No. 25-112

IN THE

Supreme Court of the United States

OKELLO T. CHATRIE,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF JAMES W. HARPER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether the execution of the geofence warrant violated the Fourth Amendment.

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INTEREST OF AMICUS CURIAE

Your amicus curiae has been a student of privacy outside the legal academy for a quarter century, examining its sociological, regulatory, legal, and constitutional dimensions, as well as general and structural constitutional law. I have published multiple reports and countless blog posts and commentaries on these topics, and with Professor Jane Bambauer I am the author of a casebook (forthcoming June 2026), *Privacy and Personal Information Law* (Carolina Academic Press).

The views in this brief are not those of either of my employers,[1] the American Enterprise Institute and the University of Florida journalism and law schools, where I hold senior research roles. My interest in this case is to advance privacy protection consistent with liberty, individualism, and other principles of the American founding and government.

SUMMARY OF THE ARGUMENT

Textualism should guide this Court in administering the Fourth Amendment. The elements of the Fourth Amendment can be applied faithfully even in difficult cases dealing with communications and data, as well as with emerging high-tech investigatory techniques.

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1. Pursuant to Supreme Court Rule 37.6, your amicus affirms that no party or counsel for a party in the pending case authored this brief. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief.

In the courts below, the legal arguments that would allow you to rule well in this case have not been tested. The Court should remand this case, instructing the courts below to develop arguments and a ruling based in the Fourth Amendment's text.

ARGUMENT

I. THE TEXT OF THE FOURTH AMENDMENT SHOULD GUIDE THE COURT IN THIS CASE.

This Court should interpret the Fourth Amendment using its text, pressing lower courts to do the same. Doing so is proper institutionally, it will help protect courts from political attack, and it will spur advocates and courts to generate better law in this area. *Stare decisis* principles favor discarding the current confused and malleable Fourth Amendment doctrine.

A. Textualism Situates the Courts Where They Belong in Our Democratic Republic

Current Fourth Amendment doctrine pays a compliment to the judiciary that this Court should reject as clearly as possible in this case. That is the idea that the Court can determine and convey to lower courts, the bar, and the public what privacy people should expect.

Privacy's contours in the United States should take form through billions of choices to share or conceal information, to embrace or shun technologies and services based on their functioning and their terms and conditions.

Justice Harlan made this Court a usurper of the privacy discovery process when he found a thread in prior cases calling on the Court to assess subjective expectations of privacy and their objective reasonableness, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring). Under the doctrine that sprung from Justice Harlan's solo concurrence in *Katz* [hereafter, the "*Katz* test"], unnecessary to the outcome of the case, it has been less Americans' arrangements that form the privacy picture bottom-up. It has been episodic and vague hints about where, if anywhere, this Court is taking privacy from government. *See* Brief of X Corp. as Amicus Curiae in Support of Petitioner at 3-5, *Chatrie v. United States*, No. 25-112 (U.S. Aug. 29, 2025).

The problem is most acute in information technology and communications, which are fast-changing. Most people do not have the technical knowledge to form subjective privacy expectations. There is no collective belief from which to glean what is objectively reasonable.

Justice Scalia extolled textualism to counter judges' good-faith desire to solve difficult problems wrongly. "[T]he main danger in judicial interpretation of the Constitution," he wrote, "is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge." Antonin Scalia, *Originalism: The Lesser Evil*, 57 Cincinnati L. Rev. 849, 863 (1989).

The *Katz* test sweetly asks members of this Court to use their predilections in guessing at the future of privacy. But that was not what America collectively agreed to by ratifying the Fourth Amendment. It asks whether

government searches and seizures are reasonable, leaving privacy for society to devise.

It is an attractive challenge, to guide society through fascinating and complex technological change, but this Court should subordinate any such attraction to another, more timeless and important value: the role of the judiciary in our democratic republic. "The ideal of popular sovereignty would be meaningless if others could set the actions of the sovereign aside" in favor of interpretations that diverge from their original meaning. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 156 (1999).

A sovereign people adopted the Fourth Amendment. Applying it accurately is the only way to honor the founding and our democracy.

B. Textualism Protects the Legitimacy of the Courts

Textualism has more practical institutional merits. It protects the legitimacy of the courts. Nontextual, non-originalist interpretation invited by the *Katz* test opens this Court and the court system to political attack.

An intuitive political science literature describes how political actors use the courts for their ends. Attacking courts can help politicians "maintain coalitional cohesion, build a new majority, or consolidate previous victories." Dave Bridge and Curt Nichols, *Congressional Attacks on the Supreme Court: A Mechanism to Maintain, Build, and Consolidate*, 41 Law & Social Inquiry 100 (Winter

2016) https://perma.cc/8XK9-5LCJ. The Bridge and Nichols study opens by illustrating how an expansive *Roe v. Wade*, 410 U.S. 113 (1973), garnered attacks on the Court serving politicians' ideological and political ends. The *Katz* test emerged from the same zeitgeist for broad social pronouncements by this Court.

