CASE NO. 09-6497
Appeal from the United States District Court for the Eastern District of Tennessee

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MELVIN SKINNER,
Defendant-Appellant.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, THE AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, THE CENTER FOR DEMOCRACY & TECHNOLOGY, THE ELECTRONIC FRONTIER FOUNDATION, AND THE ELECTRONIC PRIVACY INFORMATION CENTER, AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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REQUIRED STATEMENT OF COUNSEL

Undersigned counsel expresses a belief, based upon a reasoned and studied professional judgement that rehearing *en banc* is appropriate in the case at bar because:

(A) the panel decision was wrongly decided in light of *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945 (2012); and

(B) the case involves the following question of exceptional importance to the federal judiciary: whether, and under what circumstances, the Fourth Amendment requires the government to demonstrate probable cause and obtain a warrant to access GPS and other location information from cell phone providers.

s/N. C. Deday LaRene

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union Foundation, ACLU Foundation of Michigan, ACLU Foundation of Tennessee, Center for Democracy & Technology Electronic Frontier Foundation, and Electronic Privacy Information Center certify that they are not-for-profit corporations, with no parent corporations or publicly-traded stock.

Undersigned counsel certify that no persons and entities as described in the fourth sentence of F.R.A.P. 28.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Michigan and the ACLU of Tennessee are state affiliates of the national ACLU. Since its founding in 1920, the ACLU has appeared before the federal courts on numerous occasions, both as direct counsel and as *amicus curiae.* The protection of privacy as guaranteed by the Fourth Amendment is of special concern to both organizations.

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported organization based in San Francisco, California, that works to protect free speech and privacy rights in an age of increasingly sophisticated technology. As part of that mission, EFF has served as counsel or amicus curiae in many cases addressing civil liberties issues raised by emerging technologies, including location-based tracking techniques such as GPS and collection of cell site tracking data.

The Center for Democracy & Technology ("CDT") is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. CDT

represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC has participated as *amicus curiae* before the Supreme Court and many other courts in matters concerning new challenges to Fourth Amendment protections. See, e.g., *United States v. Jones*, 132 S. Ct. 945 (2012); *NASA v. Nelson*, 131 S. Ct. 746 (2011); *Tolentino v. New York*, 131 S. Ct. 1387 (2011); *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010); *Herring v. United States*, 555 U.S. 135 (2009); *Hiibel v. Sixth Judicial Circuit of Nev.*, 542 U.S. 177 (2004); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2005); and *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004).

All five organizations filed *amicus* briefs in *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945 (2012), the decision that is at the core of the request for *en banc* reconsideration in this case.

Pursuant to F.R.A.P. 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* and their members contributed money towards the preparation or filing of this brief.

STATEMENT OF ISSUE AS TO WHICH REHEARING IS SOUGHT

(As framed in defendant-appellant's Brief on Appeal)

Did the trial judge commit legal error in failing to suppress evidence obtained from GPS location information provided by a cellular telephone in the Defendant's possession and within the Defendant's motor home, where the Defendant had sufficient standing to challenge the search and evidence seized, where the Defendant had a legitimate expectation of privacy in the location of his vehicle, and where there was no "good faith" exception to an unconstitutional search and seizure?

STATEMENT OF THE CASE

Melvin Skinner appealed as of right his conviction and sentence after a jury trial in the United States District Court for the Eastern District of Tennessee at Knoxville, the Hon. Thomas J. Phillips, District Judge, Presiding.

Among the issues on appeal, he argued that the acquisition of location information regarding a cell phone which he carried with him in a motor home on a three-day journey eastbound from Arizona, heading toward Tennessee, and which led to a warrantless search of the motor home, violated his Fourth Amendment rights.

On August 14, a panel of this Court turned aside this and all other assignments of error, and affirmed his conviction and sentence. *United States v. Skinner*, ___ F.3d ___, Slip Opinion 12a0262p 06 (August 14, 2012) (hereinafter, "Slip Opinion").

