

12-4625

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

UNITED STATES OF AMERICA,

Corporate Disclosure Statement

Amici Curiae American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Maryland are nonprofit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in amici curiae

/s/Nathan Freed Wessler

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii.....
INTEREST OF AMICI CURIAE	iii.....
ARGUMENT	
I. The GoodFaith Exception To The Exclusionary Rule Under Davis Does Not Apply Because Suppression Would Promote Deterrence.....	1
II. The Panel Erred By Not Deciding The Fourth Amendment Question.....	6

INTEREST OF AMICI CURIAE ¹

The American Civil Liberties Union Foundation (“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 Foundation of Maryland, the organization’s affiliate in Maryland, was founded in 1931 to protect and advance civil rights and civil liberties in that state, and currently has approximately 13,000 members. The protection of privacy as guaranteed by the Fourth Amendment is of special concern to both organizations. The ACLU has been at the forefront of numerous state and federal cases addressing the right of privacy.

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.

“defendants in jurisdictions in which the question remains open will still have an undiminished incentive to litigate the issue”). There is no such precedent available to the government in this case. It is uncontested that there was no applicable Fourth Circuit precedent at the time of the GPS attachment. And as the panel majority conceded, the Supreme Court’s 30-year-old beeper decision, *United States v. Knotts*, 460 U.S. 276 (1983), is not exactly on point.” *United States v. Stephens*, 2014 WL 4069336, at 8*

United States v. Katz, 732 F.3d 187, 212 (3d Cir. 2013), vacated pending en banc reh'g, No. 122548 (3d Cir. Dec. 12, 2013). Doing so is "constitutionally culpable." *Id.* The panel majority also contemplated a new ground for application of the good-faith exception, allowing agents to rely on a "significant body of federal law," even when the circuits are split. *Stephens*, 2014 WL 4069336 at *4. That expansion of the good-faith exception is likewise consistent with the Supreme Court's direction in *Davis* and with the purpose of the exclusionary rule to deter Fourth Amendment violations. *Id.* at *13–14 (Thacker, J., dissenting).

The panel majority's opinion conflicts with Supreme Court precedent because suppressing the evidence in this case will result in appreciable deterrence.

reversal of the panel majority would achieve appreciable deterrence by ensuring that law enforcement agents do not “act with reckless disregard for [suspects’] Fourth Amendment rights” by answering crucial Fourth Amendment questions by guesswork. *Stephens*, 2014 WL 4069336, at *15 (Thacker, J., dissenting), accord *Katzin*, 732 F.3d at 211–12 (“Where an officer decides to take the Fourth Amendment inquiry into his own hands, rather than to seek a warrant from a neutral magistrate—particularly where the law is as far from settled as it was in this case—he acts in a constitutionally reckless fashion.”).

These principles are particularly important where, as here, law enforcement agents deploy a novel, surreptitious surveillance technology. This exercise of executive power is especially capable of evading public, legislative, and judicial scrutiny. Innocent people have no way to learn that they have been subjected to such surveillance, and even criminal defendants usually learn that they have been targeted only if the government makes the discretionary decision to use evidence derived in this manner in its case. Chief. Suppressing the evidence in this case would protect against widespread

of errors are uniquely preventable because the government often has the option to obtain a warrant when the law is unresolved and, given the ~~many~~ exceptions to the exclusionary rule, it will be applied sufficiently rarely so as to impose little burden.

II. The Panel Erred By Not Deciding The Fourth Amendment Question

Even if the good-faith exception applied—which it does ~~not~~—this Court should rehear the case en banc to hold that attaching and tracking ~~de GPS~~ requires a probable cause warrant. The panel majority should not have ~~declined~~ decide that issue ~~see~~ *Seppens*, 2014 WL 4069336, at *5 n.8, and should have affirmed the district court’s conclusion that GPS tracking ~~is~~ “illegal,” J.A. 475.²

When a case presents a “novel question-0.006 2l3.6()8.7(pl)3.5(w8.1(h w8.1(hh

context. See *United States v. Davis*, 754 F.3d 1205, 210-18 (11th Cir. 2014)

(holding that warrantless acquisition of cell site location information violates the

Fourth Amendment, and then applying the good faith exception), vacated pending

en banc reh'g No. 1212928 (Sept. 4, 2014), *United States v. Ford*, 2012 WL

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of Federal Rule of Appellate Procedure 29(d) and 32(a) because it contains the number of pages permitted to the Petitioner under Federal Rule of Appellate Procedure 35(b)(2), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 12 point Times New Roman.

/s/ Nathan Freed Wessler

Nathan Freed Wessler

September 15, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2014, the foregoing Amici Curiae Brief for the American Civil Liberties Union Foundation, and the American Civil Liberties Union Foundation of Maryland was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

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