No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the warrantless use of a GPS tracking device on respondent's vehicle to monitor its movements on public streets violated the Fourth Amendment.

2. Whether the government violated respondent's Fourth Amendment rights by attaching the GPS tracking device to his vehicle without a valid warrant and without his consent.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 615 F.3d 544. The order of the court of appeals denying rehearing (Pet. App. 43a), and the opinions concurring in and dissenting from the denial of rehearing en banc (Pet. App. 44a-52a) are reported at 625 F.3d 766. The opinion of the district court granting in part and denying in part respondent's motion to suppress (Pet. App. 53a-88a) is published at 451 F. Supp. 2d 71.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2010. A petition for rehearing was denied on November 19, 2010 (Pet. App. 43a). On February 3, 2011, the Chief Justice extended the time within which

to file a petition for a writ of certiorari to and including March 18, 2011. On March 8, 2011, the Chief Justice further extended the time to and including April 15, 2011, and the petition for a writ of certiorari was filed on that date. The petition for a writ of certiorari was granted on June 27, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, respondent was convicted of conspiracy to distribute five kilograms or more of cocaine and 50 or more grams of cocaine base, in violation of 21 U.S.C. 841 and 21 U.S.C. 846. The district court sentenced respondent to life imprisonment. J.A. 66-76. The court of appeals reversed respondent's conviction. Pet. App. 1a-42a.

1. In 2004, a joint Safe Streets Task Force of the Federal Bureau of Investigation and the Metropolitan Police Department began investigating respondent, who owned and operated a nightclub in the District of Columbia, for cocaine trafficking. Pet. App. 2a, 54a. The agents used a variety of investigative techniques de-

signed to link respondent to his co-conspirators and to suspected stash locations for illegal drugs. The agents conducted visual surveillance and installed a fixed camera near respondent's nightclub, obtained pen register data showing the phone numbers of people with whom respondent communicated by cellular phone, and secured a Title III wire intercept for respondent's cellular phone. *Id.* at 54a-55a; J.A. 103-105; Resp. C.A. App. 218-222, 227-289.

In addition to those techniques, the agents obtained a warrant from a federal judge in the District of Columbia authorizing them to covertly install and monitor a global positioning system (GPS) tracking device on a Jeep Grand Cherokee registered to respondent's wife, but used primarily or exclusively by respondent, for up to 90 days. J.A. 21-34,[1] 100-101, 105-110; Pet. App. 15a-16a, 38a-39a; Resp. C.A. App. 512. The warrant authorized the agents to install the device on the Jeep within ten days of the issuance of the warrant, and only in the District of Columbia, but the agents did not install the device until 11 days after the warrant was issued, and they installed it while the Jeep was parked in a public parking lot in Maryland. Pet. App. 38a-39a; J.A. 93-100. Agents also later replaced the device's battery while the Jeep was located in a different public parking lot in Maryland. J.A. 110-112, 129-132, 144-146.

The GPS device communicated with orbital satellites to establish the device's location and was accurate within

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[1] The tracking-device warrant and affidavit reproduced at J.A. 21-34 were initially filed under seal at the government's request. They have, however, been reproduced as exhibits in this litigation in filings that are available to the public. See 1:05-cr-00386-ESH Docket entry No. 150-1 (D.D.C. July 23, 2006).

50 to 100 feet. J.A. 79-81. The device generated data only when the Jeep was moving, and it was capable of forwarding data to government agents using a cell-phone connection. J.A. 80-82, 118-121. When the vehicle was not moving, the device went into "sleeping mode" to conserve its battery. J.A. 83-85. The device provided information only about the vehicle's location; it did not reveal who was driving the car, what the driver and occupants were doing, or with whom they met at their destinations.

Using the device, agents were able to track respondent's Jeep in the vicinity of a suspected stash house in Fort Washington, Maryland, which confirmed other evidence of respondent driving his Jeep to and from that location. For example, respondent's presence at the Fort Washington stash house was also established by visual surveillance, including videotape and photographs of respondent driving his Jeep to and from that location. J.A. 122-124, 163-166.

Based on intercepted calls between respondent and his suspected suppliers, investigators believed that respondent was expecting a sizeable shipment of cocaine during late October 2005. J.A. 174-178. On October 24, 2005, agents executed search warrants at various locations. They recovered nearly $70,000 from respondent's Jeep, and they recovered wholesale quantities of cocaine, thousands of dollars in cash, firearms, digital scales, and other drug-packaging paraphernalia from respondent's suspected customers. J.A. 162-163, 181-185, 187-193, 195-209. Agents also recovered from the Fort Washington stash house approximately 97 kilograms of powder cocaine, almost one kilogram of crack cocaine, approximately $850,000 in cash, and various

items used to process and package narcotics. J.A. 148-160; Pet. App. 40a.

2. A federal grand jury sitting in the District of Columbia charged respondent with conspiring to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841 and 21 U.S.C. 846; and 29 counts of using a communications facility to facilitate a drug-trafficking offense, in violation of 21 U.S.C. 843(b). Pet. App. 54a.

Before trial, respondent moved to suppress the data obtained from the GPS tracking device. J.A. 11-13. Relying on *United States* v. *Knotts*, 460 U.S. 276 (1983), and *United States* v. *Karo*, 468 U.S. 705 (1984), the district court granted the motion in part and denied it in part, explaining that data obtained from the GPS device while the Jeep was on public roads was admissible, but that any data obtained while the Jeep was parked inside the garage adjoining respondent's residence must be suppressed. Pet. App. 83a-85a. As a result, the GPS data introduced at trial related only to the movements of the Jeep on public roads. The jury acquitted respondent on a number of the charges and the district court declared a mistrial after the jury was unable to reach a verdict on the conspiracy charge. J.A. 15-17.

A grand jury charged respondent in a superseding indictment with a single count of conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841 and 21 U.S.C. 846. J.A. 35-65. After a second trial, at which the GPS evidence again related only to the movements of the Jeep on public roads, a jury convicted respondent of the sole count in the indictment. Pet. App. 3a. The district court

sentenced respondent to life imprisonment and ordered him to forfeit $1,000,000 in proceeds from drug trafficking. J.A. 19, 66-76.

3. The court of appeals reversed respondent's conviction. Pet. App. 1a-42a.

a. The court acknowledged this Court's holding in *Knotts* that monitoring the public movements of a vehicle with the assistance of a beeper was not a search within the meaning of the Fourth Amendment because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Pet. App. 17a (quoting *Knotts*, 460 U.S. at 281). The court concluded, however, that *Knotts* was not controlling because the officers in that case monitored a "discrete journey" of about 100 miles, rather than conducting prolonged monitoring of a vehicle over the course of several weeks. *Id.* at 17a-19a. The court noted that *Knotts* reserved whether a warrant would be required before police could use electronic devices as part of a "dragnet-type law enforcement practice[]," such as "twenty-four hour surveillance." *Id.* at 17a-18a (quoting *Knotts*, 460 U.S. at 283-284).

b. After determining that it was not bound by *Knotts*, the court of appeals concluded that respondent had a reasonable expectation of privacy in the public movements of his vehicle over the course of a month because he had not exposed the totality of those movements to the public. Pet. App. 22a-31a. The government's use of a GPS device to monitor those movements, the court held, was therefore a search within the meaning of the Fourth Amendment. *Id.* at 22a-35a; see *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

First, the court concluded that respondent's movements while he drove on public roads in his Jeep were not "actually exposed" to the public. Pet. App. 23a-27a. The court stated that "[i]n considering whether something is 'exposed' to the public as that term was used in *Katz*[,] we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do." *Id.* at 23a. Applying that standard, the court concluded that "the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements * * * is essentially nil." *Id.* at 26a.

