



**U.S. Department of Justice**

United States Attorney's Office  
Eastern District of Michigan

Evan Caminker  
Special Assistant United States Attorney

211 W. Fort Street, Suite 2001  
Detroit, Michigan 48226  
Telephone: (313) 226-9538  
Facsimile: (313) 226-4892  
E-Mail: evan.caminker@usdoj.gov

August 18, 2015

**VIA CM/ECF**

Deborah S. Hunt, Clerk  
U.S. Court of Appeals  
for the Sixth Circuit  
100 East Fifth Street  
Potter Stewart U.S. Courthouse  
Cincinnati, Ohio 45202-3988

**Re: United States v. Carpenter and United States v. Sanders  
Sixth Circuit Nos. 14-1572 and 14-1805  
New Authority Submission, Fed. R. App. P. 28(j)**

Dear Ms. Hunt:

Defendants' Rule 28(j) letter filed on August 10, 2015, cites *United States v. Graham*, 2015 WL 4637931 (4th Cir. Aug. 5). *Graham* does not persuasively support defendants' Fourth Amendment challenge to cell-site location evidence.

First, *Graham* held that even improperly obtained cell-site information fell within the exclusionary rule's good-faith exception because the government's reliance on judicial orders following statutory procedures was objectively reasonable.

Second, the *Graham* majority's argument that cellphone users do not voluntarily convey location information within the meaning of the third-party records doctrine is unpersuasive, for many reasons explained by the cogent dissent. In particular, the majority contends that even if cellphone users *generally* know their phones must signal nearby cell towers, users do not "voluntarily convey" location information unless they both "know" and "actively" identify the *precise* towers their phones signal. *Graham*, at \*17-\*18 & n.16. But the third-party records doctrine routinely applies to information people convey without such detailed knowledge and specific intention. People swiping credit cards at stores or gas stations may not know and do not actively identify the date, time, location, or sometimes even cost of their purchases. People making automated online payments may not know and do not actively identify the date, time, and amounts of their transactions. Patients do not know or identify much of the information their doctors

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transcribe in medical records. The *Graham* majority's "crabbed understanding of voluntary conveyance" is not faithful to the third-party records doctrine's commonplace application. *In re Application for Historical Cell Site Data*, 724 F.3d 600, 613 (5th Cir. 2013). *Cf. Huff v. Spaw*, 2015 WL 4430466, \*6 (6th Cir. July 21) (no reasonable expectation of privacy in pocket-dialed phone conversation, where someone "*inadvertently* broadcasts an activity to outsiders through commonly available telecommunications technology that he controls") (emphasis added).

Third, the *Graham* majority failed to consider whether any "search" satisfies the Fourth Amendment's reasonableness requirement. *Graham*, at \*8 & n.2 (noting only there is no "established" warrant exception). *Compare United States v. Davis*, 785 F.3d 498, 516–18 (11th Cir. 2015) (en banc) (finding such "search" reasonable).

The district court judgment should be affirmed.

Very truly yours,

BARBARA L. McQUADE  
United States Attorney

*s/Evan Caminker*  
EVAN CAMINKER  
Special Assistant U.S. Attorney

cc: Harold Gurewitz (via ecf)  
S. Allen Early (via ecf)