No. 17-950

IN THE

Supreme Court of the United States

ROSS WILLIAM ULBRICHT, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, Gun Owners Foundation, Gun Owners of America, Inc., and Restoring Liberty Action Committee in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

DownsizeDC.org and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Downsize DC Foundation, Conservative Legal Defense and Education Fund, and Gun Owners Foundation are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee is an educational organization. These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions.

These *amici* have filed briefs addressing the proper application of the Fourth Amendment to modern technologies, including the following cases in this Court:

- United States v. Jones, U.S. Supreme Court (Petition) (May 16, 2011).
- United States v. Jones, U.S. Supreme Court (Merits) (Oct. 3, 2011)
- United States v. Wurie, U.S. Supreme Court, (Apr. 9, 2014) (decided with Riley v. California)

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- Graham v. United States, U.S. Supreme Court, No. 12-4659 (Nov. 3, 2016) (Petition for Certiorari pending)
- Carpenter v. United States, U.S. Supreme Court, No. 14-1572 (Aug. 14, 2017) (Argued November 29, 2017)

SUMMARY OF ARGUMENT

This case presents the proper vehicle for this Court to re-examine the application of the Fourth Amendment to modern digital communications. This would allow a re-examination of whether United States v. Miller, 425 U.S. 435 (1976) and Smith v. Maryland, 442 U.S. 735 (1979), were rightly decided, as both were decided at an earlier time and different context. And, even more importantly, those earlier cases were decided when this Court was evaluating challenges exclusively based upon the malleable "reasonable expectation of privacy" doctrine. Fortunately, the centrality of the Fourth Amendment's protection of property rights ("persons, houses, papers, and effects") was reinstituted in United States v. Jones, 565 U.S. 400 (2012), and was reaffirmed the next year in Florida v. Jardines, 569 U.S. 1 (2013). Today, privacy supplements but does not replace property protections. Jones at 408.

Many believe that this court's 1878 decision in Ex Parte Jackson, stands for the proposition that government agents may inspect at will information about communications but not content. When this Court decided United States v. Miller in 1976 and Smith v. Maryland in 1979, it held that a person has

no "reasonable expectation of privacy" in information he voluntarily provides to third parties. Even though neither decision relied on Ex Parte Jackson as authority, many claimed that these cases were the continuation of that established precedent. To read Ex Parte Jackson to permit wide ranging government inspection of Americans' private papers turns that case on its head. Rather, its language clearly intends that the Postal Service would have only limited authority to inspect the outside of a letter or package in order to ensure its proper delivery. Ex Parte Jackson certainly did not give the rest of the federal government a general warrant to inspect the mail for any sign of criminal activity. If Americans' letters and parcels are to be protected the same "as if they were retained by the parties forwarding them in their own domiciles," there is simply no wiggle room to permit the government a roving power to gobble up "non content" information.

The third party doctrine is based on a false premise — that private information, revealed to a third party for a limited purpose, should be freely available to the government — even though it would not similarly be available to any other person. Indeed, this Court's recent decisions in United States v. Jones and Florida v. Jardines teach otherwise.

The constitutional right to jury trial comprehends the right to have the jury decide both law and fact, including the factual basis upon which the sentencing decision is based. Today, they do neither. That right was trampled here by the district court basing its sentencing decision on crimes not charged, not proven,

not submitted to the jury, and found only by a preponderance of the evidence. In this extreme case, system was gamed by the government, and the sentence imposed by the district court usurped and undermined the jury's fact-finding prerogatives.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY OR OVERTURN THE THIRD PARTY DOCTRINE EXCEPTION TO THE FOURTH AMENDMENT.

The Petition asks this Court to decide "Whether the warrantless seizure of an individual's Internet traffic information without probable cause violates the Fourth Amendment." Pet. Cert. at (I). These *amici* believe that this question answers itself — a search or seizure of an American's Internet Traffic Information intrudes on private digital equivalents of papers and effects, reveals extensive information about Internet usage, and should be fully protected by the Fourth Amendment.