Second, the court rejected the argument that because each of respondent's individual movements was in public view, respondent's movements were "constructively exposed" to the public. Pet. App. 27a-31a. The court explained that "[w]hen it comes to privacy, * * * the whole may be more revealing than the parts." *Id.* at 27a. Applying a "mosaic" theory, the court reasoned that "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble," which can "reveal more about a person than does any individual trip viewed in isolation." *Id.* at 29a. The court concluded that a reasonable person "does not expect anyone to monitor and retain a record of every time he drives his car * * * rather, he expects each of those movements to remain 'disconnected and anonymous.'" *Id.* at 31a.

Noting that seven States have enacted legislation requiring the government to obtain a warrant before it may use GPS tracking technology, Pet. App. 33a-34a,

the court of appeals further concluded that respondent's expectation of privacy in the month-long public movements of his Jeep was one that society was prepared to recognize as reasonable, *id.* at 31a-35a.

Having concluded that the GPS monitoring constituted a search, the court further considered whether that search was nevertheless reasonable under the Fourth Amendment. Pet. App. 38a-39a. The court rejected the government's argument that the search was reasonable because, under the "automobile exception" to the Fourth Amendment's warrant requirement, see *Maryland* v. *Dyson*, 527 U.S. 465, 466-467 (1999) (per curiam); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974), the agents could have repeatedly searched respondent's vehicle based on probable cause without obtaining a warrant. Pet. App. 38a-39a. The court observed that the government had not raised this argument in the district court, but nevertheless rejected the argument on the merits, stating that "the automobile exception permits the police to search a car without a warrant if they have reason to believe it contains contraband; the exception does not authorize them to install a tracking device on a car without the approval of a neutral magistrate." *Id.* at 39a.

c. The court of appeals rejected the government's argument that the court's decision could invalidate the use of prolonged visual surveillance of persons or vehicles located in public places and exposed to public view. Pet. App. 35a-38a. As a practical matter, the court suggested that police departments could not afford to collect the information generated by a GPS device through visual surveillance, but GPS monitoring, according to the court, "is not similarly constrained." *Id.* at 35a-36a.

The court also explained that the constitutionality of prolonged visual surveillance was not necessarily called into question by its decision, because "when it comes to the Fourth Amendment, means do matter." *Id.* at 37a (citation omitted). For example, the court explained, police do not need a warrant to obtain information through an undercover officer, but they need a warrant to wiretap a phone. *Ibid.* The court ultimately decided to "reserve the lawfulness of prolonged visual surveillance" for another day. *Id.* at 37a-38a.

d. Finally, the court concluded that the district court's error in admitting evidence obtained by use of the GPS device was not harmless. Pet. App. 39a-42a. The court rejected the government's contention that the other evidence linking respondent to the conspiracy was overwhelming and instead found that "the GPS data were essential to the Government's case." *Id.* at 41a. The court therefore reversed respondent's conviction. *Id.* at 1a-2a.

4. The court of appeals denied the government's petition for rehearing en banc. Pet. App. 43a. Chief Judge Sentelle, joined by Judges Henderson, Brown, and Kavanaugh, dissented. *Id.* at 45a-49a. Chief Judge Sentelle explained that the panel's decision was inconsistent not only with the decisions of every other court of appeals to have considered the issue, but also with this Court's decision in *Knotts*. *Id.* at 45a. Chief Judge Sentelle observed that the Court's statement in *Knotts*, that nothing in the Fourth Amendment "prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case," was "[c]entral to [its] reasoning." *Id.* at 46a (quoting *Knotts*, 460

U.S. at 282). He concluded that "[e]verything the Supreme Court stated in *Knotts* is equally applicable to the facts of the present controversy," because "[t]here is no material difference between tracking the movements of the *Knotts* defendant with a beeper and tracking [respondent] with a GPS." *Ibid.*

Chief Judge Sentelle found "unconvincing[]" the panel's attempt to distinguish *Knotts* "not on the basis that what the police did in that case is any different than this, but that the volume of information obtained is greater in the present case," noting that "[t]he fact that no particular individual sees * * * all [of a person's public movements over the course of a month] does not make the movements any less public." Pet. App. 46a-47a. Chief Judge Sentelle also criticized the panel opinion for giving law enforcement officers no guidance about "at what point the likelihood of a successful continued surveillance becomes so slight that the panel would deem the otherwise public exposure of driving on a public thoroughfare to become private." *Id.* at 47a. He noted that "[p]resumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem." *Id.* at 48a.

With regard to the panel's holding that respondent acquired a reasonable expectation of privacy in the totality of his movements over the course of a month because "that whole reveals more . . . than does the sum of its parts," Chief Judge Sentelle stated that the panel had failed to explain how the whole/part distinction affects respondent's reasonable expectation of privacy. Pet. App. 47a-48a. He explained that "[t]he reasonable ex-

pectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero," and "[t]he sum of an infinite number of zero-value parts is also zero." *Ibid*. Whatever the whole revealed, Chief Judge Sentelle explained, the test of the reasonable expectation is not "in any way related to the intent of the user of the data obtained by the surveillance or other alleged search." *Id*. at 48a.

Finally, Chief Judge Sentelle noted, "[l]est the importance of this opinion be underestimated," that because the panel found that the privacy invasion was not in the agents' using a GPS device, "but in the aggregation of the information obtained," Pet. App. 48a, the panel's opinion calls into question "any other police surveillance of sufficient length to support consolidation of data into the sort of pattern or mosaic contemplated by the panel," *ibid*. Chief Judge Sentelle could not "discern any distinction between the supposed invasion by aggregation of data between the GPS-augmented surveillance and a purely visual surveillance of substantial length." *Id*. at 48a-49a.

Judge Kavanaugh also dissented. Pet. App. 49a-52a. In addition to the reasons set forth by Chief Judge Sentelle, Judge Kavanaugh would have granted rehearing to resolve respondent's alternative claim on appeal, which the panel did not address, that the initial warrantless installation of the GPS device on his car violated the Fourth Amendment because it was "an unauthorized physical encroachment within a constitutionally protected area." *Ibid*. (internal quotation marks omitted).

SUMMARY OF ARGUMENT

The installation and use of a GPS device to monitor the movements of respondent's vehicle on public roadways did not violate the Fourth Amendment.

I. A. In *Katz* v. *United States*, 389 U.S. 347, 351 (1967), this Court recognized that the privacy interests safeguarded by the Fourth Amendment do not extend to matters "knowingly expose[d] to the public." Under that principle, officers do not conduct a "search" when they observe matters conducted in the open, which anyone could see.

1. In *United States* v. *Knotts*, 460 U.S. 276, 283-285 (1983), the Court made clear that technological enhancements in the ability to observe matters "knowingly expose[d] to the public" do not render those observations a search. *Knotts*, like this case, involved the use of a tracking device to monitor the movements of a vehicle on public roads. The tracking device in that case—a beeper—enabled officers to maintain surveillance of the vehicle's movements when visual observations failed. But the Court made clear that its use did not constitute a search. A person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281.

2. The court of appeals concluded that the use of the GPS device to monitor the movements of respondent's vehicle infringed his reasonable expectation of privacy because the likelihood that any person would observe his movements over a month is "essentially nil." Pet. App. 26a. But this Court has never applied a test that turned on the likelihood that matters exposed to the public would actually be observed in order to determine whether a search has taken place. The Court in *Knotts*

referred to what officers "could have observed" without use of the beeper, 460 U.S. at 285, not what a private individual *likely* would have observed. Similarly, in *Smith* v. *Maryland*, 442 U.S. 735, 745 (1979), the Court placed no weight on whether a phone company would actually compile, print, and review a log of all telephone calls a customer made; what mattered was that the customer conveyed the numbers to the company which was "free" to record them in a list.

Any rule that looks to the "likelihood" that a private person would acquire the same information that the police obtain by monitoring a car's public movements would be wholly unworkable. Police could not predict when prolonged GPS tracking would cross some ill-defined "likelihood" limit keyed to hypothetical actions by members of the public. And such a test is an unreliable gauge of privacy: any individual who moves on public roadways knows that his movements can be readily observed. Respondent, for example, had to be aware that any neighbor could have observed his frequent visits to his Fort Washington stash house.