Delegitimizing commentary and political activity can and does come from both sides of the political "aisle." This Court is too familiar with how they can manifest themselves in literal threats and attacks.

The courts cannot be faulted for suffering political attacks, of course, but this Court can have strategic influence. On a margin important enough to pursue, this Court can reduce the amenability of the court system to attack. That is done, in part, by avoiding making the Court a Solon, a Hammurabi, or a Lycurgus.

Law in the United States does not come down from law-givers, but up from below. The common law assembles the genius of people's experience over centuries. When Congress acts, it uses authority delegated by the people.

This Court is a law interpreter, not a law-giver. Interpreting texts is what the Court must do, and as little else as possible. Avoid being the super-sociologist Court that declares what our privacy expectations can be, so easily rendered for the public as "conservative" or "liberal" rulings. Stick to the text.

C. Textualism Applied in This Case Can Spur Systemic Improvement in Fourth Amendment Law

This Court can also create systemic improvement in the development of Fourth Amendment law. A decision that models how lower courts should apply the Fourth Amendment, or instructs them to do so, will pay dividends in better legal administration.

The *Katz* test collapses questions about search (implicitly seizure) and reasonableness all into one jackpot question. Did government action upset a reasonable expectation of privacy? Almost all lawyers today were taught that the Fourth Amendment turns on reasonable expectations of privacy. Called upon to argue the Fourth Amendment, they will argue that. No one gets fired for buying IBM.

One can make a career in legal scholarship trying to divine all the meanings and implications of the *Katz* test. *See* Kerr, Orin. The *Katz* test may endure in part because of the attention required by such a confounding legal doctrine!

Make the Fourth Amendment boring. Rather than broad but tentative social statements, renewed textualism would allow this Court to issue clear rulings about small dimensions of the Fourth Amendment. The Sixth Circuit did so in 2010, explicitly treating emails as papers or effects. *United States v. Warshak*, 631 F.3d 266, 286 (2010). So in *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016), no one disputed that "an email is a 'paper' or 'effect' for Fourth Amendment purposes." *Id.* at 1304 (citations omitted).

If this Court requires advocates and courts to treat the Fourth Amendment as a law, they will hash through the meanings of its terms. The cases that come to you will present smaller, truly legal questions to resolve. Interpreting the Fourth Amendment will get easier and more intuitive. Many hands make light work.

D. *Stare Decisis* Considerations Cut Against the *Katz* Test

This Court and its members have articulated the factors going into *stare decisis* differently at different times, but all factors support either sharply limiting or reversing the *Katz* test.

Justice Thomas has most stoutly defended this Court's obligation to the Constitution—its actual terms—over the meanings sometimes given to it by errant past Courts. In *Gamble v. United States*, 139 S.Ct. 1960 (2019), Justice Thomas characterized it as contrary to the Court's "judicial duty" to uphold precedents that are "outside the realm of permissible interpretation." *Id.* at 1981 (Thomas, J., concurring). The *Katz* test is not textual interpretation at all. It switches the inquiry from the reasonableness of government action to the reasonableness of privacy expectations.

Another statement of *stare decisis* factors comes from *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009). "[T]he fact that a decision has proved "unworkable" is a traditional ground for overruling it. . . . Beyond workability, the relevant factors . . . include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Id.* at 2088-89.

The *Katz* test and its child, the third-party doctrine, are not completely "unworkable." But look at the work. "Reasonable expectations" have emerged not from legal arguments but competitions to importune this Court, one side making broad policy and sociological arguments, the other law enforcement need and convenience, neither side arguing law.

The third-party doctrine was "workable" in the sense that it was a bright line rule: Something handed to another is stripped of constitutional protection. But this Court declined to follow that workable standard to a wrong outcome in *Carpenter*. Now judges must confront, impossibly, whether a dataset shared with a third party is similar in indeterminate senses to the data in *Carpenter*. Those judges fight. *United States v. Chatrie*, 107 F.4th 319, 364 (4th Cir. 2024) ("That's just poppycock.")

The "antiquity" of a precedent favors it. At fifty and sixty years old respectively, the third-party doctrine and *Katz* test are better thought of as experiments that have failed. While the Court leaves them in place, they continue to age, but they do not improve.

Reliance is another *stare decisis* consideration, relating to age. These doctrines are unreliable, as nobody can predict what will result in the *next* case beyond a new set of leaves dropped into the tea.

The final *stare decisis* factor from *Montejo*—soundness of the reasoning—is a slam dunk. The Katz test literally reasons backward from "expectations" to find whether or not a search has occurred—a stipulated sense of "search" found in no other law or lexicon. This Court should jettison the *Katz* test in favor of a textual methodology.

II. THE FOURTH AMENDMENT CAN BE ADMINISTERED AS A LAW[2]

This Court can and should apply the text of the Fourth Amendment and general legal principles as literally as possible. That sometimes requires new and deeper analysis of what it means to "search" and "seize." In high-tech cases it requires fuller awareness of how property and contract rights apply to communications and data. But it is a more methodical judicial exercise than applying the *Katz* test.

