NO. 14-5800

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

ROCKY HOUSTON,
Defendant-Appellant.

On Appeal from the United States District Court
Eastern District of Tennessee at Knoxville
CASE No. 3:13-cr-00009

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, ELECTRONIC FRONTIER FOUNDATION, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, LIBERTARIAN NATIONAL COMMITTEE, & HON. BOB BARR IN SUPPORT OF REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(c)(1) and 26.1, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL), a nonprofit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 9,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law.

NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to accused persons, criminal defense lawyers, and the criminal justice system as a whole. In furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL frequently appears as amicus in cases involving the Fourth Amendment, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests. In particular, NACDL has briefed Fourth Amendment issues

[1] Pursuant to Rule 29(a), counsel for *amici curiae* certifies that all parties have consented to the filing of this brief. Pursuant to Rule 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. This brief does not purport to represent the position of NYU School of Law.

regarding the use of myriad modern technologies that have the potential to severely limit constitutional protection, and NACDL regularly conducts programs to educate the public on these issues.

The Brennan Center for Justice at NYU School of Law is a non-partisan public policy and law institute focused on fundamental issues of democracy and justice, including access to the courts and constitutional limits on the government's exercise of power. The Center's Liberty and National Security (LNS) Program uses innovative policy recommendations, litigation, and public advocacy to advance effective national security policies that respect the rule of law and constitutional values. The LNS Program is particularly concerned with domestic surveillance and related law enforcement policies, including the dragnet collection of Americans' communications and personal data, and the concomitant effects on privacy and First Amendment freedoms. As part of this effort, the Center has filed numerous amicus briefs on behalf of itself and others in cases involving electronic surveillance and privacy issues. See, e.g., United States v. Moalin, No. 13-50572 (9th Cir. 2015); Matter of a Warrant (Microsoft Corp. v. United States), No. 14-2985 (2d Cir. 2015); United States v. Carpenter, Nos. 14-1572 & 14-1805 (6th Cir. 2015); Riley v. California, 134 S. Ct. 2473 (2014); United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013); United States v. Jones, 132 S. Ct. 945 (2012); Amnesty Int'l USA v. Clapper, 638 F.3d 118 (2d Cir. 2011); Hepting v. AT&T Corp., 539

F.3d 1157 (9th Cir. 2008); and In re Nat'l Sec. Agency Telecomms. Records Litig., 564 F. Supp. 2d 1109 (N.D. Cal. 2008).

The Electronic Frontier Foundation ("EFF") is a member-supported, non-profit civil liberties organization that has worked to protect free speech and privacy rights in the online and digital world for 25 years. With roughly 26,000 active donors and dues-paying members nationwide, EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age. EFF has filed *amicus* briefs with this Court in cases such as United States v. Warshak, 631 F.3d 266 (2010), involving the application of constitutional principles to emerging technologies, and has served as counsel or *amicus* in numerous state and federal cases involving the application of the Fourth Amendment to new technologies. See, e.g., Riley v. California, 134 S. Ct. 2473 (2014); Maryland v. King, 133 S. Ct. 1958 (2013); United States v. Jones, 132 S. Ct. 945 (2012); City of Ontario v. Quon, 560 U.S. 746 (2010). EFF also served as amicus and later as counsel in United States v. Vargas, a case in which the court recognized that "the American people have a reasonable expectation of privacy in the activities occurring in and around the front yard of their homes particularly where the home is located in a very rural, isolated setting" and held "[t]his reasonable expectation of privacy prohibits the warrantless, continuous, and

covert recording of [the defendant's] front yard for six weeks." Case No. CR-13-6025, 2014 U.S. Dist. LEXIS 184672 (E.D. Wash. Dec. 15, 2014).

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan public interest organization of more than 500,000 members dedicated to defending the civil liberties guaranteed by the Constitution. The ACLU of Tennessee is a state affiliate of the national ACLU. The protection of privacy as guaranteed by the Fourth Amendment is of special concern to both organizations. The ACLU and ACLU of Tennessee have been at the forefront of numerous state and federal cases addressing the right of privacy.