3. The court of appeals also relied on a "mosaic" theory to justify the conclusion that prolonged GPS monitoring was a search, positing that the entirety of a vehicle's movements over a month reveals patterns and habits that are not evident in "short-term surveillance." Pet. App. 29a. But this Court's cases do not support a "mosaic" approach. The governing principle is that the observation of matters knowingly exposed to the public is not a search, and that principle applies to any travel on public roadways. In *Knotts*, the Court relied solely on the fact that the monitored vehicle was driving on the public roadways, not on a view that the beeper moni-

tored only a single journey. And in *United States* v. *Karo*, 468 U.S. 705 (1984), the Court applied the same principle in holding that months-long beeper and visual surveillance of public movements of an item carried in a vehicle was not a search. The court of appeals found support for its "mosaic" theory only in a Freedom of Information Act decision pertaining to rap sheets and a misinterpretation of a portion of *Smith* that rejected any *subjective* expectation of privacy in the numbers dialed because the telephone company furnished customers with a list of calls. Neither case supports recognizing an expectation of privacy when driving a car on public streets because prolonged observations reveal patterns.

In addition, the "mosaic" theory is unworkable. Law enforcement officers could not predict when their observations of public movements would yield a larger pattern and convert legitimate short-term surveillance into a search. Courts would be hard pressed to pinpoint that moment even in retrospect. And the extension of the mosaic theory to other non-search investigatory techniques that, in the aggregate, reveal patterns—such as pen registers, trash pulls, review of bank records, and visual surveillance—would deeply unsettle Fourth Amendment law and cloud the validity of a host of standard police practices.

B. Law enforcement has not abused GPS technology. No evidence exists of widespread, suspicionless GPS monitoring, and practical considerations make that prospect remote. As this Court has previously indicated, if "dragnet" use of tracking technology occurs in the future, its constitutional implications can be addressed at that time. *Knotts*, 460 U.S. at 283-284. And if prophylactic protections are deemed warranted to address law

enforcement techniques that do not constitute a "search" or "seizure," the legislative process is the appropriate way to address them.

C. Applying this Court's doctrine, the use of a GPS tracking device to monitor the movements of respondent's vehicle on public streets was not a search. All of the Jeep's movements were unquestionably exposed to public view. Respondent did not have a justifiable expectation that his public movements would remain invisible to private or government observation.

II. The government's attachment of a GPS tracking device to respondent's vehicle, as distinct from its use to track the vehicle's public movements, also did not violate the Fourth Amendment. No warrant was required because the attachment of the device was neither a search nor a seizure.

A. Attaching a tracking device to a vehicle's exterior is not a search because the attachment reveals no information at all, and certainly no private information. The attachment of a tracking device to a vehicle's exterior creates, at most, only the *potential* for a search, in that the tracking device might subsequently be monitored in a private area. But a potential invasion of privacy does not constitute a search. *Karo*, 468 U.S. at 712.

B. Attaching a tracking device is also not a seizure. A seizure within the meaning of the Fourth Amendment requires a meaningful interference with an individual's possessory interest in the property. Installation of the GPS device on respondent's car did not draw power from the vehicle, prevent respondent from driving it, or occupy space that could have been used for passengers or packages. At most, it involved a technical trespass on

the space occupied by the device, but that is insufficient to amount to a seizure.

III. Even if installing or using the GPS tracking device was a search or seizure, it was reasonable under the Fourth Amendment. In assessing Fourth Amendment reasonableness, this Court has balanced the nature and degree of the intrusion against the governmental interests supporting the investigatory technique. It has frequently struck the balance against requiring a warrant and probable cause when the intrusion is modest and the government interests are significant or inconsistent with the warrant procedure. In this context, neither probable cause nor a warrant should be required. A GPS device does not conduct a visual or aural search of the item to which it is attached, it is used to gather information that could be observed by any member of the public, and cars have traditionally been afforded diminished Fourth Amendment protection. On the other side of the ledger, a critically important use of GPS surveillance is at the beginning stages of an investigation, to *establish* probable cause. The warrantless surveillance here, which was supported by at least reasonable suspicion, is valid under that test.

ARGUMENT

I. THE USE OF A GPS TRACKING DEVICE TO MONITOR THE MOVEMENTS OF RESPONDENT'S VEHICLE ON PUBLIC STREETS WAS NOT A SEARCH UNDER THE FOURTH AMENDMENT

A. Individuals Have No Reasonable Expectation Of Privacy In Information That Is Exposed To Public View

In *Katz* v. *United States*, 389 U.S. 347 (1967), this Court held that the use of an electronic listening device that was attached to the outside of a public telephone booth constituted a Fourth Amendment search. *Id.* at 352-353. *Katz* recognized that "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure," *id.* at 353, but instead depends on the reasonable expectations of privacy that an individual has in a particular place at a particular time. As formulated in Justice Harlan's concurrence in *Katz*, the protection of the Fourth Amendment requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361; see *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979) (adopting Justice Harlan's formulation).

Katz found a search because a person who uses a telephone booth seeks "to exclude * * * the uninvited ear" from the conversation, 389 U.S. at 352, and the government's interception of the conversation "violated the privacy upon which [the defendant] justifiably relied," *id.* at 353. But the Court recognized that, under reasonable-expectation-of-privacy analysis, "[w]hat a

person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Id.* at 351.

The Court's post-*Katz* search jurisprudence has consistently distinguished between matters kept private and matters exposed to public view. In *Oliver* v. *United States*, 466 U.S. 170 (1984), the Court held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields." *Id.* at 178. The Court explained that "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance" and that "as a practical matter these lands usually are accessible to the public and the police." *Id.* at 179. And in *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), the Court held that a state health inspector did not conduct a search when he observed smoke emanating from an industrial plant, because the inspector "had sighted what anyone in the city who was near the plant could see." *Id.* at 865.

These cases demonstrate the principle that a person has no reasonable expectation of privacy in information that is exposed to public view. When police officers acquire that information, they do not conduct a search within the meaning of the Fourth Amendment.

1. The use of technology to acquire information exposed to public view does not affect the reasonable expectation of privacy in that information

With advances in technology, law enforcement officers have become more efficient in conducting criminal investigations. This Court's decisions establish, however, that the distinction drawn in *Katz* between private information and information that is "expose[d] to the public" remains the relevant inquiry to determine

whether a particular form of government surveillance constitutes a search. 389 U.S. at 351. The Fourth Amendment does not preclude the government from using technology to collect information that is in public view, because the technology does not make the information collected any less public. The government does conduct a search, however, if it uses technology to detect private activities occurring in private areas.

a. In *United States* v. *Knotts*, 460 U.S. 276 (1983), the Court applied the reasonable-expectation-of-privacy framework to conclude that no search had occurred when law enforcement officers used an electronic tracking device to monitor the movements of a vehicle on public roads. The officers in *Knotts*, without obtaining a warrant, had installed an electronic beeper in a container of chemicals in Minneapolis, Minnesota, that was subsequently transported in a vehicle. *Id.* at 277. Officers followed the vehicle on part of its journey, but they ceased visual surveillance when the driver "began making evasive maneuvers." *Id*. at 278. They resumed surveillance an hour later after using the beeper to determine that the container was stationary and transmitting a signal from a cabin near Shell Lake, Wisconsin. *Ibid*.

The Court concluded that the officers' use of the beeper did not implicate the Fourth Amendment because it conveyed only facts in which the car's driver had no legitimate expectation of privacy:

> When [the driver] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Knotts, 460 U.S. at 281-282. The electronic monitoring was not a search because a person "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281.

