Nos. 12-10489 & 12-10657

In the

United States Court of Appeals for the Fifth Circuit

No. 10-11202

NETSPHERE, INC. Et Al,
Plaintiffs
v.
JEFFREY BARON,
Defendant-Appellant
v.
ONDOVA LIMITED COMPANY,
Defendant-Appellee

Cons. w/ No. 11-10113
NETSPHERE INC., Et Al, Plaintiffs
v.
JEFFREY BARON, Et Al, Defendants
v.
QUANTEC L.L.C.; NOVO POINT L.L.C.,
Appellants
v.
PETER S. VOGEL,
Appellee

Cons. w/ No. 11-10289
NETSPHERE, INC., ET AL, *Plaintiffs*
v.
JEFFREY BARON, *Defendant- Appellant*
v.
DANIEL J SHERMAN, *Appellee*

Cons. w/ No. 11-10290
NETSPHERE, INC. ET AL, *Plaintiffs*
v.

JEFFREY BARON, ET AL, *Defendants*

QUANTEC L.L.C.; NOVO POINT L.L.C., *Non-Party Appellants*
v.
PETER S. VOGEL, *Appellee*

Cons. w/ No. 11-10390
NETSPHERE, INC. ET AL, *Plaintiffs*
v.
JEFFREY BARON, Defendant – *Appellant*

QUANTEC L.L.C.; NOVO POINT L.L.C., *Appellants*
v.
ONDOVA LIMITED COMPANY, Defendant – *Appellee*
v.
PETER S. VOGEL, *Appellee*

Cons. w/ No. 11-10501
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – *Appellant*

QUANTEC L.L.C.; NOVO POINT L.L.C., *Appellants*
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P., *Appellant*
v.
PETER S. VOGEL; DANIEL J. SHERMAN, *Appellees*

Cons. w/ No. 12-10003
NETSPHERE, INC. ET AL, *Plaintiffs*
v.

JEFFREY BARON, *Defendant – Appellant*

QUANTEC L.L.C.; NOVO POINT L.L.C., *Appellants*

GARY SCHEPPS, *Appellant*
v.
PETER S. VOGEL, *Appellee*

Cons. w/ No. 12-10444

In re: NOVO POINT LLC, Petitioner

Cons. w/ No. 12-10489
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – *Appellant*

QUANTEC L.L.C.; NOVO POINT L.L.C., *Appellants*
v.
PETER S. VOGEL; DANIEL J. SHERMAN , *Appellees*

Cons. w/ No. 12-10657
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – *Appellant*

QUANTEC L.L.C.; NOVO POINT L.L.C., *Appellants*
v.
PETER S. VOGEL; DANIEL J. SHERMAN , *Appellees*

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F

MOTION FOR LEAVE TO FILE AND REPLY BRIEF OF AMICUS CURIAE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF REVERSAL

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF REVERSAL

Amicus curiae United States Justice Foundation respectfully moves for leave of Court to file the accompanying brief under Federal Rule of Appellate Procedure 29.

STATEMENT OF INTEREST

The United States Justice Foundation (hereinafter referred to as "USJF") is a nonprofit, public interest, legal action organization, dedicated to instruct, inform, and educate the public on, and to litigate, significant legal issues confronting America. Founded in 1979 by attorneys seeking to advance the conservative viewpoint in the judicial arena, USJF has since submitted testimony to the U.S. Senate on virtually every U.S. Supreme Court appointee, sponsored conferences on a variety of important legal issues, published studies and reports on topical issues, and litigated numerous Constitutional cases, including up to the United States Supreme Court.

The Appellees' response briefing fails to accurately represent the historical bounds of federal jurisdiction. Particularly, the Appellees' request for a massively expanded authority to seize private property represents a fundamental and dangerous deviation from the traditional restraints to which the federal courts have historically been bound. Appellees' argument seeks to fundamentally change the relationship between court and citizen. There is a concern that, in light of the radical extension of power argued for by Appellees, the Appellants' briefing fails to sufficiently raise (1) the controlling historic precedent and (2) argument on the extent to which the Constitution was framed to protect the great end for which men entered into society: to secure their property. Finally, the cornerstone case upon which Appellees' argument is grounded has been erroneously set forth by the Appellees, and, in light of the significant ramifications on the issue, a correction of the Appellees' erroneous argument should be considered by the Court.

For these reasons, amicus curiae respectfully requests that the Court grant leave to file this brief.