The majority opinion, authored by Judge Rodgers, and joined by Judge Clay, held that there was no Fourth Amendment violation "because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you go cell phone." Opinion, p. 6. Judge Donald, concurring in part and concurring in the judgment, would have held that "acquisition of this information constitutes a search within the meaning of the Fourth Amendment, and," therefore, required the government to "either obtain a warrant supported by probable cause or establish the applicability of an exception to the warrant requirement," but would not have reversed, under the following rationale: "because the officers had probable cause to effect the search in this case and because the purposes of the exclusionary rule would not be served by suppression, I believe some extension of the good faith exception enunciated in *United States v. Leon*, 468 U.S. 897 (1984), is appropriate." Slip Opinion, p. 17.

This brief is filed in support of defendant-appellant's timely filed Petition for Rehearing *En Banc,* which was docketed on August 28, 2012.

ARGUMENT

THE PANEL MAJORITY OPINION IS IN CONFLICT WITH THE MEANING AND MANDATE OF THE SUPREME COURT'S RECENT DECISION IN *UNITED STATES V. JONES*.

This Court should grant rehearing because the majority opinion is wrongly decided in light of *United States v. Jones*, *supra.* The panel majority opinion is an unusually important and weighty precedent given its status as the first appellate decision in the nation to apply *Jones* to GPS tracking via cell phones and severely undercuts the *Jones* decision by effectively limiting it to its facts. While *Jones* places constitutional restrictions on the ability of the police to track the location of a car using GPS, the Sixth Circuit has now held that agents can engage in even more intrusive surveillance of cell phones without implicating the Fourth Amendment at all. This Court should grant rehearing so the important issues in this case can be more thoroughly considered.

The Panel Majority's Decision is Inconsistent with *United States v. Jones*.

Jones involved the attachment of a GPS tracking device to a vehicle and the use of that device to track the vehicle's movements over a period of 28 days. The lead opinion, authored by Justice Scalia, held that the Fourth Amendment was implicated by the physical intrusion involved. *Id*. at 949 ("The Government physically occupied private property for the purpose of obtaining information."). Justice Scalia's opinion

did not rule out that purely electronic surveillance could violate the Fourth Amendment. Rather, "[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to *Katz*[1] analysis." *Id*. at 953.

Four other justices joined a concurring opinion, written by Justice Alito which maintained that surreptitious long-term monitoring of the defendant through the GPS device constituted a search because it impinges on expectations of privacy. *Id.* at 964.

Justice Sotomayor, writing separately, "agree[d] with Justice ALITO that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy,'" *id.*, at 955, but observed that drawing appropriate limitations on the scope of such a rule posed difficulties, and "because the Government's physical intrusion on Jones' Jeep supplies a narrower basis for decision . . . join[ed] the majority's opinion." *Id.*, at 957.

Thus, five justices held that the scope of the information-gathering in *Jones*, 28 days of GPS location data, "impinged on expectations of privacy" protected by the Fourth Amendment.

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[1] As expressed in Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967) that analysis posits "that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." (Internal quotation marks omitted).

The panel majority distinguishes *Jones* on the grounds that law enforcement agents did not physically trespass to install a tracking device, Slip Opinion, p. 10, and the agents did not "so comprehensively track a person's activities that the very comprehensiveness of the tracking is unreasonable for Fourth Amendment purposes," Slip Opinion, pp. 10-11. The first point is undisputed, but the panel majority's reasoning as to the second is so conclusory as to fail to engage in a meaningful exploration of the issue.

Tracking a cell phone via GPS for three days implicates many of the same privacy concerns at issue in *Jones*, and is in some respects even more invasive. This case, like *Jones*, involves GPS tracking. GPS technology is especially invasive because it enables the government to track "[t]he whole of a person's progress through the world, into both public and private spatial spheres." *People v. Weaver*, 12 N.Y.3d 433, 441 (NY 2009). Moreover, it makes it possible for the government to do so at exceedingly low cost and when cell phone GPS tracking is at issue, the police do not even need to engage in the minimal legwork of attaching the device to a car and intermittently changing its batteries. The primary practical restraint on location tracking, its resource-intensive nature, has fallen away because of the same technological change, the rise of GPS, that has also made location tracking more

invasive than ever. As a result, court supervision and appropriate legal standards are all the more critical.