The Court acknowledged that the beeper enabled law enforcement officers to determine where the container of chemicals had been delivered, even though "they would not have been able to do so had they relied solely on their naked eyes." *Knotts*, 460 U.S. at 285. But the Court explained that "scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise," because "[a] police car following [the vehicle] at a distance throughout his journey could have observed him leaving the public highway and arriving at [his destination]." *Ibid.*

In reaching this conclusion, the Court relied on *United States* v. *Lee*, 274 U.S. 559 (1927), in which the Court held that the nighttime use of a searchlight to observe liquor on a ship's deck did not constitute a search. The Court explained in *Lee* that the liquor was apparently sitting on deck, and authorities did not conduct an "exploration below decks or under hatches." *Id.* at 563. The Court added that the "use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." *Ibid.*; see also *Texas* v. *Brown*, 460 U.S. 730, 739-740 (1983) (plurality opinion) (flashlight used to inspect car not a search).

Similarly, in *Smith* v. *Maryland*, 442 U.S. 735 (1979), the Court applied the *Katz* test and concluded that the use of a pen register to record the numbers dialed on the defendant's telephone did not constitute a search. Not-

ing that a pen register records only the numbers dialed from a phone and not the contents of any conversation, *id.* at 741-742, the Court concluded that the defendant did not have a reasonable expectation of privacy in the numbers dialed.

First, the Court observed that it was doubtful that telephone users generally entertain any actual expectation of privacy in the numbers they dial, because users typically are aware that they must convey phone numbers to the telephone company, that the company has facilities for recording this information, and that it does in fact sometimes record the information for a variety of legitimate business purposes. 442 U.S. at 742-743. The Court stated that the defendant's conduct "was not and could not have been calculated to preserve the privacy of the number[s] he dialed," because he had to convey those numbers to the phone company to place the calls. *Id.* at 743.

Second, the Court concluded that even if the defendant had a subjective expectation of privacy with respect to the numbers he dialed, that expectation was not one that society was prepared to recognize as reasonable. The Court explained that "[w]hen [the defendant] used his phone, [he] voluntarily conveyed numerical information to the telephone company," and he therefore had no legitimate expectation of privacy in the phone numbers he dialed. *Smith*, 442 U.S. at 744. Noting that the defendant had conceded that he would have no reasonable expectation of privacy in the phone numbers if he had placed the calls through an operator, the Court stated that "[w]e are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate." *Id.* at 744-745.

b. In contrast, in the context of the home, when technology-assisted surveillance reveals information that has not been exposed to public view, the Court has determined that the surveillance infringes a reasonable expectation of privacy and amounts to a search. In *Kyllo* v. *United States*, 533 U.S. 27 (2001), the Court held that officers' use of thermal imaging technology to detect relative amounts of heat radiating from within a home was a Fourth Amendment search. *Id.* at 29, 40. Emphasizing the special sanctity of the home in Fourth Amendment analysis, the Court explained that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion" infringed a reasonable expectation of privacy (at least where the technology is not in "general public use"). *Id.* at 34 (internal quotation marks and citation omitted).

c. These cases reveal that, while technological intrusions into private places can infringe a legitimate expectation of privacy, when the police make observations of matters in public view, the assistance of technology does not transform the surveillance into a search. As the Court stated in *Knotts*, the suggestion that technology violates a reasonable expectation of privacy when it enhances the police's ability to acquire information in the public domain "simply has no constitutional foundation." 460 U.S. at 284.

2. Information that has been exposed to public view remains public without regard to the likelihood that any one person would acquire all of the information

This case, like *Knotts*, involves movements of a vehicle on public streets. That location information was "conveyed to anyone who wanted to look." 460 U.S. at

281. The court of appeals nevertheless concluded that respondent had a reasonable expectation of privacy in those movements because "the likelihood a stranger would observe all those movements * * * is essentially nil," Pet. App. 26a. That standard has never been used to determine whether individuals have a reasonable expectation of privacy in information that has been exposed to public view, and it would be both impractical in application and at odds with Fourth Amendment principles.

a. In *Knotts*, the Court did not analyze the likelihood that someone would follow a vehicle during a 100-mile trip from Minneapolis, Minnesota, to a cabin in Shell Lake, Wisconsin, to observe "the fact of whatever stops [were] made, and the fact of [the] final destination." *Knotts*, 460 U.S. at 281-282. Instead, the Court stated that the use of a beeper to track the vehicle "raise[d] no constitutional issues which visual surveillance would not also raise" because "[a] police car following [the vehicle] at a distance throughout [the] journey *could have* observed [the defendant] leaving the public highway and arriving at the cabin." *Id.* at 285 (emphasis added).

Similarly, in *Smith*, the Court rejected the defendant's argument that because phone companies did not usually make records of local numbers called, an individual could reasonably expect that information to be private. The Court stated that "[t]he fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not, in our view, make any constitutional difference." 442 U.S. at 745. "Regardless of the phone company's election," the important distinction was that "petitioner voluntarily conveyed to [the phone company] informa-

tion that it had facilities for recording and that it was free to record." *Ibid.*

In short, this Court has never considered "the likelihood [that] a stranger" (Pet. App. 26a) would conduct surveillance of a criminal suspect in order to determine whether the government's collection of information that is in public view infringes a reasonable expectation of privacy.

b. In support of its examination of the "likelihood" that particular activities exposed to the public would actually be observed by any one person (Pet. App. 23a, 24a-26a), the court of appeals cited *California* v. *Greenwood*, 486 U.S. 35 (1988), and *Bond* v. *United States*, 529 U.S. 334 (2000), both of which involved tactile observation of items that were not visually exposed to the public. In *Greenwood*, the Court held that the defendants lacked a reasonable expectation of privacy in the contents of trash bags that they placed on the curb in front of their house. 486 U.S. at 40-41. The Court acknowledged that the defendants may have had a "subjective" expectation of privacy based on the unlikelihood that anyone would inspect their trash after they placed it on the curb "in opaque plastic bags" to be picked up by the garbage collector after a short period of time. *Id.* at 39. But that expectation, the Court held, was not "objectively reasonable." *Id.* at 40. The Court explained that once the defendants placed the bags on the curb where they were readily accessible to anyone who wanted to look inside, "the police [could not] reasonably be expected to avert their eyes from evidence of criminal activity that *could have been* observed by any member of the public." *Id.* at 41 (emphasis added). The Court attached no importance to the defendants' subjective ex-

pectation that "there was little likelihood" that anyone would inspect their trash. *Id.* at 39.

In *Bond*, the Court held that, unlike the opaque trash bags left on the curb in *Greenwood*, an opaque duffel bag that a bus passenger placed in an overhead compartment is not "exposed" to the public for the type of "physical manipulation" that a border patrol agent engaged in to investigate the bag's contents. *Bond*, 529 U.S. at 338-339. The Court in *Bond* explicitly distinguished "visual, as opposed to tactile, observation" of an item in a public place, noting that "[p]hysically invasive inspection is simply more intrusive than purely visual inspection." *Id.* at 337. The physical manipulation revealed additional, private information that had not already been exposed to the public—unlike the case with visual observation of matters that *are* exposed to public view.

The court of appeals also relied (Pet. App. 23a-24a) on this Court's flyover cases, see *California* v. *Ciraolo*, 476 U.S. 207 (1986); *Florida* v. *Riley*, 488 U.S. 445 (1989), in support of asking whether visual observation was in fact likely to occur. That reliance is misplaced. *Ciraolo* and *Riley* involved visual inspections of private areas (the curtilage of homes), not public movements. In both cases, the Court acknowledged that although the defendants had exhibited actual expectations of privacy in their backyards, those expectations were not reasonable "[i]n an age where private and commercial flight in the public airways is routine." *Ciraolo*, 476 U.S. at 215; see *Riley*, 488 U.S. at 450 (plurality opinion).[2] The

[2] Justice O'Connor's concurrence in *Riley* clarified that she believed that the defendant's backyard had been "exposed" to the public not because it was possible or legal for commercial planes to fly over the

Court's analysis in those cases was used to determine whether something ordinarily private was sufficiently "exposed" to the public to make an expectation of privacy in that area unreasonable. In contrast, the court of appeals used the unlikelihood of prolonged observation of a car's movements on public roads to determine that activities "exposed" to the public could reasonably be expected to remain private. But this Court has never conducted that type of inquiry for matters—like a vehicle's movements on public roads—that have clearly been exposed to public view.

c. In addition to lacking any foundation in this Court's Fourth Amendment cases, the court of appeals' inquiry into the "likelihood" that publicly observable matters would actually be observed by non-law-enforcement personnel is unworkable. In evaluating whether use of a tracking device would amount to a search, and thus, in the court of appeals' view, require a warrant, officers would have to assess how likely it would be that a stranger would observe a suspect's movements for any given period of time. That inquiry gives no realistic guidance to officers in the field. And it overlooks that officers could not be expected to know at the outset whether following the vehicle will produce useful information never, quickly, or only over a long period of time.