The Libertarian National Committee is the governing body of the Libertarian Party. Founded in 1971, the Libertarian Party is the third largest political party in the United States. It is active in all 50 states and has more than 250,000 registered voters. The Libertarian Party platform reflects its core commitments to the principles of a free-market economy, civil liberties and personal freedom, and a foreign policy of non-intervention, peace and free trade. Of particular relevance to this case, the Libertarian Party advocates for policies that substantially reduce the size and intrusiveness of government. As such, it has a strong interest in giving voice to those Americans who oppose the expanded use of new technologies by law enforcement, at the expense of every citizen's personal privacy and individual liberty.

The Hon. Bob Barr is a former Congressman who represented the citizens of Georgia's 7th Congressional District in the US House of Representatives from 1995 to 2003. During his tenure in the US House, Mr. Barr served on the Judiciary Committee and chaired one of its subcommittees; he also served on the Financial Services Committee and was Vice Chairman of the Government Reform and Oversight Committee. Mr. Barr was appointed as the United States Attorney for the Northern District of Georgia by President Ronald Reagan in 1986, and served until 1990. He has taught constitutional law at Atlanta's John Marshall Law School and has served as an adjunct professor at Kennesaw State University. In addition, Mr. Barr heads Liberty Guard, a non-profit and non-partisan organization dedicated to protecting individual liberty. He also serves on the Boards of Law Enforcement Education Foundation and Law Enforcement Education Organization. He has written and spoken widely about the importance of protecting Fourth Amendment rights, including establishing a higher degree of clarity in court decisions in this regard.

SUMMARY OF ARGUMENT

This case presents issues of exceptional constitutional importance that merit rehearing *en banc*. The panel opinion fails to account for the realities of modern surveillance technology, risking further error by lower courts asked to interpret the Fourth Amendment in the digital age. On a superficial level, this case involves a single surveillance camera on a utility pole in rural Tennessee. But the precedent it sets has a disturbingly far reach, imperiling the privacy rights of millions of Americans. The full Sixth Circuit should rehear this case to ensure that other courts do not discount the role of technology in modern Fourth Amendment analysis.

ARGUMENT

I. The Panel Fails to Account for the Realities of Modern Technology.

The panel erred by equating continuous, sophisticated video surveillance with the "views enjoyed by passersby on public roads." United States v. Houston, No. 14-5800, slip op. at 6 (6th Cir. Feb. 8, 2016). Of course, the view from a car on a road is generally much different than the view from a video camera "located on top of a public utility pole." Id. at 5-6. But the error here is more fundamental: the panel majority did not take account of the significant differences between human observation and long-term, covert electronic surveillance. The panel majority's reasoning defies consistent guidance from the Supreme Court on the need to account for the realities of modern technology in Fourth Amendment analysis.

The Supreme Court has cautioned against blindly extending rules designed for the physical world into the digital era. Most recently, the Court in Riley v. California required a warrant to search the contents of a cell phone, declining to extend the search-incident-to-arrest exception to digital data. 134 S. Ct. 2473, 2485 (2014). The Court reasoned that cell phones differ in such "a quantitative and a qualitative sense from other objects" that applying the old rule would not adequately safeguard Fourth Amendment guarantees. Id. at 2489, 2494-95.

Similarly, in United States v. Jones, the Court held that a Fourth Amendment search occurred when the police attached a GPS tracker to a suspect's car and monitored it for 28 days. 132 S. Ct. 945, 949 (2012). The opinion centered on the physical trespass from affixing the GPS device, but five Justices also concluded that the monitoring itself violated the Fourth Amendment, despite the fact that the car was visible to anyone as it traveled on public roads. Id. at 958, 964 (Alito, J., joined by Ginsburg, Breyer, and Kagan, JJ., concurring); id. at 955 (Sotomayor, J., concurring). Justice Scalia suggested that "achieving the same result through electronic means, without an accompanying trespass," may be "an unconstitutional invasion of privacy," but felt it was not necessary to reach that question. Id. at 954.