The panel does not appear to have considered that tracking a cell phone is even more invasive than tracking a vehicle. While in *Jones* the police tracked the location of Jones's vehicle 24 hours a day for 28 days, they were not tracking Jones himself so comprehensively, because the vehicle was only a proxy for Jones's location some of the time. By contrast, people carry their cell phones with them in their pockets and purses wherever they go, including into their own homes. Cell phone GPS tracking enables truly comprehensive, 24/7 tracking. Had the police merely attached a GPS device to Skinner's mobile home, they would have known the location of the mobile home. But by tracking Skinner's cell phone, the agents additionally learned that Skinner was inside the mobile home and would have learned his location in any protected space in which he entered.

Moreover, the panel failed to meaningfully grapple with the question whether three days of continual tracking constitutes prolonged surveillance. To be sure, neither Justice Alito nor Justice Sotomayor drew a bright line indicating how many days surveillance can continue before it becomes "prolonged." But it does not suffice, as the panel majority did here, to cite Justice Alito's reliance on *United States v. Knotts*, 460 U.S. 276 (1983) as though it resolves the matter, for *Knotts* involved tracking for

a single trip that took certainly less than 24 hours and possibly lasted only a few hours. *Id.*, at 278-279.

There are good reasons, not considered by the panel, why three days of cell phone tracking should be considered "prolonged." First, this duration of surveillance is far beyond what people experience as they go about their day-to-day lives. While it is possible that in the course of ordinary life a person would be observed throughout a single short trip, the possibility that a person would be followed by another continuously for three days is beyond remote. Second, this duration of surveillance is sufficiently long that, traditionally, it would have required an extraordinary commitment of resources. As the D.C. Circuit has remarked, "[c]ontinuous human surveillance for a week would require all the time and expense of several police officers, while comparable photographic surveillance would require a net of video cameras so dense and so widespread as to catch a person's every movement, plus the manpower to piece the photographs together." *United States v. Maynard*, 615 F.3d 544, 565 (D.C. Cir. 2010). Similarly, three days of round-the-clock tracking would require the kind of high level of coordination law enforcement traditionally engaged in only in extraordinary circumstances.

Here, the investigative activity comes within the kind of privacy interests identified by Justices Alito and Sotomayor - the continuous monitoring of a personal

device in the possession of the defendant while he traveled, slept, ate and drank, over a significant distance and a period of time. Because, to a very large extent, where one is tells so much about what one is doing, the monitoring here gave the investigators the ability, at any time over a period of several days and nights, and without judicial scrutiny or supervision, to insert themselves into the defendant's private life. As Justice Sotomayor pointed out in her concurrence in *Jones*:

> In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.

Id., at 955.

The record does not, of course, suggest that the agents' monitoring informed them of Mr. Skinner's attendance at a church, political rally, or gay bar, but just as the validity of a search does not hinge on its outcome, *Maryland v. Garrison*, 480 U.S. 79, 85 (1987), that is not the test. Rather, the point is that the continuous monitoring clearly endowed the investigators with the capacity to gather a wealth of intensely personal information about Mr. Skinner and his private life, and for that reason impinged on defendant's expectations of privacy protected by the Fourth Amendment. And, because a warrantless search or seizure is "*per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated

exceptions," *Katz v. United States, supra*, at 357, only a proper warrant, supported by a constitutionally adequate showing of probable cause (as required by the Fourth Amendment itself), could justify those intrusions.

The panel majority's mis-reading of *Jones* may be explained in part by the fact that *Jones* was decided four days after argument was heard by the panel, and the panel opinions were written without benefit of briefing and argument regarding the impact of that decision.[2] Given the centrality of *Jones* to the legal landscape of modern electronic surveillance, this circumstance alone suggests the appropriateness of affording the parties, and the Court, a full and fair opportunity to address its implications.

The Panel Majority Relied on an Erroneous Understanding of the Facts

The panel majority's legal conclusion is also predicated on a material misunderstanding of the technology in question. The panel suggested that Skinner has no Fourth Amendment interest in "data given off by his voluntarily procured pay-as-you-go cell phone," because a criminal is not "entitled to rely on the expected

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[2] Both parties did file letters pursuant to F.R.A. P. 28(j) regarding the decision in *Jones*, but these letters, which were subject to the 350 word limitation of the Rule and the prohibition against "additional argumentation not properly authorized under Rule 28(j), which only permits a party to advise the Court of supplemental authority under specified conditions," *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 329 n. 17 (6th Cir. 2011), can hardly serve as proxies for the kind of consideration which the impact of *Jones*, an issue central to the case, deserves.

untrackability of his tools," Slip Opinion, pp. 6-7. But this analysis appears to be based on a misunderstanding about how the government tracked Skinner.