It would also help achieve this Court's oft-stated goal of preserving "that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001); *United States v. Jones*, 565 U.S. 400, 950 (2012); *Id.* at 958 (Alito J., concurring in the judgment). That is done by leaving Americans' privacy choices in place unless government need upends them consistent with the Fourth Amendment.

A. The Court Should Interpret Each of the Fourth Amendment's Terms

The first phrase of the Fourth Amendment says, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend.

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2. This section draws heavily from Jim Harper, *Administering the Fourth Amendment in the Information Age*, National Constitution Center, A Twenty-First Century Framework for Digital Privacy white paper series (May 2017). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4692954. At the time, for whatever reason, it could not find a law review home.

IV. Absent confused doctrine, courts would analyze its elements as follows:

- Was there a search?
- Was there a seizure?
- Was any search or seizure of "persons, houses, papers, [or] effects"?
- Was the searched or seized item the complainant's?
- Was any such search or seizure reasonable?

If there was a search or seizure, if it was of the complainant's protected things, and if it was unreasonable, then the right has been violated.

This Court follows the text in easy cases. In *Terry v. Ohio*, 392 U.S. 1, 6 (1968), the year after *Katz*, this Court readily recognized seizure and search. *Id.* at 19 ("[T]here can be no question . . . that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing."); *id.* at 35 (Douglas, J., dissenting). At a cost, Courts often co-mingle seizure and search, because seizures facilitating a search have the same constitutional consequence. But in harder cases, such as when communications and data are involved, "search" and "seizure" seem harder to apply, and the Court has retreated to the confusing and malleable *Katz* test.

Applying the words of the Fourth Amendment, background legal principles, and an understanding

of technology, it is possible to administer the Fourth Amendment in all cases without artifice.

B. Was There a Search?

While "seizure" (below) is based in property concepts, there is no common law of "search." Nearly sixty years of the *Katz* test has prevented advocates and courts from articulating the meaning of the word "search" for Fourth Amendment cases.

There are sources to draw on. This Court at least used original public meaning as a resource in *Kyllo v. United States*, 533 U.S. 27, 32 fn. 1 (2001) ("When the Fourth Amendment was adopted, as now, to "search" meant "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief." N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989).").

1. Searching is an Activity

Information science examines information behavior, which encompasses "searching." *See* Natalya Godbold, "Beyond Information Seeking: Towards a General Model of Information Behaviour," Information Research, Vol. 11 No. 4 (July 2006) https://perma.cc/YB9F-JRZ3. Influential information scientist Thomas D. Wilson has a "nested" model: General interaction with information proceeds to information seeking and finally searching. *Id.* at Figure 3. *See also*, David Bawden and Lyn Robinson, Introduction to Information Science 232 (2nd ed. 2022); T.D. Wilson, Exploring Information Behaviour: An

INTRODUCTION 44-48 ("Modeling the Information Search") https://perma.cc/BY3S-HFZL.

Logically, searching is done by holding in mind (or machine) some sought-after thing, then surveying the field in which it may be found. To search a wood for a thief, picture the thief, then look among all the things in the forest for a man in a mask, black beret, thin moustache. We search documents, databases, or the Internet by entering distinctive character strings and perusing what matches in "*search* results." There are countless ways to search that follow this pattern.

2. Evidence of Searching's "Purpose of Finding Something"

Acts of searching aside, Daniel Webster tells us through *Kyllo* that a distinguishing characteristic of searching is having "a purpose of finding something." Absent the *Katz* test, advocates might have been literally asking government agents for the last sixty years whether they had such a purpose when their actions were arguable searches.

There are objective indicia of a purpose of finding something. Actions that bring information or things out of concealment suggest searching. Picking up others' things, entering private property, and manipulating others' persons, objects, devices, or data—all these activities may show an aim to expose something that was concealed, suggesting a search.

Kyllo is a wonderfully instructive search case. When the government's agents aimed their thermal imager at

Danny Lee Kyllo's triplex, it was not for sport. "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion," this Court held, "the surveillance is a 'search' and is presumptively unreasonable without a warrant." 533 U.S. at 40. There's a lot packed into that sentence but bringing a peculiar device to that place and using it on that building were good evidence of "searching."

3. Searches of Communications and Data

The special problem of communications and data seems challenging, but the Fourth Amendment's text can handle them.

In establishing the protected status of mail under the Fourth Amendment, this Court in *Ex Parte Jackson*, 96 U.S. 727 (1878), made an important distinction: It denied constitutional protection to open mail but gave protection to people's papers when "closed against inspection, wherever they may be." *Id.* at 733. Closed mail must be opened to be read: a search. Open mail can just be read: no search.