Indeed, this case could be said to conflict with Jones insofar as it involves a warrantless trespass by the government when it installed a pen register and trap and trace device on "the wireless router in petitioner's living room." Pet. Cert. at 5. This trespass by itself is a Fourth Amendment violation that requires granting the petition.

Yet, more than a quarter century after the creation of the World Wide Web and the ubiquitous use of the

Internet by nearly all Americans, the applicability of the Fourth Amendment is still in a state of confusion. The lower federal courts routinely apply precedents and doctrine that are urged upon them by law enforcement and federal prosecutors, who act as though it would be better if the Fourth Amendment were written out of the Constitution, so that the business of government could proceed unimpeded.

A. Ex Parte Jackson Has Been Misread to Permit Warrantless Government Inspection of "Non Content" Information.

This Court's first substantive Fourth Amendment case, Ex Parte Jackson, 96 U.S. 727 (1878), decided 140 years ago, addressed the application of the Fourth Amendment to the mail. Ex Parte Jackson differentiated between two types of mail handled by the Post Office Department: (i) "letters, and sealed packages" that are "intended to be kept free from inspection,"[2] as contrasted with (ii) other lesser classes of mail, "such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined." Ex Parte Jackson at 733.

As to letters and packages that are protected from inspection, the Court stated that they are "fully guarded from examination and inspection, **except** as to their outward form and weight, as if they were retained by the parties forwarding them in their own

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[2] Today, mail "closed against postal inspection" consists of mail entered as First-Class Mail, Priority Mail, or Express Mail. U.S. Postal Service, Domestic Mail Manual (DMM) 233.3.2.1.

domiciles." *Id.* (emphasis added). Some have keyed in on that phrase of exception — "except as to their outward form and weight" — and have assumed that phrase means the government may inspect the exterior of the mail at will, for any purpose whatsoever, so long as the inspection does not physically intrude to the interior of the mailpiece.[3]

In truth, the Court's statement in Ex Parte Jackson did not provide a license for the government to snoop through the mail. Such a reading completely contradicts the rest of the sentence in which the phrase appears — which promises that letters and packages will be "**fully guarded** from examination and inspection ... **as if they were retained by the parties forwarding them in their own domiciles**." Ex Parte Jackson at 733 (emphasis added). It is entirely unclear how a mail piece could be "fully guarded" as if the letter were still sitting on a kitchen table in one's home, yet it be permissible for the government to examine, inspect, and record the exterior of the letter or package in any manner, for any purpose.

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[3] It appears that the Postal Service has embraced this erroneous understanding of Ex Parte Jackson by adopting a program known as the "Mail Isolation Control and Tracking program." This constitutes a universal type of "mail cover" — a "computer[] photograph [of] the exterior of every piece of paper mail that is processed in the United States — about 160 billion pieces last year." R. Nixon, "U.S. Postal Service Logging All Mail for Law Enforcement," New York Times (July 3, 2013) http://www.nytimes.com/2013/07/04/us/monitoring-of-snail-mail.html. *See* 39 C.F.R. §233.3.

On the contrary, it seems clear that the Ex Parte Jackson language "except as to their outward form and weight" limits the governments authority to the Post Office's processing and delivery of the mail. Indeed, achieving delivery is the sole purpose for which packages or letters are taken from "domiciles" and put into the mailstream. Ex Parte Jackson, then, acknowledges that the Postal Service may take such "examination and inspection" actions as are necessary to ensure delivery — *i.e.*, to weigh and examine the package to ensure proper postage and packaging, to read the address for proper sorting, to move the package from place to place through its system, and finally, to deliver it to its destination. But that does not mean that, for example, local sheriffs' deputies without a warrant can bring drug-sniffing dogs to the post office to screen all mail for criminal activity.[4] And