This Court has refused to require officers to make such predictions in other Fourth Amendment contexts precisely because of the impracticality of doing so. See, *e.g.*, *Kentucky* v. *King*, 131 S. Ct. 1849, 1859 (2011) (rejecting forseeability test to determine whether officers may enter a home based on exigent circumstances that

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area, but because the defendant did not rebut the reasonable inference that overflight was common. 488 U.S. at 454-455.

arose in response to lawful investigative activities because it would require officers to "quantify the degree of predictability" about how particular occupants would react to police inquiry); *United States* v. *Robinson*, 414 U.S. 218, 235 (1973) (rejecting rule that would require case-by-case adjudication of whether search incident to lawful arrest was justified based on "what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found").

d. In the context of information that is in public view, the court of appeals' "likelihood" approach is also not a reliable gauge of a person's reasonable expectation of privacy. Although it may be unlikely that a stranger would follow someone for an extended period of time, a stranger certainly could observe the "places, people, amusements, and chores" that make up another person's routine. See Pet. App. 26a-27a. Respondent could not have kept private the fact that he frequently drove his Jeep to the Fort Washington stash house, and neighbors certainly could have noticed respondent's regular visits.

3. The reasonable expectation of privacy in activities exposed to public view does not depend on the total quantity of information collected

The other basis for the court of appeals' conclusion that GPS surveillance infringed a reasonable expectation of privacy was that the investigation became a search when the officers aggregated sufficient public information to create a "mosaic" of respondent's activities. Pet. App. 27a-35a. Without defining how long GPS surveillance of public movements may occur before the surveillance reveals enough information to become a search, the court of appeals stated that by tracking re-

spondent's vehicle for 28 days, the officers intruded on a reasonable expectation of privacy by "discovering the totality and pattern of [respondent's] movements from place to place," *id.* at 21a-22a, which "reveal[ed] far more than the individual movements," *id.* at 29a. That approach finds no support in Fourth Amendment law, and it would pose a myriad of problems for courts and officers.

a. *Knotts* was not based on the length of time the beeper was in place or the quantity of information it transmitted to police. The Court's Fourth Amendment holding—that no search took place—rested on the principle that "when [the driver] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination." *Knotts*, 460 U.S. at 281-282. Because those actions were exposed to public view, the driver had no reasonable expectation of privacy in the location information the beeper conveyed. *Id.* at 281-282, 284-285.

Although the facts of *Knotts* did involve police monitoring of a "discrete journey" (Pet. App. 17a) on public roads with the assistance of electronic surveillance, the Court applied the same Fourth Amendment principles to prolonged electronic tracking in *United States* v. *Karo*, 468 U.S. 705, 715 (1984). In *Karo*, agents placed a tracking device in a can of ether and left the device in place for five months as the can was transported between different locations. *Id.* at 708-710. The Court held that certain transmissions from the beeper during that prolonged period—*i.e.*, those that revealed information about private spaces—could not be used to establish

probable cause in an application for a warrant to search a residence. *Id.* at 714-718. But the Court's holding on that point did not depend upon the duration of the electronic tracking. Although the court of appeals in *Karo* had distinguished *Knotts* on the ground that "[t]he *Knotts* case involved surveillance over only a few days; monitoring in [this] case took place over five months," *United States* v. *Karo*, 710 F.2d 1433, 1439 (10th Cir. 1983), rev'd, 468 U.S. 705 (1984), the Court concluded that the remaining evidence, including "months-long tracking" of the ether can through "visual and beeper surveillance," established probable cause supporting issuance of the warrant. *Karo*, 468 U.S. at 719-720. The Court expressed no concern about the prolonged monitoring.

As Chief Judge Sentelle stated in his dissent from the denial of rehearing en banc, "[t]he reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero," and "the sum of an infinite number of zero-value parts is also zero." Pet. App. 47a-48a. Nothing in this Court's Fourth Amendment cases supports the court of appeals' "mosaic" theory that a person can maintain a reasonable expectation of privacy in the totality of his public movements, each of which is "convey[ed] to anyone who want[s] to look." *Knotts*, 460 U.S. at 281-282.

b. In support of its unprecedented "mosaic" approach, the court of appeals stated that this Court has "implicitly recognized" (Pet. App. 28a) a distinction between a whole and the sum of its parts for purposes of determining whether information has been exposed to the public. The court cited *United States Department of Justice* v. *Reporters Committee for Freedom of the*

Press, 489 U.S. 749 (1989), and *Smith* v. *Maryland*, *supra*, neither of which offers any support for the court's decision. Pet. App. 27a-29a. *Reporters Committee for Freedom of the Press* is not a Fourth Amendment decision examining whether the government's acquisition of publicly available facts constituted a search. Rather, it is a Freedom of Information Act (FOIA) case addressing a person's request to obtain information about an individual from the government. After examining statutory restrictions on the dissemination of "rap sheets" and other "compiled computerized information," the Court held that an individual has a privacy interest within the meaning of FOIA in his rap sheet, which compiled "scattered bits" of public information, "not freely available * * * either to the officials who have access to the underlying files or to the general public." 489 U.S. at 766, 767-771. Its analysis does not bear on, let alone resolve, the question of whether an individual who exposes his or her movements to the public retains a reasonable expectation of privacy in the sum of those movements for purposes of the Fourth Amendment.

The court of appeals also stated (Pet. App. 28a) that, in *Smith*, this Court considered "whether [a person] expects all the numbers he dials to be compiled in a list" in determining whether a person has a reasonable expectation of privacy in the phone numbers he dials. That is incorrect. The Court noted in *Smith* that a person "see[s] a list of their * * * calls on their monthly bills" in support of its conclusion that individuals would not "in general entertain any actual expectation of privacy in the numbers they dial," and thus would lack even a *subjective* expectation of privacy. 442 U.S. at 742. The Court's ultimate conclusion was that any subjective ex-

pectation of privacy a person has in the phone numbers he dials is objectively unreasonable, because when a person uses his phone, he "voluntarily convey[s] numerical information to the telephone company," thereby "expos[ing] th[e] information" to a third party. *Id.* at 744.