Olmstead v. United States, 277 U.S. 438 (1928), failed to adapt that rule to new technology. Telephone communications are much like written letters, except that they reduce words to electric signals rather than printing on paper. Crucially, these signals pass along telephone lines invisibly and inaudibly to any human.

Chief Justice William Howard Taft described the technical processes that captured and reproduced Olmstead's communications, *id.* at 457, but later declared, "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only." *Id.* at 464.

Justice Butler—not Brandeis!—had the better of it in his dissent, writing, "The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it." *Id.* at 487 (Butler, J., dissenting). Collecting the signals was a seizure. Converting them to the sounds they represented was a search.

Communications and data, just like other things, can be seized (see below), and they are searched when their contents are brought out of natural concealment into exposure just like imperceptible physical phenomena. *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 553 ("For the holding in *Kyllo* to make sense, it must be the transformation of the existing signal into a form that communicates information to a person that constitutes the search.").

4. Searches of Exposed Things

In natural language, there can be examinations of already exposed things that rise to the level of "search"—"to search the wood for a thief," recall. The use of certain devices or technologies to enhance perception of exposed things may signal when sensing activities cross over from casual observation, looking, or seeking to purposeful searching.

Ordinary enhancements to sensing do not make for "search." *United States v. Lee*, 274 U.S. 559, 563 (1927) (validating use of a searchlight to apprehend cases of liquor onboard a boat during Prohibition); *Texas v. Brown*, 460 U.S. 730, 740 (1983) ("the use of artificial means to illuminate a darkened [car interior] simply does not constitute a search").

But the use of highly powerful or exotic sensors may exhibit that purposefulness that betrays searching. Recall that a factor in the *Kyllo* decision was the use of a device "not in general public use." *Kyllo*, 533 U.S. at 40. (When we all have thermal imagers in our glasses, heat signatures may just be part of "looking.")

Then there are very modern search problems such as what the Fourth Circuit dealt with in Leaders of a *Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330 (4th Cir. 2021).

The two conceptual parts of searching generally occur in a particular order. First, identify the thing to search for. Next, examine the field in which it may be found.

Technology can reverse the order. The field may be catalogued first, and the item sought selected later. In *Beautiful Struggle*, the "Hawkeye Wide Area Imaging System" captured roughly 32 square miles of Baltimore per image per second, 40 hours a week. *Id.* at 334. Which Baltimoreans it would be used on—TBD.

The *Beautiful Struggle* court relied on *Carpenter* to strike down the program. *Id.* at 341. Here it simply

illustrates how powerful information technologies may intersect with the "search" concept.

Facial recognition systems arguably collect and search facial images to make facial signatures that themselves are searched en masse later seeking a match. *See* Jim Harper, *How the Founders Addressed Facial Recognition Technology*, AEI blog (Mar. 18, 2025) https://tinyurl.com/s7tk6s5k. Exposed things can be searched. The text of the Fourth Amendment encompasses searches both *of* persons and *for* persons.

If not for the *Katz* test, there might be a healthy law of search today, for this Court to nudge along in discrete, truly legal decisions. Seizure has more for the Court to work with, but there is still work to do.

C. Was There a Seizure?

Seizure has a deep common-law pedigree in property law. But it, too, suffers from six decades of relative neglect under the *Katz* test. Along several dimensions, decisions that would elucidate "seizure" for Fourth Amendment administration suffer from semantic confusion.

This Court has rarely defined "seizure" distinctly from "search" in the Fourth Amendment context. *United States v. Jacobsen*, 466 U.S. 109, 114 n.5 (1984) ("[T]he concept of a 'seizure' of property is not much discussed in our cases.") That is in part because small seizures are often constituents of a larger search. Courts merge them for discussion.

United States v. Jones, 132 S. Ct. 945 (2012), said, at some cost to clarity, "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Id.* at 949. The invasion of a property right in making use of the car and the searching that facilitated violated the Fourth Amendment the same way. *See ACLU v. Clapper*, 785 F.3d 787, 823 (2nd Cir. 2015) (attachment of the GPS device in Jones was "a technical trespass on the defendant's vehicle.") This was also true of moving stereo equipment, an under-emphasized seizure, to search for serial numbers in *Arizona v. Hicks*, 480 U.S. 321 (1987).

Seizures and searches are not the same, and they do not always occur together. In *Soldal v. Cook County*, 506 U.S. 56 (1992), government agents seized a mobile home—literally helped take it from its owner—making no search of it. *Id.* at 68. It is the paradigmatic seizure-without-search case to *Kyllo*'s search without a seizure.

The Second Circuit's gloss on *Jones*, cited above, exposes a second challenge in administering the seizure concept. That court called what happened in *Jones* a "technical trespass." That seems to be a violation of a property right that might not support a trespass cause of action. Should that be a constitutional seizure?