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[4] It appears that some law enforcement agents in the United States actually screen mail on a routine basis with drug-sniffing dogs and other techniques, without a warrant, and even without any particularized suspicion of any criminal activity. And many courts have erroneously relied on Ex Parte Jackson to permit this activity. *See, e.g.*, United States v. Demoss, 279 F.3d 632, 635 (8th Cir. 2002) ("By entrusting the package to FedEx for delivery ... the sender virtually *guaranteed* that any characteristic of the package that could be observed by the senses would be so observed. And there was **no legitimate expectation that law-enforcement officers would not be among the observers**.") (bold added, italics original.) *See also* Daniels v. Cochran, 654 So. 2d 609, 611 (Fl. Ct. App., 4th Dist. 1995) (sheriff's office "conducting **routine package checks** on a conveyor belt at a Federal Express office using two K-9 drug-sniffing dogs" was found permissible, even though the subsequent opening of the package without a warrant was not (emphasis added)). Jardines, however, established principles which teach the opposite. After all, if the police cannot

it certainly prohibits the Postal Service from maintaining a national registry of every piece of mail a person sends and receives. This view is confirmed by Samuel Warren and Louis Brandeis in their famous 1890 article "Right to Privacy": "[a] man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written."[5]

As one commentator put it, "modern surveillance law is built on the idea that the contents of communications receive Fourth Amendment protection but that non-content metadata — records about communications, and other third-party business records — do not."[6] Unfortunately, this misreading of Ex Parte Jackson has taken this country down a dangerous course, over many decades, now culminating in a federal government that is engaged in the mass surveillance of the American public through every medium of modern communication. However, Ex Parte Jackson provides no support for the proposition that the government is entitled to free access to any sort of "metadata" generated in making personal communication — whether that be the address on a

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examine the exterior of a house with a drug-sniffing dog, why would they be permitted to rummage through packages with that same drug-sniffing dog — when those packages are supposed to be protected "as if they were retained by the parties forwarding them in their own domiciles"?

[5] S. Warren and L. Brandeis, "The Right to Privacy," 4 HARV. L. REV. 5 (Dec. 15, 1890).

[6] O. Kerr, "Supreme Court agrees to hear 'Carpenter v. United States,'" Washington Post (June 5, 2017).

mailpiece, the addresses and subject headers in an email, the phone numbers dialed from a landline, the "cell site location information" conveyed by a cellular phone, or the Internet routing information associated with electronic communications.

B. Smith Was Wrongly Decided and Should Be Overruled.

The court of appeals understandably, but wrongly, saw this case as involving only "reasonable expectations of privacy," and thus its opinion started and ended with the third party doctrine and Smith v. Maryland, 442 U.S. 735 (1979). According to the lower court, "Internet users 'should know that [internet routing information] is provided to and used by Internet service providers for the specific purpose of directing the routing of information.'" United States v. Ulbricht, 858 F.3d 71, 96 (2nd Cir. 2017). Thus, "[i]n light of the *Smith* rule," and the fact that ISP information is "precisely analogous to the capture of telephone numbers at issue in *Smith*," the Court concluded that "no reasonable person could maintain a privacy interest in that sort of information." *Id.* at 97.

Petitioner readily distinguishes this case from Smith, which, he notes, involved a "pen register" device that only "record[ed] the numbers dialed from the telephone at petitioner's home." Smith at 737. As this Court noted in Smith, the government "'could not even determine from the use of a pen register whether a communication existed ... nor whether the call was even completed....'" *Id.* at 741. In this case, however,

the "pen register and trap and trace device" used by the government allowed it to learn far more about Mr. Ulbricht's communications, such as "the IP addresses contacted by petitioner's router; the time and duration of those connections... the individual devices that were connecting to the Internet through the router[, along with] what *type* of Internet traffic was occurring." Pet. Cert. at 5-6.