The panel majority suggests that Skinner's cell phone emitted GPS data in the same inherent way in which every person emits a unique and traceable scent, Slip Opinion, p. 7, but that is not the case. The GPS data in this case was not "emitted" in the ordinary course of the phone's functioning. Although the record is somewhat unclear, the government appears to have obtained a court order requiring Skinner's mobile provider to take special steps to direct the phone to produce the requested data. *United States v. Skinner*, 2007 WL 1556596 at * 3 n.9 (E.D.Tenn. 2007) ("Technically, the phone company does the actual pinging, but the phone company will ping a phone at the government's ordered request."); *see also* Orin S. Kerr, Looking into the Record of *United States v. Skinner*, the Sixth Circuit Phone Location Case, http://www.volokh.com/2012/08/17/looking-into-the-record-ofunited-states-v-skinner-the-sixth-circuit-phone-location-case/, as viewed September 2, 2012.[3]

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[3] "Cellular service providers typically do not maintain records of the GPS coordinates of cellular telephones operating on their network, but the provider may generate such location data at any time by sending a signal directing the built-in satellite receiver in a particular cellular telephone to calculate its location and transmit the location data back to the service provider. This process, known as 'pinging,' is undetectable to the cellular telephone user." *In re Application of the United States*, ___ F.Supp.2d ___, 2011 WL 3423370, * 5 (D.Md. Aug. 3, 2011). The record of the evidentiary hearing conducted on the defendant's Motion to Suppress in the district court makes clear that it was through the process of "pinging that the investigators

Particularly because Skinner's cell phone would not have transmitted GPS data but for the government's request, this case is properly analyzed under the Supreme Court's tracking devices cases and not under cases addressing third party business records. Slip Opinion, p. 8 (citing *Smith v. Maryland*, 442 U.S. 735 (1979) (holding that individuals have no reasonable expectation of privacy in the telephone numbers they dial because those numbers are voluntarily conveyed to phone companies and comprise the business records of phone companies)). While it would have been necessary to address the business records exception in the far more common scenario of the government seeking access to stored, historical cell site location records, this case presents the comparatively rare scenario in which the government procured an order compelling Skinner's mobile carrier to general precise, GPS location data in real time.

Building on this faulty factual premise, the panel concluded that because Skinner's phone "emit[ted]" location data, he could not have a Fourth Amendment interest in this data. Slip Opinion, p. 7. This is a second legal error that requires correction.

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acquired the location data at issue. *See, e.g.*, R.E. 71, Transcript of Evidentiary Hearing, February 13, 2007, pp. 80, 222 PageId #'s 108 and 250.

That a person's property emits information that is technologically capable of being ascertained by law enforcement agents is not enough to extinguish any Fourth Amendment interest in that information. Otherwise, the Supreme Court could not have concluded in *Kyllo v. United States*, 533 U.S. 27, 29 (2001) that "the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment." In *Kyllo*, the government had argued that "the thermal imaging must be upheld because it detected 'only heat radiating from the external surface of the house,'" *id*. at 35 (quoting Br. of United States at 26) – which is exactly parallel to the panel majority's reasoning that GPS tracking is not a search because it detects only "GPS location information emitted from [Skinner's] cell phone." Slip Opinion, p. 5. The Court in *Kyllo* rejected this technologically-determinist approach and applied the reasonable expectation of privacy test, and it concluded that because individuals have such an expectation in the interior of their homes, the thermal imaging in *Kyllo* was a search. *Id.*, at 34-35.

CONCLUSION

Because of the inconsistency between the panel majority's decision with the principles articulated in *United States v. Jones, supra*, because of the importance of the question presented to the emerging jurisprudence of electronic surveillance, and

because of the importance of the question presented to the emerging jurisprudence of electronic surveillance, the Court should grant rehearing *en banc*, and, on plenary review, reverse the district court's denial of the defendant's motion to suppress, as well as his conviction and sentence.

Respectfully submitted,

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DATED: September 4, 2012

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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