Historically, "trespass" seems to have referred to any wrong. "[E]very invasion of private property, be it ever so minute, is a trespass." *Entick v. Carrington*, 19 Howell's St Trials 1029, 1066 (CP 1765). "It is not so much the breaking of his door nor the rummaging of his drawers

that constitutes the essence of the offense, but it is the invasion of his indefeasible rights of personal liberty." *Id.*

In modern times, trespass seems more to refer to the cause of action. Some scholarship treats property, the right, as indistinguishable from trespass, the cause of action. *See*, *e.g.*, Orin S. Kerr, *The Curious History of Fourth Amendment Seizures*, 1 Sup. Ct. Rev. 67 (2012).

The better fulcrum for administering the constitutional right is whether there has been an invasion of a property right, not whether a trespass cause of action exists. *See* Laurent Sacharoff, *Constitutional Trespass*, 81 Tenn. L. Rev. 877 (2014).

Modern precision also requires recognizing seizure when government agents violate any incident of property ownership. Possession is one thing. The right to use, the right to exclude others, and to the income of property—the enjoyment of its benefits—are yet more in the "bundle of sticks" that comprises property rights. Tony Honoré, *Oxford Essays on Jurisprudence* 104-147 (A.G. Guest ed., 1961), *republished in* Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* 161, 162 (1987).

This Court should recognize taking a copy of data as a seizure because it violates the right to exclude. Blackstone defined property as "that sole and despotic dominion . . . exercise[d] over the external things . . . in total exclusion of the right of any other." 2 William Blackstone, *Commentaries* 2. This Court, too, has focused on exclusion as the critical property right. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court called the right to exclude "one of the most treasured strands" of

property rights. 458 U.S. 419, 435 (1982). *Kaiser Aetna v. United States* called it "one of the most essential sticks." 444 U.S. 164, 176 (1979).

Casual use of language in a spate of Fourth Amendment cases from the 1980s may suggest that only possession—the "possessory" interest in property—is relevant to Fourth Amendment analysis. In *United States v. Place*, 462 U.S. 696 (1983), for example, the Court discussed the "possessory" interest in luggage. *Id.* at 705. *See also United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *United States v. Karo*, 468 U.S. 705, 712 (1984).

In the past, it may have been sound to treat deprivation of "possessory interests" as coterminous with constitutional seizure. Possession was nine-tenths of the law. But seizure of other property rights matter more in today's information-fueled economy and society.

The line between possession and use was what Officer Dunnigan crossed in *Riley v. California*, 134 S.Ct. 2473 (2014). He had properly seized Riley's cell phone incident to arrest, *id.* at 2480, but Dunnigan also *used* the phone, manipulating its interface and drawing down its battery power, to gather evidence.

Use of physical items that is otherwise unremarkable may become constitutionally significant if the use interacts with information or information technologies, as in *Jones*. The government did not take possession of Jones's car, but by attaching their GPS device to it, a teeny-tiny seizure, they used the car to transport their location sensor and conduct an extensive search.

Detailed attention to property rights also explains seizure of data without reference to the device on which it is held, such as when government agents download or copy a suspect's data. Though they have different propert*ies* than tangible items, information and data are routinely held, used, and traded consistent with the sticks in the property "bundle." *See* Jim Harper, *Personal Information is Property*, 73 Kan. L. Rev. 113, 131-135 (2024).

When government agents copy data or information that is otherwise unavailable to them, they have taken the rights to use and enjoy that data's benefits for the government, and the owner's right to exclude others has been violated. *See* Mark Taticchi, *Note: Redefining Possessory Interests: Perfect Copies of Information as Fourth Amendment Seizures*, 78 Geo. Wash. L. Rev. 476, 491-96 (2010).

As with telephones according to Justice Butler's view in *Olmstead*, people use modern communications and Internet facilities under contracts that allocate property rights. Though hardly with perfect clarity, *see* Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 Tex. L. Rev. 85, 142-45 (2014), these contracts detail how communications machinery will be used, and they divide up the ownership of information and data. The use of cables and switches is subdivided into nanoseconds and slivers of wavelength rather than minutes on a wire, but the contractual protections for customer privacy are similar—if more explicit and detailed—to what Justice Butler saw.

Whether property is tangible or intangible, Fourth Amendment seizures occur whenever government agents invade a property right. Courts should recognize all the property rights that can be seized.

D. Was the Seizure or Search of a Thing the Fourth Amendment Protects?

When there has been a seizure or search, the next question is whether it was of a constitutionally protected item—a person, house, paper, or effect.

Professor Andrew Guthrie Ferguson finds that each of the items singled out for protection in the Fourth Amendment has been given "a more expansive reading than the pre-technological (pre-industrial) world of the Founders." Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 Cal. L. Rev. 805, 854 (2016). Changing technology and lifeways may augment, stretch, or evolve—but must not break—the Fourth Amendment's terms.