Even though Smith's telephone pen register is clearly distinguishable from the Ulbricht Internet pen/trap device, there is a cleaner way to resolve this case. Rather than distinguishing Smith, this Court should grant certiorari to reconsider and overturn it. Smith was wrongly decided, having been based entirely on the widely-criticized third party doctrine, and employing a privacy analysis which gave short shrift to a phone user's property rights in the "non content" part of his communication. More importantly, Smith was decided during an era during which this Court had abandoned the fundamental principles resurrected in Jones. Certainly, the Smith Court did not stop to consider the property rights baseline recently revitalized by this Court, before concluding that no one has any privacy interest in the phone numbers he dials.

The Smith Court claimed that "application of the Fourth Amendment depends on whether the person ... can claim a ... 'legitimate expectation of privacy'...." Smith at 740. In Jones, however, this Court noted that a search occurs whenever "[t]he Government physically occupie[s] private property for the purpose of obtaining

information" — even if that property is in public. Jones at 404.

To be sure, *dicta* in Jones claimed that "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." Jones at 411. However, it is entirely unclear why that should be so. Property rights do not rise and fall based on whether there is a tangible object involved. A person has just as much legal right to the "virtual" dollars in his bank account as he does to the tangible dollars in his wallet. As the Oregon Supreme Court keenly observed, there certainly can be a trespass without any physical intrusion: "It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion." Martin v. Reynolds Metals Co., 342 P.2d 790, 793 (1959).

While it may be one thing to say that a trespass analysis is not easily applied to cases without a physical intrusion, it is quite another to conclude that property rights therefore don't apply, and that instead the watered-down Katz v. United States, 389 U.S. 347 (1967) privacy test should govern.

Writing in concurrence in Jones, Justice Sotomayor questioned whether the third party doctrine should be reexamined, and whether Fourth Amendment rights extend even to situations where a person has turned over information to a third party for safekeeping, or for

a limited purpose. Jones at 417. In making that observation, Justice Sotomayor was in good company; as Justices Marshall and Brennan had written in dissent in Smith, "constitutional protections are not abrogated whenever a person apprises another of facts valuable in criminal investigations." Smith at 748 (Marshall, J., dissenting). This case presents an excellent vehicle for this Court to reconsider this doctrine.

C. The Third Party Doctrine Should Be Reconsidered.

The third party doctrine, as set out in cases such as United States v. Miller, is deeply flawed, but for many years it had limited application, as most "information" was contained on paper or early forms of computers, with serious limits on what, how much, and where information could be stored. However, today Americans turn over virtually **all** of their information to third parties, and it theoretically can be retained forever. For example, financial information is nearly entirely digitized, to the point where many Americans' wallets contain no anonymous paper currency at all. As this Court noted in Riley v. California, 134 S. Ct. 2473, 2489 (2014), even "[c]ell phones ... store many different types of information ... photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on." In addition, one's medical records, schedules, the books he reads, a lawyer's legal research and privileged work product, Internet browsing histories, and a dozen different types of location tracking data are all recorded and maintained digitally. Some Americans

even entrust nude pictures of themselves to third party programs, such as Snapchat, for delivery. In recent years, improvements in online, third-party storage allow devices such as "Chromebooks" to operate nearly entirely on data stored in "the cloud." Hopefully, no court would hold that Americans lose all "privacy" interests in any data entrusted to a third party. But they do not lose their property rights. Privacy often has proven to be a poor protector of rights. As many have noted, as the technology available to the government surveillance state continues to improve, one's reasonable "expectations" of what is private correspondingly shrinks.

Even if information a person shares with third parties is no longer considered to be private, it still remains his property. And a proper reading of Ex Parte Jackson teaches that the Fourth Amendment protects not only to the content of communications, but also the "metadata" surrounding them as well. The address on an envelope might be entrusted to the Postal Service for delivery, but the fact remains that the letter itself — address and all — is the sender's property, becoming the recipient's property when delivered. *See* Jones at 409.