DATED: August 27, 2012

Respectfully Submitted,

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REPLY ISSUE I:

WHAT IS THE JURISDICTIONAL AUTHORITY OF THE FEDERAL COURTS TO IMPOSE AN EQUITY RECEIVERSHIP OVER PRIVATE PROPERTY ?

The Appellees' responsive briefing argues that, in 1787, the English Chancery would impose a receivership over property to prevent its dissipation, even where no interest in, or to, the property was the subject-matter of the underlying proceedings. In support, the Appellees offer Vann v. Barnett, 2 Bro C.C. 158 (1787). However, the fundamental error of the Appellees' argument is demonstrated by Vann. As emphasized in Metcalf v. Pulvertoft, 1 Ves. & B. 183, the receiver's appointment in Vann was based on a sworn affidavit setting out the plaintiff's equitable title to the property placed in a receivership. Thus, in 1787, the Chancery extended its jurisdiction to impose a receivership where: (1) there was a sworn showing of cause; and (2) the plaintiff claimed an equitable right in, and to, the property seized in a receivership. Neither of these elements are present with the receivership order challenged in this appeal.

The trend over the 220 years following Vann has not involved a radical departure from the underlying principals involved in that case. Thus, in 1848, the U.S. Supreme Court recognized the court's underlying jurisdictional basis for imposing a receivership as being "to preserve the subject-matter in dispute". Forgay v. Conrad, 47 U.S. 201, 204 (1848). Seventy-five years later, the Supreme Court reaffirmed the principal that a federal court's jurisdiction to impose receivership was limited to preserving property in which a present interest was claimed. Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 497 (1923). The Supreme Court held that the federal court *lacked jurisdiction* to appoint a receiver to insure future payment to unsecured creditors. Id. Finally, in 1935, the High Court was explicit in its ruling:

> "[T]here is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition. The English chancery court from the beginning declined to exercise its jurisdiction for that purpose."

Gordon v. Washington, 295 U.S. 30,37 (1935).

A decade after Gordon, the U.S. Supreme Court held that where property lay "wholly outside the issues in the suit", a federal court lacks authority to freeze that property. De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 220 (1945). In De Beers, the Court *rejected* the argument that seizure of the property was necessary "to protect its jurisdiction," where there was a lack of connection between the property frozen and the claims at issue in the underlying lawsuit. In rejecting a similar asset freeze in 1988, the Fifth Circuit emphasized that the De Beers reasoning was based on "the lack of connection between the property frozen and the underlying lawsuit". In re Fredeman Litigation, 843 F.2d 821, 826, 824-826 (5th Cir. 1988). The Fifth Circuit reiterated the underlying principal that property must be subject to a claim in controversy pending before the court in order for the court's control over that property to be "essential to preserving the court's subject matter jurisdiction or processing the litigation to a complete resolution". Id.

Accordingly, the jurisdictional authority of the federal courts to impose a receivership over private property is dependent upon a dispute as to the subject-matter of that property being at issue before the court. See Cochrane v. WF Potts Son & Co., 47 F.2d 1026, 1029 (5th Cir. 1931). The Appellees are seeking to radically depart from this traditional jurisdictional limit, and to place *all property*, including property not itself subject to any claim or controversy, under the authority of the federal courts. The Appellees' request for a *massively* expanded authority to seize private property represents a fundamental, and dangerous, deviation from the traditional restraints to which the federal courts have historically been bound.

REPLY ISSUE II:

DOES THE FOURTH AMENDMENT PROHIBIT A RECEIVERSHIP TO SEIZE PRIVATE PROPERTY NOT SUBJECT TO A CONTROVERSY INVOLVING THAT PROPERTY?

As the U.S. Supreme Court held in the seminal case of Boyd v. United States, 116 U.S. 746 (1886), the first freedom of the Fourth Amendment protects the people from any search for, or seizure of, any private property to which Government could not

affirmatively demonstrate that it had a superior right. Applied here, the property-based principles of the Fourth Amendment protect against a receivership seizing an individual's property not subject to a controversy involving that property. By seizing the defendant's property, the District Court trespassed on Mr. Baron's *indefeasible right* of private property.