The concept of "papers" requires updating in light of changed information and communication technologies. "It was not 'papers' as a particular form-factor for cellulose that the Framers had in mind when they wrote the Fourth Amendment. It was as information storage and exchange, including through letters sent in the mail." Jim Harper, "Escaping Fourth Amendment Doctrine After *Jones*: Physics, Law, and Privacy," 9 Cato S. Ct. L. Rev. 219, 234 (2011-2012); *United States v. Seljan*, 547 F.3d 993, 1014-17 (9th Cir. 2008) (Kozinski, J., dissenting), *cert. denied*, 129 S. Ct. 1368 (2009) ("What makes papers special—and the reason why they are listed alongside houses, persons and

effects—is the ideas they embody, ideas that can only be seized by reading the words on the page."); *United States v. Warshak*, 631 F.3d 266, 285-86 (6th Cir. 2010) ("Email is the technological scion of tangible mail . . . ").

The same information about each American's life that once resided on paper and similar media in attics, garages, workshops, master bedrooms, sewing rooms, and desk drawers, *cf. Chimel v. California*, 395 U.S. 752, 754 (1969), now resides, digitized, in cell phones and similar electronic devices. "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—unless the phone is." *Riley v. California*, 134 S.Ct. 2473, 2491 (2014).

The Court did not say so in *Katz*, but it treated the sound of Katz's voice, suitably shrouded, as a constitutionally protected item. One might struggle with treating it like tangible items, but sound is a natural information conveyance equivalent to made items like paper and other tangible things. The best understanding of *Katz* consistent with the text of the Fourth Amendment is that a whisper or shrouded oral communication is an "effect" or what might be called "personal curtilage." Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 Wm. & Mary L. Rev. 1283 (2014). Recognizing this is necessitated by modern technologies, which can gather and make use of such things in ways founding era technologies could not. When people's digital devices produce personal data, that data also may be part of a "virtual curtilage." *See* Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 Cal. L. Rev. 805, 854 (2016).

E. Was the Searched or Seized Item the Complainant's?

The Fourth Amendment uses the possessive pronoun "their." Doing so delimits the items in which a person may assert rights against unreasonable seizure or search. To discern what that limitation means, start with Webster. "[*T*]heir has the sense of a pronominal adjective, denoting of them, or the possession of two or more; as *their* voices; *their* garments; *their* houses; *their* land; *their* country." N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (emphases in original) https://perma.cc/CHR9-2FML. Two senses may apply. The first, "of them," suggests things intimately bound to a person, but not necessarily owned. The examples given are "their voices" and "their country," possibly "their land" in the Woody Guthrie sense. Many other things may be bound to a person but not owned by them, such as one's family, one's reputation, one's picture, one's hobby, one's route, and so on. Many of them cannot be searched or seized, but some can. There is a category of non-owned things that can constitutionally be "theirs."

So the "property-based Fourth Amendment" is a misnomer. "Their" draws in both property and things intimately bound to people, "of them."

The "intimately bound" sense of "their" harmonizes the cases dealing with shared spaces and things. So in *United States v. Jeffers*, 342 U.S. 48 (1951), searching a hotel room—which Jeffers obviously did not own, or even rent, but used with permission, *id.* at 50—required a warrant. Same with a union office in *Mancusi v. DeForte*, 392 U.S. 364 (1968). *Byrd v. United States*, 584 U.S. 395

(2018), situated its holding in the *Katz* test, but in textual terms it means that cars in lawful possession of drivers are "theirs" as to third parties no matter what rental agreements say. *Id.* at 1531. A co-tenant can consent to searches of spaces that are theirs; they cannot give consent to searches of spaces that are not theirs. *United States v. Matlock*, 415 U.S. 164 (1974).

The other sense of "their" denotes things a complainant owns.[3] Your *amicus* hopes there is no need to review all of property law here.

If a complainant's constitutionally protected item was searched or seized, the final question is whether that was reasonable.

F. Was the seizure or search reasonable?

When constitutionally protected items that were the complainant's have been seized or searched, the Fourth Amendment calls for examining the reasonableness of doing so. This is where much judging should occur.

The word "unreasonable" in antecedents to the Fourth Amendment and the amendment itself "conveyed a particular meaning: namely, against reason, or against the reason of the common law." Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181,

3. Webster uses the word "possession," which could limit the meaning of "their" only to things one possesses—literally holds or has physically secured. Most likely Webster was using "possession" to indicate all incidents of ownership. At the time of the Founding, the order, "Give them back their things," would have meant to restore possession to an owner. If "their" means only possession, that sentence is incoherent.

1270 (2016). "That which was consistent with the common law was reasonable and, therefore, legal. That which was inconsistent was unreasonable and, ipso facto, illegal." *Id*. at 1270-71.

The boundaries laid out by "positive law" are excellent guides to what is reasonable. *See* William Baude & James Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821 (2016). Common law, statutes, and regulations delimit what people can and cannot do in general—ordinary people and government agents alike. Searching or seizing that falls within these bounds would almost always be constitutionally reasonable.