The lower court completely disregarded any analysis of the property rights inherent to one's Internet routing information, not even once mentioning this Court's majority opinion in Jones. Of course, under Jones, it doesn't matter if one "should know" or even does know that the government is snooping around his private papers — his property rights are the same no matter where his property is located. *Id.*

at 406. While perhaps "no reasonable person could maintain a privacy interest in [various types] of information" (Ulbricht at *97), property interests do not depend on what judges decide is "reasonable."

In this case, Mr. Ulbricht turned over information, his Internet traffic, to his Internet Service Provider, Comcast. *See* App. at 113a. The government intercepted this information, putting that information to the government's use without Mr. Ulbricht's knowledge or permission. In doing so, the government interfered with the bailee/bailor relationship between Mr. Ulbricht and Comcast. Mr. Ulbricht had entrusted his data to Comcast for a particular purpose, delivery to the intended recipient, giving Comcast — but no one else — limited authority and information to be used for delivery of that data — not to further a criminal investigation.

It is axiomatic that, if a bailee misuses property entrusted to him by the bailor, he is liable for damages under an action for breach of contract, trespass, trover, *etc*. *See* W.F. Elliott, A Treatise on the Law of Bailments and Carriers, p. 75 (Bobbs-Merrill Company: 1914). Of course, Comcast here would deny liability, since it was the government which demanded Comcast turn over the information. But if, as this Court has claimed, the Fourth Amendment is concerned with protecting property rights, then the government should not be permitted to forcibly interfere in the relationship between bailee and bailor.

The proper analysis, then, is that which is laid out by this Court in Jardines. There, the Court refused to

permit the police to traipse around a home with a drug-sniffing dog, hoping to find something incriminating. The Court noted that the

> implicit license [of a visitor to a home] typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. [Jardines at 8 (citations omitted).]

Likewise, there is no legal principle entitling a third party corporation to take confidential information, that has been shared with it by a customer, and turn around and publish that information. According to Jardines, unless armed with a warrant, the police have no more rights to interfere than does "any private citizen." When it comes to demanding (without a warrant) that Comcast turn over the Internet traffic of a customer — "[t]here is no customary invitation to do that."

The lower court in this case justified the government's activities based on the notion that, from a privacy standpoint, one has less an expectation of privacy in less sensitive "non content" information than he does in the actual content of his communications. No doubt that is so. But from a property perspective, his rights are the same — even when the information at issue is considered insignificant from a privacy standpoint. As Entick v. Carrington, 95 Eng. Rep. 807 K.B. (1765), taught, "our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." This Court echoed that sentiment in Jones, finding that even what the government termed an insignificant "technical trespass" to a Jeep parked in a public lot was still a trespass. *See* Jones at 420-423.

If the seizure in this case was performed by a private party, Mr. Ulbricht would have numerous remedies. First, as discussed above, he would have legal rights against Comcast, the bailee, and the third party who absconded with his private information. But perhaps more importantly, he would have had the opportunity to go out into the marketplace to find a new Internet Service Provider — one that would guarantee that his information would be kept private. If it became known by the public that Comcast was makings its users' browsing histories available for others to see, no doubt its customers would be outraged. Many immediately would seek out a new company with which to do business — one that respected the security of their data. But when the

government can simply demand that all providers turn over whatever data it seeks, that consumer choice is negated.[7]

II. THE TEXTUAL AND HISTORICAL RECORD OF THE RIGHT TO TRIAL BY JURY SUPPORTS PETITIONER'S REQUEST FOR REVIEW OF HIS LIFE SENTENCE.