A. The Textual Development of the Fourth Amendment Demonstrates that It Protects Two Distinct Rights.

On June 8, 1789, James Madison offered in Congress "his long-awaited amendments" to the United States Constitution, as they had been recommended by several state ratification conventions. See Sources of Our Liberties, pp. 421-24 (R. Perry & J. Cooper, eds., Rev. Ed., American Bar Foundation: 1978) (hereinafter "Sources"). Among those proposed amendments was the following text, the precursor to what would become the Fourth Amendment of the Constitution set forth in the Bill of Rights:

> "The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, **shall not**

> **be violated** by warrants issued **without probable cause, supported by oath** or affirmation, or not particularly describing the places to be searched, and the persons or things to be seized."
>
> The Founders' Constitution, p. 25 (P. Kurland & R. Lerner, eds.: Univ. of Chicago Press:1987) (hereinafter "Founder's Constitution") (emphasis added).

Madison's text reflected Section 10 of the 1776 Virginia Declaration of Rights, which secured to the people only the right to be free from general warrants:

> "That general warrants, whereby an officer ... may ... search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not be granted."
>
> Sources, p. 312.

Virginia's Declaration did not stand alone. Similar provisions appeared in the original Delaware, North Carolina, and Maryland Declarations of Rights. *See* Sources, pp. 339 (Delaware),

348 (Maryland), and 355 (North Carolina). However, four other states adopted a different type of declaration, indicating that the protection against general warrants was but a subset of an overarching property right. The 1776 Pennsylvania Declaration took the lead, stating:

> "That the people **have a right to hold** themselves, their houses, papers, and possessions **free from search and seizure**, **and therefore** warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer ... may be commanded ... to search suspected places, or to seize any person ..., his property ..., not particularly described, **are contrary to that right**, and ought not be granted."
>
> Sources, p. 330 (emphasis added).

Similar direct protections of property rights appeared in the 1777 Vermont, the 1780 Massachusetts, and the 1784 New Hampshire Declarations. *See* Sources, pp. 366 (Vermont), 376 (Massachusetts) and 384 (New Hampshire). The latter two began

with a single sentence, remarkably similar to the first phrase of the ratified Fourth Amendment: "Every subject has a right to be secure from all unreasonable searches and seizures, of his person, his houses, his papers, and all his possessions." In contrast, Madison's initial proposal would have protected the "rights of the people to be secured in their persons, their houses, their papers, and their other property" **only** from general warrants. Instead, Congress submitted to the States for ratification a much more muscular Fourth Amendment, which reads:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated**, and no** warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added.)

In striking "by" from Madison's original draft, and substituting "and no," preceded by a comma, Congress changed Madison's single subject sentence into a compound one, setting

forth two distinct rights. See N.B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, p. 103 (Johns Hopkins Press: 1937). The first phrase affirmatively secures the people's unalienable right to private property, and the other protects the property rights of the people from execution of general warrants, even where the Government has a superior property interest.

B. The Fourth Amendment's First Guarantee Secures the Unalienable Right of the People to Private Property, Unless the Government Demonstrates a Superior Property Right.

By its grammatical change, Congress signified that, separate from the warrant requirement, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, **shall not be violated...."** (Emphasis added.) While the Massachusetts and New Hampshire Declarations stated this right in principle, the Fourth Amendment added teeth to the principle — stating that those inherent property rights "shall not be violated."

1. The Fourth Amendment Protects an Indefeasible Right of Private Property.

As noted above, the Fourth Amendment's prohibition against "unreasonable searches and seizures" is derived from the similar language found in Article XIV of the Massachusetts Declaration of Rights, and in Article XIX of the 1784 New Hampshire Declaration of Rights. See Sources, pp. 376, 384. Both Declarations lay as their foundational principle that "all men are born free and equal and have certain natural, essential, and unalienable rights; among which [are] the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property...." Article I of the Massachusetts Declaration, reprinted in Sources, p. 374. *Accord*, Article II of the New Hampshire Declaration, reprinted in Sources, p. 382.

Because the people's right to private property was inherent, God-given, and unalienable, any search or seizure of any person's property would be "unreasonable," unless it could be shown that the property searched for or seized either did not belong to the person, or had been forfeited by some illegal act. Thus, a fitting summary of our analysis ends where the Boyd Court began its

analysis with a quote from the 1765 English case of Entick v. Carrington:

> **"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable"**
>
> Boyd, 116 U.S. at 627.

DATED: August 27, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains 2,265 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using MS Word 2000 in 14 and 15 point century font.

DATED: August 27, 2012

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CERTIFICATE OF SERVICE

This is to certify that this brief was served this day on all parties who receive notification through the Court's electronic filing system.

DATED: August 27, 2012

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