Far from supporting the court of appeals' mosaic approach, *Smith* demonstrates that the Court has consistently applied the *Katz* framework notwithstanding concerns that the aggregated result (revealing a list of all the phone numbers a person has dialed), could "reveal the most intimate details of a person's life." *Smith*, 442 U.S. at 748 (Stewart, J., dissenting).

c. As with the court of appeals' "likelihood" analysis, see pp. 25-26, *supra*, its "mosaic" rationale is unworkable. The court's opinion gives no guidance to law enforcement officers about how long a device may remain in place before the monitoring becomes too "prolonged" because it reveals a pattern. Perhaps the court of appeals would find use of a GPS device for a few hours (or a few days) acceptable because it would yield only a few tiles of a mosaic. But the court's opinion offers no workable standard for law enforcement officers—or courts—to determine when extended use of a GPS device becomes a search. See Pet. App. 48a (Sentelle, C.J., dissenting from denial of rehearing en banc) (noting that "[p]resumably, had the GPS device been used for an hour or perhaps a day, or whatever period the panel believed was consistent with a normal surveillance, the evidence obtained could have been admitted without Fourth Amendment problem"); see also *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001) ("[W]e have traditionally recognized that a responsible Fourth Amend-

ment balance is not well served by standards requiring sensitive, case-by-case determinations * * * lest every discretionary judgment in the field be converted into an occasion for constitutional review."). Indeed, under the court of appeals' approach, the court seemingly should have identified the precise point at which the use of the GPS device became a search and excluded only GPS data gathered thereafter. Instead, the court considered all of the GPS information to be tainted when conducting its harmless-error analysis, Pet. App. 39a-41a, thus apparently treating even the early (pre-mosaic) stages of the monitoring as a search. But officers' conduct that was lawful at the time should not retroactively be deemed a search because of what they learned later.[3]

The court of appeals' "mosaic" theory also has the potential to destabilize Fourth Amendment law and to raise questions about a variety of common law-enforcement practices. Protracted use of pen registers, repeated trash pulls, aggregation of financial data, and prolonged visual surveillance can all produce an immense amount of information about a person's private life—that is often the goal. Each of those practices has been held not to be a Fourth Amendment search. See

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[3] For example, in *United States* v. *Cuevas-Perez*, 640 F.3d 272 (2011), petition for cert. pending, No. 11-93 (filed July 20, 2011), the Seventh Circuit held that the 60-hour GPS surveillance of a vehicle as it traveled from Arizona to Illinois was not a search, *id.* at 272-273 (opinion of Cudahy, J.), and in *United States* v. *Hernandez*, No. 10-10695, 2011 WL 2750914 (July 18, 2011), the Fifth Circuit concluded that the two-day GPS surveillance of a vehicle was not a search, *id.* at *1. Under the court of appeals' mosaic approach, even the initial few days of surveillance in those cases would have been deemed a search if the GPS device had remained in place for a longer period of time, but the court of appeals gave no guidance for where the line should be drawn.

Smith, 442 U.S. at 745-746; *Greenwood*, 486 U.S. at 44-45; *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *Karo*, 468 U.S. at 721. Multiple non-search investigatory techniques do not become a search when the information obtained from them is aggregated. But under the court of appeals' theory, these non-search techniques could be transformed into a search when used for some undefined period of time or in combination. The court of appeals' mosaic theory thus has limitless potential to require courts to draw impossible lines between the moderate degree of observation permitted under the court's approach, and the excessive or prolonged degree that becomes a search.

B. The Court Should Not Depart From Its Well-Established Reasonable-Expectation-Of-Privacy Framework To Protect Against Theoretical Future Misuses Of Technology

According to the court of appeals, this Court in *Knotts* "reserved the question whether a warrant would be required in a case involving 'twenty-four hour surveillance.'" Pet. App. 17a-18a. The court of appeals misconstrued this statement from *Knotts*, which addressed a concern raised by the defendant in that case about future misuses of beeper technology. Far from reserving the question of whether police could conduct prolonged electronic tracking of the public movements of a suspected cocaine dealer's vehicle without a warrant, the Court made clear in *Knotts* that its established reasonable-expectation-of-privacy framework should not be expanded to protect against hypothetical misuses of technology that do not occur in reality. If prophylactic protections beyond those provided by the Fourth Amendment are deemed warranted, Congress has the ability to provide those protections.

1. In *Knotts*, the defendant argued that the Court should "remain mindful" that if it were to conclude that using an electronic tracking device to monitor an object's public movements was not a search, then "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision," and "[a]ny person or residence could be monitored at any time and for any length of time." Resp. Br. at 9-10, *Knotts*, *supra* (No. 81-1802). In addressing this concern, the Court noted that the defendant "d[id] not actually quarrel with [the Court's reasonable expectation of privacy] analysis." *Knotts*, 460 U.S. at 283. Instead, the court pointed out that the defendant's concern about government misuse of electronic tracking technology was not occurring in reality, and the Court explained that "if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 283-284.

Members of this Court have used the term "dragnet" to refer to mass or widespread searches or seizures that are conducted without individualized suspicion. See, *e.g.*, *Cupp* v. *Murphy*, 412 U.S. 291, 294 (1973) (discussing police "dragnet" procedures without probable cause in *Davis* v. *Mississippi*, 394 U.S. 721 (1969)); *Berger* v. *New York*, 388 U.S. 41, 65 (1967) (Douglas, J., concurring) (wiretaps covering all conversations and participants). The officers in this case were not engaged in "dragnet" surveillance; they used the mobile tracking device to monitor the movements of a single vehicle driven by a person suspected of large-scale cocaine trafficking. See pp. 2-4, *supra* (noting that officers obtained evidence linking respondent to his co-conspirators and

to suspected drug stash locations through visual surveillance, a pole camera, a pen register, and a Title III wire intercept). Notably, when the Court in *Karo* considered prolonged electronic monitoring of the movements of an item carried in a vehicle, it did not hesitate to hold that the "months-long tracking" of the item through "visual and beeper surveillance" constituted legitimate evidence under *Knotts* that properly formed the basis for a warrant. 468 U.S. at 719, 721.

The court of appeals pointed to no evidence that law enforcement officers engage in GPS monitoring of vehicles without any suspicion of criminal activity. Any such general monitoring would ordinarily prove to be an extraordinarily inefficient and unproductive use of law enforcement resources. Officers would have to sift through and analyze voluminous lists of geographic coordinates (see, *e.g.*, J.A. 223-225), hoping to find some indication of criminal activity. As in *Knotts*, "the fact is that the 'reality hardly suggests abuse.'" 460 U.S. at 283-284 (quoting *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566 (1978)). The decision whether to apply "different constitutional principles" to hypothetical programs of mass, suspicionless surveillance can await resolution if such programs ever occur.

2. Under current constitutional principles, the government's investigation in this case did not amount to a search. If prophylactic measures are deemed necessary or appropriate to guard against the capabilities of technology to collect information that has been exposed to public view, that protection should be provided through the legislative process, not through distortion of Fourth Amendment doctrine.

The legislature has historically played that role. For example, in *United States* v. *Miller*, *supra*, the Court

held that the government's acquisition of copies of an individual's bank records by means of a subpoena duces tecum served on the bank was not a Fourth Amendment search. 425 U.S. at 443. After the Court's decision in *Miller*, Congress enacted the Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, tit. XI, 92 Stat. 3697 *et seq.*, in order "to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity." H.R. Rep. No. 1383, 95th Cong., 2d Sess. 33 (1978). The House Report explicitly stated that the Act was meant to supplement the Fourth Amendment, noting that "while the Supreme Court found no constitutional right of privacy in financial records, it is clear that Congress may provide protection of individual rights beyond that afforded in the Constitution." *Id.* at 34.

Similarly, after the Court held in *Smith* that the use of a pen register was not a Fourth Amendment search, Congress imposed limits on the government's ability to obtain pen register data through the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 301(a), 100 Stat. 1868. And a few state legislatures have already enacted laws requiring a court order before installing and using a mobile tracking device. *E.g.*, Minn. Stat. Ann. § 626A.35 (West 2009); Haw. Rev. Stat. Ann. § 803-44.7 (LexisNexis 2007).[4]

[4] The court of appeals stated that Utah, Florida, South Carolina, Oklahoma, and Pennsylvania also prohibit the use of "electronic monitoring devices" without a warrant. Pet. App. 33a-34a. Three of those States *specifically exclude* communications from a "mobile tracking device" from the definition of "electronic monitoring device." See Utah Code Ann. § 77-23a-3 (2008); Fla. Stat. Ann. § 934.02 (West 2011); Okla. Stat. Ann. tit. 13, § 176.2 (West 2011). And although the court of appeals identified statutes in each of those States setting forth

The Fourth Amendment does not require police to obtain a warrant before they may observe activities that are in public view. The Court should not depart from its established reasonable-expectation-of-privacy framework to account for hypothetical misuse of technology that does not occur in reality.