Based on recent Sixth Amendment decisions of this Court, Petitioner makes a strong case that "facts that justify an otherwise unreasonable sentence must be found by a jury or admitted by the defendant before they can be used to increase the defendant's sentence." Pet. at 29. Specifically, Petitioner asserts that his "life imprisonment without the possibility of parole for drug crimes that do not ordinarily carry that sentence, based substantially on numerous factual findings made by the sentencing judge by a preponderance of the evidence," violates his Sixth Amendment jury trial rights. *Id.* at 24. Additionally, Petitioner reminds this Court of a number of its recent rulings confirming the jury as a "'bulwark between the State and the accused,'" because the jury sits not only as the finder of

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[7] It was not long ago that protections afforded by the Fourth Amendment to Americans was understood to prevent the seizure of objects of only evidentiary value — known as the mere evidence rule. *See, e.g.*, Gouled v. United States, 255 U.S. 298 (1921). Under that rule, the government could not seize property unless it had a property right superior to that of the individual — contraband, or the fruits or instrumentality of a crime. The rule was cast aside in Warden v. Hayden, 387 U.S. 294 (1967), based on a pre-Jones belief that the Fourth Amendment protected privacy, not property.

fact with respect to the crimes charged, but also as the finder of facts which"'alter[] the legally prescribed punishment so as to aggravate it, [which] necessarily forms a constituent part of a new offense.'" *Id.* at 28.

A. As a Bulwark Against Tyranny, the Jury May Judge Law and Fact.

It is commonly believed that, until the ratification of the Sixth Amendment, there was no constitutional right to a trial by jury in federal criminal proceedings. This assumption is incorrect. Prior to the ratification of the first 10 amendments, Article III, Section 2, Clause 3 provided that "[t]he trial of all crimes ... shall be by jury." As Joseph Story explained, this right was singled out in the original Constitution because it was the "great bulwark of [the people's] civil and political liberties, and watched with an unceasing jealousy and solicitude." 2 J. Story Commentaries on the Constitution at § 1779 (5th ed. 1891). "The great object of a trial by jury in criminal cases," Story continued, "is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness of the people." *Id.* at § 1780. In short, the right to a jury trial in criminal cases was envisioned by our Founders as a protection of all of our other rights.

Indeed, "[t]he most famous landmark in the development of freedom of the press" was the jury's acquittal of John Peter Zenger upon charge of seditious libel, at a time when "American courts continued to punish persons who criticized the government." *See* Sources of Our Liberties at 307 (R. Perry & J. Cooper,

eds., ABA Found.: 1972). Had Zenger not been entitled to trial by jury, he would have been found guilty. However, because Zenger was tried by a jury of his peers, his freedom of speech was protected even though seditious libel was, at that time, a criminal offense.

The jury's power to safeguard the people from unjust laws was considered to be effective because the jury was composed of 12 impartially selected jurors who must unanimously concur in the guilt of the accused. *See* Story's Commentaries at § 1779, n.2. Blackstone extolled the virtues of the unanimity rule, celebrating the jury of "precisely twelve men ... bound by strict unanimity [as the] constitution of [an] admirable criterion of truth, and most important guardian both of public and private liberty." 3 Blackstone's Commentaries at 352. To freely fulfill this role, it was commonly understood that the jury was to be, and still must be, judge of both law and facts. As the nation's first Chief Justice, John Jay, led the way with this classic and famous jury charge:

> [I]t is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.... [Y]ou have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. [Georgia v. Brailsford, 3 U.S. 1, 4 (1793).]

Such was also the opinion of Jay's contemporaries and 20th century judges:

- "It was never yet disputed or doubted that a general verdict ... was a legal determination of the issue. Therefore, the jury have a power of deciding an issue upon a general verdict. And, if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience. J. Adams & C.F. Adams, The Works of John Adams, Vol. 2, at 254 (Little, Brown and Co.: 1850).

- "[T]he jury has the power to bring in a verdict in the teeth of both law and facts." Justice Oliver Wendell Holmes in Horning v. District of Columbia, 254 U.S. 135, 138 (1920).