But a seizure or search that would be a civil or criminal wrong must occur only after the second-thought and third-party review provided by the warrant application process. The *Olmstead* Court would have done well to heed the Washington state law that made it a misdemeanor to intercept messages sent by telegraph or telephone. Remington Compiled Stat., § 2656-18 (1922); *see Olmstead*, 277 U.S. at 480 (Brandeis, J., dissenting).

In *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016), then-Judge Gorsuch did *Katz*-test analysis but also considered reasonableness in light of longstanding common law concepts. Opening and examining private correspondence "seems pretty clearly to qualify as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment," he wrote. "Of course, the framers were concerned with the protection of physical rather than virtual correspondence. But a more obvious analogy from principle to new technology is hard to imagine." *Id*. at 1307-08 (citations omitted).

Textualism does not relieve courts of judging, sorry to say. But it moves the locus of judging from broad privacy pronouncements to assessing narrow questions: right, wrong, and reasonableness in given factual circumstances. Textualism is the better way to administer the Fourth Amendment than the untethered guesstimation called for by the *Katz* test.

III. TEXTUALISM CAN BE USED IN THIS CASE

This section applies the textual methodology described above to this case. Below, "*En banc*" refers to the en banc opinion, *United States v. Chatrie*, 136 F.4th 100 (4th Cir. 2025), "*Panel*" refers to the original panel, *United States v. Chatrie*, 107 F.4th 319 4th Cir. 2024), vacated by the grant of rehearing en banc, 4th Cir. Loc. R. 40(e), and "*District Court*" refers to the district court memorandum opinion, *United States v. Chatrie*, 590 F. Supp. 3d 901 (E.D. Va. 2022).

A. Was There a Search?

The opinions below rely on the *Katz* test or variants to argue whether or not there was a search. En banc, *passim*. The *Katz* test distorts the meaning of the word "search" beyond recognition, so much of those analyses have nothing at all to do with whether there was literally a search.

The panel majority highlights a certain evasion when it says in finding no search, "[Google] must first *comb through* its entire Location History repository to identify users who were present in the geofence." Panel at 324 (emphasis added). What is another word for "comb through"?

The Fifth Circuit in *United States v. Smith*, 110 F.4th 817 (5th Cir. 2024), had the better of it, recognizing that the process the geofence warrant required of Google was a search. *Id.* at 837. The *Smith* court also ably attributed the searching to the government. *Id.* at 838 fn. 12.

B. Was There a Seizure?

Mandated disclosure of data to the government seized that data, depriving Google and its customers of the right to exclude others from it, even while Google remained in possession.

C. Was any Search or Seizure of "Persons, Houses, Papers, [or] Effects"?

Digital materials are the modern scion of those formerly stored on paper and similar materials. *United States v. Warshak*, 631 F.3d 266, 286 (2010).

D. Was the Searched or Seized Item the Complainant's?

On this question, there is work to do. The courts below have not teed these issues up for this Court, in part because of the procedural history and in part because of the *Katz* test's misdirections.

The opinions below did essentially no analysis on the question of ownership advocated by Chatrie. The panel majority dismissed Chatrie's property argument in a footnote, saying that Chatrie "does not cite any positive law" to support the argued-for ownership interest. *Panel* at 332 fn. 20. Chatrie did not invoke other incidents of

ownership, said the panel, such as having tort rights against thieves. *Id*. The panel dismissed possessive pronouns as indicia of ownership. And, seeking to weaken the argument that Google and Chatrie divided property rights in data, the panel stated that the Google Drive product has terms that are clearer about statutory intellectual property rights. *Id*.

They are clearer, but that is because Google Drive is a service to which people upload entire files. Specifying that they retain statutory intellectual property rights in that context says nothing about common law property rights in personal information created in another suite of applications. Across sprawling product lines, Google is not a legislature producing statute law meant to be interpreted as a unified whole.

Procedurally, Chatrie had won on the Fourth Amendment merits, largely on the warrant's lacking particularity. *District Court* at 929-933. He appealed the application of the good-faith exception to the exclusionary rule. *Id*. at 936-941. Chatrie did not need to renew or expand on alternative merits arguments to do that. A panel pivoting back to the merits, Panel at 325 ("We agree that the motion should be denied, but for a different reason"), should be generous in accepting merits arguments.

The *Chatrie* panel is not alone in blinding itself to certain arguments. In *Harper v. Werfel*, 118 F.4th 100 (1st Cir. 2024), the petitioner (your *amicus* here) presented the First Circuit with copious arguments based in contract and property rights relating to personal information. Still the court wrote, "Harper makes no effort in his

opening brief to explain the legal source of the interest he asserts."[4] *Id.* at 111.

The *Harper* court cited two cases in which litigants sought in the Due Process clause rights to a contract extension, *Board of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972), and continued over-payment of benefits, *Cahoon v. Shelton*, 647 F.3d 18 (1st Cir. 2011), respectively. The Due Process clause does not create such rights, which must "stem from an independent source such as state law." *Roth*, 408 U.S. at 577. On the basis of these cases, the First Circuit refused consideration of Harper's directly asserted contract and property rights. Contract and property rights have an independent source, state law.