C. Respondent Had No Reasonable Expectation Of Privacy In The Movements Of His Vehicle On Public Streets Because That Information Was Exposed To Public View

Applying the analytical framework of this Court's cases, the use of a GPS device to track the public move-

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a procedure for obtaining a tracking-device warrant, see Pet. App. 33a-34a, those statutes do not require that police obtain such a warrant. Similarly, a federal statute authorizes judges to issue tracking-device warrants, see 18 U.S.C. 3117, and the Federal Rules of Criminal Procedure include procedures for obtaining tracking-device warrants, see Fed. R. Crim. P. 41(e)(2)(C) and (f)(2). But those provisions do not prohibit the use of a tracking device without a warrant. The legislative history of Section 3117 makes clear Congress's understanding that, under the Court's decision in *Knotts*, a warrant is not required for either the installation or use of a mobile tracking device. See H.R. Rep. No. 647, 99th Cong., 2d Sess. 60 (1986) (noting Court's holding in *Knotts* that warrantless "installation of a beeper on a container to follow on a public roadway does not violate the Fourth Amendment"); see also Fed. R. Crim. P. 41(d) advisory committee's note (2006 Amendments) (stating that Rule 41 does not specify a standard for installation of a tracking device "or hold that [tracking device] warrants may only issue upon probable cause").

In any event, contrary to the court of appeals' apparent view (Pet. App. 34a), the existence of those state laws does not inform the existence of a legitimate expectation of privacy under the Fourth Amendment in the public movements of a vehicle. See *Virginia* v. *Moore*, 553 U.S. 164, 173 (2008) ("[W]hen States go above the Fourth Amendment minimum, the Constitution's protections concerning search and seizure remain the same."); *Whren* v. *United States*, 517 U.S. 806, 815 (1996) (Fourth Amendment protections do not turn on local law enforcement practices, even those set by rule).

ments of respondent's vehicle did not constitute a search. The GPS device used in this case conveyed the same type of information that the beeper conveyed in *Knotts*—the approximate location of the object to which it was attached. See J.A. 79-81. As in *Knotts*, respondent had "no reasonable expectation of privacy in his movements from one place to another" as he traveled on public roads. 460 U.S. at 281. Unlike private areas adjacent to homes, see *Ciraolo*, 476 U.S. at 215; *Riley*, 488 U.S. at 450-451, or items that are carried in public in opaque bags, see *Bond*, 529 U.S. at 338-339, the movements of a vehicle on public streets have unquestionably been exposed to public view. See *Knotts*, 460 U.S. at 285; see also *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) ("A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."). And as this Court has long held, "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351.

The GPS device assisted the officers in understanding respondent's role in a large-scale cocaine-trafficking conspiracy, including his repeated visits to a suspected stash house in Fort Washington. J.A. 122-124, 163-166. Because respondent drove to the stash house on public roads where police, neighbors, or other members of the public could observe him, he may not claim a constitutionally protected expectation of privacy in those movements. See *Knotts*, 460 U.S. at 281-282 (driver "voluntarily conveyed [his movements] to anyone who wanted to look"). Use of the GPS device to monitor the movements of respondent's vehicle on public roads was not a Fourth Amendment search, and evidence obtained from the GPS device was properly admitted at trial to prove

respondent's participation in the cocaine-trafficking conspiracy.

II. ATTACHING THE GPS TRACKING DEVICE TO RESPONDENT'S VEHICLE WAS NOT A SEARCH OR SEIZURE UNDER THE FOURTH AMENDMENT

Although the court of appeals did not address the question, respondent also contends that the attachment of the GPS device to his vehicle, as distinct from the use of the device to monitor the vehicle's public movements, violated the Fourth Amendment. It did not. Respondent had no reasonable expectation of privacy in the exterior of his vehicle, and attachment of the GPS device therefore did not constitute a search. Nor did the attachment constitute a seizure, because it did not meaningfully interfere with respondent's possessory interest in the vehicle.

A. Attaching The Tracking Device To Respondent's Vehicle Was Not A Search Because Respondent Had No Reasonable Expectation Of Privacy In The Exterior Of The Vehicle

As explained above, a search within the meaning of the Fourth Amendment occurs only where a "legitimate expectation of privacy * * * has been invaded by government action." *Knotts*, 460 U.S. at 280. Respondent does not contend that the officers searched any interior compartment of his vehicle, or that agents physically moved or altered any part of the vehicle. Accordingly, the question before the Court is whether respondent had a reasonable expectation of privacy in the exterior of the vehicle. The answer is no.

1. This Court held in *New York* v. *Class*, 475 U.S. 106 (1986), that individuals have no reasonable expectation of privacy in the exterior of a vehicle because "[t]he

exterior of a car * * * is thrust into the public eye." *Id.* at 114. In *Class*, a police officer inspected the outside of a vehicle while conducting a traffic stop and also reached inside the vehicle to move papers that obscured the vehicle identification (VIN) number on the dashboard. *Id.* at 107. The Court held that even reaching into the vehicle to move the papers did not amount to a search, because "[t]he VIN's mandated visibility makes it more similar to the exterior of the car than to the trunk or glove compartment." *Id.* at 114. Furthermore, parking a vehicle in a public lot does nothing to "bar the public from viewing" the car's exterior. *Oliver*, 466 U.S. at 179; see *Greenwood*, 486 U.S. at 40 ("It is common knowledge that [objects] on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.")

Consistent with the principle announced in *Class*, courts have held that police do not conduct a search when they inspect a car's doors, wheels, or undercarriage. See, *e.g.*, *Cardwell* v. *Lewis*, 417 U.S. 583, 591 (1974) (plurality opinion) (noting that officers examined a car's wheel and took paint scrapings from exterior of a vehicle left in a public parking lot, and stating "we fail to comprehend what expectation of privacy was infringed"); *United States* v. *Rascon-Ortiz*, 994 F.2d 749, 750-752, 754-755 (10th Cir. 1993) (examination of car's undercarriage not a search); *United States* v. *Price*, 869 F.2d 801, 803-804 (5th Cir. 1989) (same); see also, *e.g.*, *United States* v. *George*, 971 F.2d 1113, 1120-1121 (4th Cir. 1992) (examination of car's tires not a search); see generally 1 Wayne R. LaFave, *Search and Seizure* § 2.5(c), at 653 (4th ed. 2004) (examination of exterior of a vehicle is not a Fourth Amendment search absent some physical intrusion into the vehicle).

Of course, the officers in this case did more than conduct a visual inspection of respondent's vehicle while it was parked in a public parking lot; they attached a mobile tracking device to the vehicle's exterior. But the act of attaching the device to the vehicle's exterior revealed no information in which respondent had a reasonable expectation of privacy. The Court rejected this argument in *Karo*, holding that the installation of a beeper in the canister that came into the defendant's possession was not a search because the installation, as opposed to the monitoring of the beeper, "conveyed no information that [the defendant] wished to keep private, for it conveyed no information at all." 468 U.S. at 712.

Respondent contends (Br. in Opp. 33) that attaching a tracking device to his vehicle is comparable to an exploratory squeezing of the outer surface of a passenger's personal luggage, which this Court concluded in *Bond* amounted to a search. See 529 U.S. at 339. But the officer's exploratory manipulation of the duffel bag in *Bond* was a search because the tactile observation revealed information about the contents of the luggage, in which the owner had a reasonable expectation of privacy. *Id.* at 338-339. In contrast, attachment of the tracking device to the exterior of respondent's vehicle revealed no information to the officers. See *Karo*, 468 U.S. at 712. Because the attachment did not reveal any information in which respondent had a reasonable expectation of privacy, it was not a Fourth Amendment search.

2. As the Court acknowledged in *Karo*, the placement of an electronic tracking device on an object "create[s] a *potential* for an invasion of privacy" in that the device could subsequently be used to observe information about a private area. 468 U.S. at 712; *id.* at 714 (holding that transmissions from beeper that revealed

information about private areas could not be used to establish probable cause in an application for a warrant to search a residence). But as the Court explained in *Karo*, "we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *Id.* at 712. "A holding to that effect," the Court explained, "would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on." *Ibid.* The Court concluded in *Karo* that any impairment of privacy interests that may result from attaching a tracking device to an object is "occasioned by the monitoring of the [device]," not by the installation. *Id.* at 713.