- "We recognize ... the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence.... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision." United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

- "The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge...." United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

B. The Right to a Jury Trial Extends to the Sentencing Process.

Both Joseph Story and before him, William Blackstone,[8] traced the right to jury trial back to the 1215 Magna Carta, the pertinent article of which reads: "no person shall be arrested, nor imprisoned, nor banished, nor be deprived of life, &c., but by the judgment of his peers." 2 Story's Commentaries at §1779. On its face, the text contemplates a sentencing process which deprives a person of his freedom by imprisonment or deprived of his life will be conducted by a jury, not a judge. Indeed, greatly influenced by the Magna Carta, the 1677 Concessions and Agreements of West New Jersey adopted a jury trial guarantee on that very principle:

> That no Proprietor, freeholder or inhabitant of the said Province of West New Jersey, shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises, upon any account whatsoever, without a due tryal, and judgment passed by twelve good and lawful men of his neighbourhood.... [Sources at 185.]

Approximately 100 years later, the First Continental Congress described the right to trial by jury in these terms: "The next great right is that of trial by jury [where] neither life, liberty, nor property, can be taken

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[8] 3 Blackstone's Commentaries at 349.

from the possessor, until twelve of his ... peers ... upon a fair trial ... in open court ... shall pass their **sentence** upon oath against him...." Sources at 284 (emphasis added).

According to these texts, the right to be judged by one's peers is not limited to being "convicted" of a crime. Rather, it extended to the punishments imposed upon conviction — imprisonment, and other limits on one's freedom, as well as loss of citizenship and of life.

C. The Sentencing Here Violated Ulbricht's Right to Jury Trial.

As recently reported by Denver trial judge Morris B. Hoffman in his sprawling study on jury sentencing, it is commonly assumed that "English juries had no role in sentencing." M.B. Hoffman, "The Case for Jury Sentencing," 52 DUKE LAW J. 951, 958 (2003). On closer look, however, Judge Hoffman discovered this practice was attributable to the fact that "when English judges imposed sentences, they had almost no discretion." *Id.* at 962. America told a different story: "sentencing schemes with no input from the jury were the American exception, not the rule." *Id.* at 964. Nevertheless, as in England, so in the United States, "legislatures commonly set a specific period of incarceration for each offense." *Id.* at 964-65. And the juries remained the real sentencers by way of their verdict. *Id.* at 965.

In the early decades of the 19th century, things began to change. The "penitentiary became the

predominant form of punishment," shifting the sentencing power from juries to "judicial professionals." *Id.* at 965-66. Not only did this change reduce the number of states retaining "jury sentencing" to only five in the first decade of the 21st century (*id.* at 966), but it also ushered in an extensive pre-sentence process designed to ascertain what length of incarceration was necessary to "correct" criminals so they would not, upon release from prison, engage in further criminal conduct. In the federal system, this rehabilitative search has led to an extensive investigation that confers on the trial judge "broad latitude" to impose a sentence on information that has nothing to do with the crimes actually charged, or with uncharged activity that was related to a crime charged. Such findings are governed, not by the standard of reasonable doubt, but by the much lower standard of preponderance of the evidence. *See* Ulbricht at *123-*124.

It is not necessary to believe that the current system of judge sentencing is improper to understand that it has been abused below in this extreme case, wherein the prosecutor was allowed to game the system by avoiding charging the deaths claimed, yet then using those claimed crimes at sentencing as though they had been facts found by a jury. The record is clear on this point. The district court denied that Ulbricht had been "prosecuted or punished for homicide on a theory that he personally caused those [drug-related] deaths" (*id.* at *25), an offence with obvious evidentiary hurdles, including whether there was sufficient evidence of either the *mens rea* or *actus reus*. *See id.* at *124-*127. However, the district court

certainly sentenced Ulbricht as though he had caused those deaths. Moreover, the panel below accepted the transparently false rationale of the government, that the deaths were introduced and should be considered at sentencing only because they "'illustrate the obvious: that drugs can cause serious harm, including death.'" *Id*. at *126. Since the fact that drugs can be harmful was obvious and known to the court, that could not have been the reason. And the panel admitted the drug-related deaths affected sentencing, although it attempted to sanitize it as playing only a "little part" in sentencing. *Id*. at *128. Uncorrected by this Court, these types of abuses will continue, and will allow the trampling of the right to trial by jury of many Americans.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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