not be shared further.

If this Court properly views a citizen's digital footprint as his property, carrying the right to exclude and requiring a valid, particularized warrant before it may be searched or seized, much of the confusion

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[22] *Carpenter* at 308 (noting that "'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties,' *Smith [v. Maryland*, 442 U.S. 735, 743-44 (1979)] ... 'even if the information is revealed on the assumption that it will be used only for a limited purpose.' *United States v. Miller*, 425 U.S. 435, 443 ... (1976)."

among the courts below, and much of the devastation wrought on the Fourth Amendment by focusing on "reasonable expectation of privacy" instead of "unreasonable search and seizure," can be remedied. This Court should take the opportunity both to define a citizen's digital footprint as property, and to cabin *Smith* and *Miller* to restore the citizen's property right to share information with a fellow citizen, while excluding the government from seizing it. Only then can this Court ensure that "the child Independence" will need not meet its death at the hands of the digital age.

CONCLUSION

The judgment of the Fourth Circuit affirming the decision of the district court denying the motion to suppress should be reversed, and the geofence warrant should be deemed to violate the Fourth Amendment.

Respectfully submitted,

RICK BOYER
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, VA 24506

JOHN I. HARRIS III
SCHULMAN, LEROY & BENNETT, P.C.
3310 West End Avenue
Suite 460
Nashville, TN 37203

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for *Amici Curiae*
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