Justice Alito addressed it directly, however, in his concurrence. To replicate the capabilities of a GPS tracker, he wrote, would require either "a very tiny

constable" with "incredible fortitude and patience," id. at 958 n.3, or else "a large team of agents, multiple vehicles, and perhaps aerial assistance," which would be "difficult and costly and therefore rarely undertaken." Id. at 963. As a result, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." Id. at 964.

Thus, the relevant question is "not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do." United States v. Maynard, 615 F.3d 544, 559 (D.C. Cir. 2010) (aff'd *sub nom* United States v. Jones, 132 S. Ct. 945 (2012)); Warshak v. United States, 631 F.3d 266, 287 (6th Cir. 2010) (noting that while telephone companies had the "right" to monitor phone calls in certain situations and "maids routinely enter hotel rooms to replace towels and tidy the furniture," there was nevertheless a legitimate expectation of privacy in telephone conversations and rented hotel rooms). The question should be whether the covert use of a powerful video surveillance camera for ten weeks "involved a degree of intrusion that a reasonable person would not have anticipated." Jones, 132 S. Ct. at 964 (Alito, J., concurring); see also City of Ontario v. Quon, 560 U.S. 746, 748 (2010) ("Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior.")

A district court in Washington had occasion to consider this question with strikingly similar facts and found that "law enforcement's video surveillance of [defendant's] front yard for six weeks with a camera that could zoom and record violated his reasonable expectation of privacy." Order Granting Defendant's Motion to Suppress at 21, United States v. Vargas, No. CR-13-6025 (E.D. Wash. Dec. 15, 2014), ECF No. 106. The court reasoned that continuous, "dragnet" surveillance is "not akin to either a naked-eye observation or a photographic picture by a live officer," id. at 22, and that "indiscriminate video surveillance raises the specter of the Orwellian state.'" Id. at 21 (quoting United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987)). By contrast, the panel majority here thought nothing of the camera's continuous recording and broadcast functions, its ability to pan and zoom, or the fact that it was considerably less noticeable than an ATF agent atop a utility pole in rural Tennessee for ten weeks.

The Sixth Circuit should grant rehearing *en banc* to fully consider these factors and ensure that rapidly evolving technology does not "erode the privacy guaranteed by the Fourth Amendment." Kyllo v. United States, 533 U.S. 27, 34 (2001) (requiring warrant for use of thermal imaging technology to observe private property); see also Arizona v. Evans, 514 U.S. 1, 17-18 (1995) (O'Connor, J., concurring) ("With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.").

In the past, the Sixth Circuit has led the way on this front. In Warshak v. United States, the court recognized that email "is the technological scion of tangible mail" and that it would "defy common sense to afford emails lesser Fourth Amendment protection." 631 F.3d 266, 286 (6th Cir. 2010). As a result, the court held that a warrant is required to search the contents of emails, even though the data is lawfully accessible to third-party service providers. Id. at 287-88. If the panel decision in this case stands, however, lower courts will be bound to repeat its error as they confront complex constitutional questions regarding law enforcement's use of technology.

II. Long-Term Electronic Surveillance Is Qualitatively Different from Personal Observation.

Pointing even a single mounted surveillance camera at a home for a long period allows the police to view and record for a duration and with an intrusiveness that would simply be impossible otherwise. With its unblinking eye, a camera captures not just "a day in the life" but a "way of life." Maynard, 615 F.3d at 562. The ability to pan and zoom, and to record every movement outside the home—a place that serves as the hub of private activity in the lives of most people—can yield a "wealth of detail about [his] familial, political, professional, religious, and sexual associations." Jones, 132 S. Ct. at 955 (Sotomayor, J., concurring). It can see, for instance, not only that a well-known political activist comes to visit, but that every visit is the day before a public protest – strongly suggesting that the

activist and resident are planning the protests. It can see not only that a young woman enters the property, but also that she regularly does so within an hour after the resident's wife has left, suggesting that the pair are engaged in an affair. This is more than a difference in efficiency; it is a difference in kind.