Courts are treating common law contract, property law, and the two together—bailment—as alien. It should concern this Court if subordinate courts are turning away basic common law concepts that underlie the Constitution.

Litigants do not and should not need to detail well understood common law concepts in opening briefs. The respondent in *United States v. Jones*, 132 S.Ct. 945 (2012), did not cite any positive law to support the proposition that he owned the car he drove, or that he should be treated as an owner. The brief simply used the possessive pronoun "his" and apostrophes when talking about Jones in relation to his car. *See* Brief for Respondent, *United States v. Jones*, No. 10-1259 (U.S. Sept. 26, 2011).

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4. The court also erroneously and inexplicably claimed that Harper raised the contract's repeated use of the possessive pronoun "your" for the first time at oral argument, though Harper had explicitly argued it in his opening brief.

Jones's claim was not forfeited. This Court easily recognized possessive pronouns as fully sufficient assertion of ownership. The Court detailed in its ruling that Jones, not technically the owner, had the rights of a bailee. *Id*. at 949 fn. 2.

No court should accept arguments for evolution in property rights without question, but the footnote of the panel below in this case makes recognition of common-law development impossible: Property rights arguments will be refused until a court has already accepted a property rights argument.

There is copious evidence that information has taken on the form of common law property. Jim Harper, *Personal Information is Property*, 73 Kan. L. Rev. 113, 131-135 (2024). Lower courts are curiously refusing to consider the possibility.

E. Were the Search and Seizure Reasonable?

The Fourth Amendment's strong implication is that probable cause warrants are the essence of reasonableness. There was a warrant here. Chatrie challenged it, and his argument won over the District Court. Your *amicus* has done far less work on the second phrase of the Fourth Amendment than the first, so the following is offered more tentatively.

There was almost certainly probable cause to believe that evidence of crime would be found in the Location History records held by Google. A location dataset of that size would reveal hundreds of thousands of speeding

violations, at least. Open to law enforcement, such datasets could hasten the solution of many crimes. Probable cause is "too easy" in such a dataset because the dataset is so large.

It is less obvious whether a search of Location History data Google holds lacks particularity. The district court found much to lament about the design of the search. District Court at 923-26. But the particularity issue begs the question whether the search was of one dataset—Google's—or many datasets held by Google for its customers.

Development of property principles in this area will hold the answers. It may be that the dataset is one big business record of Google's. On the other hand, it may be that private information held by a service provider is a "bailment for mutual benefit."

That is a presumption that pending state legislation would create. Common Law Privacy and Consumer Protection Act, H.B. 1436, 2026 Sess. (New Hampshire). In that proposal "[p]ersonal information that remains identifiable after incorporation in a digital record is presumed to remain the property of its original owner," and "[a] digital record derivative of such a record containing no personally identifiable information is presumed to belong to its creator by rules of accession." *Id.*

If bailments are recognized, that does not entirely foreclose searches of large datasets for crime control purposes the way *Florida v. Jardines*, 133 S. Ct. 1409 (2013), foreclosed drug-detection dogs at front doors. *Id.* at 1416 ("There is no customary invitation to do *that.*").

Service providers can offer contract terms that allow for investigatory use of data, with results narrowly circumscribed to protect the privacy of law-abiding customers. *See* Jane R. Bambauer, *Filtered Dragnets and the Anti-Authoritarian Fourth Amendment*, 97 S. Cal. L. Rev. 571 (2024). That is a delicate negotiation for public-spirited technology providers to brook with the public; it is not a decision for would-be law-givers.

Google has stopped centrally storing users' Location History data. *See* Cyrus Farivar & Thomas Brewster, *Google Just Killed Warrants That Give Police Access to Location Data*, Forbes (Dec. 14, 2023), https://perma.cc/GCP9-QPBG. Google may have perceived a risk of huge compliance costs and lost business if governments and consumers both see it as a soup tureen from which private information can be ladled.

This case is not mooted by Google's action, and the practice of requiring online service providers to search customer data for information to use against them could grow. *See* District Court at 914. It is a "geofence" warrant in this case, but the list of potential search parameters is as long as the list of data elements in customer databases across the digital economy.

As a policy matter, warrants allowing dragnet searches of huge customer datasets seem inconsistent with American values, consumer demand, and privacy. But there are not legal arguments before you in this case from which you can wisely choose. The Fourth Circuit simply did not consider them.

CONCLUSION

The record before you in this case is insufficient to inform your deliberations. The inertial force of the *Katz* test and the antipathy of lower courts to arguments that would be useful in a textual analysis of the Fourth Amendment have denied this Court what it needs to rule well. *See Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011) ("[W]e are a court of review, not of first view." (citation and internal quotation marks omitted)).

Accordingly, your amicus suggests that you remand this case to the court below or the district court with instructions to develop arguments and rulings based in the Fourth Amendment's text.

Respectfully submitted,

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