The duration and covertness of the camera's scrutiny make the surveillance far more like that in Jones, Riley, or Kyllo, supra, than that in United States v. Skinner or California v. Ciraolo. In Skinner, a divided panel of this court held that tracking a cell phone in real time did not rise to the level of a search; the tracking lasted for only three days, however, and the panel acknowledged that longer-term surveillance might be more intrusive. 690 F.3d 772, 780 (6th Cir. 2012), cert. denied, 133 S. Ct. 2851 (2013). In Ciraolo, the police flew an airplane over an individual's yard one time, from a height of 1,000 feet. 476 U.S. 207, 209 (1986). Because that brief flyover – conducted at a far more remote altitude than the surveillance camera trained on Houston – exposed only "what [was] visible to the naked eye," the Court held that no warrant was needed. Id. at 215.

Here, the camera's value was precisely that it could gather what was *not* "visible to the naked eye": not only views of Mr. Houston carrying a firearm on his property, which were otherwise unavailable to the agents from any location they could practicably be, but a detailed picture of his daily life that no member of the

public would, as a practical matter, be in a position to glean. Cf. Ciraolo, 476 U.S. at 215.

Moreover, because it was surreptitious and far less expensive than tasking a team of agents, the surveillance "evade[d] the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility." Jones, 132 S. Ct. at 956 (Sotomayor, J., concurring); see also Vargas, No. CR-13-6025 (E.D. Wash. Dec. 15, 2014).

III. The Panel Opinion Authorizes Constant, Warrantless Government Surveillance.

If the panel decision stands, it will authorize nearly limitless government spying, based not on probable cause or even reasonable suspicion but simply on executive discretion and the convenience of a nearby utility pole. The FBI could, for instance, point a camera at the private yard of every member of this Court and record the occupants' movements for later perusal. The government could also use other, even more intrusive surveillance technologies. For instance, a micro-sized drone could circle above a house for months, gathering information about the occupants' interests and associations. See, e.g., Will Knight, This Surveillance Drone Never Needs to Land, MIT Technology Review (Nov. 5, 2015), https://www.technologyreview.com/s/543196/this-surveillance-drone-never-needs-to-land/. Such monitoring is surely not what the Founders envisioned when they guaranteed the right of the people to be secure in their persons and houses.

IV. To Engage In Long-Term, Covert Surveillance, Police Simply Need a Warrant.

Finally, while Fourth Amendment analysis must take account of new technology, this does not mean that police will be impotent against criminals. Instead, the task for law enforcement is simple: when the use of new technology constitutes a search, get a warrant. Where a legitimate law enforcement need exists, this is a fairly minimal hurdle; indeed, the day this Court decided Anderson-Bagshaw, the government was able to obtain a warrant in this case. See Houston, No. 14-5800, slip op. at 6 (6th Cir. Feb. 8, 2016). While law enforcement might find it more efficient to bypass this additional step, a warrant is not "an inconvenience to be … weighed against the claims of police efficiency"; it is "an important working part of our machinery of government." Riley, 134 S. Ct. at 2493 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971)) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court should grant rehearing *en banc*.

Respectfully Submitted,

Dated: February 29, 2016

By: /s/ Michael Price

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 29, which limits the allowable length of an amicus brief to one-half the maximum length authorized for a party's principal brief, counsel hereby certifies that the foregoing brief is within the page limit, and is double-spaced, with one-inch page margins, and written in proportionally spaced, 14-point typeface, pursuant to Federal Rule of Appellate Procedure 32.

/s/ Michael Price

Michael Price

February 29, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of February, 2016, the foregoing *Amici Curiae* Brief for the National Association of Criminal Defense Lawyers, Brennan Center for Justice at NYU School of Law, the Electronic Frontier Foundation, the American Civil Liberties Union, the American Civil Liberties Union of Tennessee, the Libertarian National Committee, and the Hon. Bob Barr was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Notice will also be sent to Defendant-Appellant Rocky Houston via U.S. mail.

/s/ Michael Price

Michael Price