Since *Class* and *Karo* were decided, every court of appeals to consider the issue has concluded that affixing an electronic tracking device to the exterior of a vehicle parked in a public area is not a search within the meaning of the Fourth Amendment. See *United States* v. *Hernandez*, No. 10-10695, 2011 WL 2750914, at *2 n.4 (5th Cir. July 18, 2011); *United States* v. *Cuevas-Perez*, 640 F.3d 272, 274 & n.2 (7th Cir. 2011), petition for cert. pending, No. 11-93 (filed July 20, 2011) (citing *United States* v. *Garcia*, 474 F.3d 994 (7th Cir.), cert. denied, 552 U.S. 883 (2007)); *United States* v. *McIver*, 186 F.3d 1119, 1127 (9th Cir. 1999), cert. denied, 528 U.S. 1177 (2000). The Court should reach the same result here.

B. Attaching The Tracking Device To Respondent's Vehicle Was Not A Seizure Because The Device Did Not Meaningfully Interfere With Respondent's Possessory Interests In The Vehicle

A "seizure of property" within the meaning of the Fourth Amendment occurs only where "there is some

meaningful interference with an individual's possessory interests in that property." *Karo*, 468 U.S. at 712 (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984)). In *Karo*, the Court explained that "[t]he existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated," because "an actual trespass is neither necessary nor sufficient to establish a [seizure]." *Id*. at 712-713. The Court held in *Karo* that installation of a beeper in the container of chemicals was not a "seizure," because "[a]lthough the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way." *Id.* at 712.

Several courts of appeals have considered whether installation of a GPS tracking device on the exterior of a vehicle amounted to a Fourth Amendment seizure, and each court has concluded that it did not. In *United States* v. *Garcia*, *supra*, the Seventh Circuit explained that attachment of a GPS device to the defendant's car "did not 'seize' the car in any intelligible sense of the word," because the device "did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, [and] did not * * * alter the car's appearance." 474 F.3d at 996; see also *Hernandez*, 2011 WL 2750914, at *2 n.4 (rejecting claim that placement of magnetized GPS tracking device on undercarriage of truck was a Fourth Amendment seizure); *McIver*, 186 F.3d at 1127 (rejecting similar claim where there was no evidence that the device deprived the owner "of dominion and control" over the vehicle or "caused any damage to the electronic components of the vehicle"); *Foltz* v. *Commonwealth*, 698

S.E.2d 281, 285-292 (Va. Ct. App. 2010) (rejecting same claim), aff'd on other grounds, 706 S.E.2d 914 (Va. Ct. App. 2011) (en banc); cf. *Commonwealth* v. *Connolly*, 913 N.E.2d 356, 369 (Mass. 2009) (holding that installation of GPS device was a seizure under state constitution where police installed device in the engine compartment so that it could draw power from the vehicle's electrical system).

Respondent has not identified any way in which placing a tracking device on the exterior of his vehicle interfered with his possessory interests, and nothing in the record suggests that the device prevented respondent from driving the vehicle, affected its "driving qualities," drew power from the vehicle, or occupied space that could have been used for passengers or packages. Nor does respondent contend that the tracking device impaired the value of his vehicle by causing any physical damage or alteration. As in *Karo*, "[a]t most, there was a technical trespass on the space occupied by the [device]." 468 U.S. at 712. That physical act is no more a seizure than is marking a vehicle's tire with a white chalk "X" so that an officer enforcing parking laws may later determine how long the vehicle has been parked in a particular spot. Although the chalk mark is an unwanted addition to the vehicle—and is also an addition used to track the vehicle's location—the chalk mark does not diminish the owner's use or control over his vehicle. The same is true of the mobile tracking device placed on respondent's vehicle.

The only authority that respondent has identified in support of his argument that attachment of the tracking device to his vehicle was a Fourth Amendment seizure (see Resp. C.A. Br. 55 n.202; Br. in Opp. 33) is Judge Kleinfeld's concurring opinion in *United States* v.

McIver, *supra*. In Judge Kleinfeld's view, attachment of a tracking device interfered with the vehicle owner's possessory interests because radio signals emitted from the device could have interfered with the vehicle's operation, or the device could have short-circuited and caused a fire. 186 F.3d at 1134. Judge Kleinfeld also stated that the attachment interfered with the owner's "possessory interest * * * in excluding individuals from performing mechanical work on his vehicle or altering it without his consent." *Id.* at 1133.[5]

The hypothetical concerns outlined in Judge Kleinfeld's *McIver* concurrence are insufficient to demonstrate that a seizure occurred in this case. A seizure turns on more than speculative possibilities; to prove that a seizure occurred, the defendant must point to a particular way in which "there [wa]s some meaningful interference with [his] possessory interests in [his] property." *Karo*, 468 U.S. at 712. Respondent has never claimed that the tracking device interfered with the vehicle's electrical system. The tracking device used a standard GPS receiver, of the same type regularly used in cell phones and navigation systems without affecting the operation of automobiles. See J.A. 79-82. Likewise, respondent has never made any claim that the mobile tracking device posed any risk of a short circuit. Nor did respondent make any claim below that the tracking device was attached in an intrusive way, requiring officers to alter mechanical parts of the vehicle. Having failed to develop those factual claims below, respondent

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[5] Judge Kleinfeld's opinion did not carry the day. The majority opinion in *McIver* held that the tracking devices did not "deprive [the defendant] of dominion or control" over his vehicle or "cause[] any damage to the electronic components of the vehicle," and thus did not meaningfully interfere with any possessory interest. 186 F.3d at 1127.

cannot now rely on speculation and hypotheticals to demonstrate that his vehicle was "seized" within the meaning of the Fourth Amendment.

Respondent's seizure claim rests on the assertion that the GPS device was used to collect location information; he has not maintained that attaching the device interfered with his possessory interests. Resp. C.A. Reply Br. 17 ("[T]he Government's warrantless acquisition of recorded movement/location information is a seizure."); *id.* at 23 ("The use of GPS is akin to a seizure."); see also Resp. C.A. App. 418 (respondent's suppression motion grounding a "seizure" argument in his "expectation of privacy in his Jeep," not interference with possessory interests). The placement of the device on the vehicle's exterior did not meaningfully interfere with respondent's possessory interests, and it is not transformed into a seizure when the device is used to track the vehicle's movements.[6]

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[6] In his dissent from the denial of rehearing en banc, Judge Kavanaugh stated that the Court's opinion in *Silverman* v. *United States*, 365 U.S. 505 (1961), might be relevant to the question whether the installation of a GPS device on respondent's vehicle implicated the Fourth Amendment. Pet. App. 50a-52a. *Silverman*, however, relied on a physical-encroachment principle that no longer states the governing test under the Fourth Amendment. In *Silverman*, officers listened to conversations occurring inside of a row house using a "spike mike" that they inserted into the baseboard of the adjoining house until it made contact with the defendants' heating duct. *Id.* at 506-507. The Court concluded that this technique implicated the Fourth Amendment, because "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by [the defendants]." *Id.* at 509. The Court distinguished that surveillance technique from techniques that had been held not to implicate the Fourth Amendment—the use of a detectaphone against the wall of an adjoining office in *Goldman* v. *United States*, 316 U.S. 129 (1942), and the use of a microphone on an undercover officer in *On Lee* v. *United States*, 343

III. EVEN IF USING THE GPS TRACKING DEVICE TO MONITOR THE PUBLIC MOVEMENTS OF RESPONDENT'S VEHICLE OR ATTACHING THE DEVICE TO THE VEHICLE'S EXTERIOR WAS A SEARCH OR SEIZURE, IT WAS REASONABLE UNDER THE FOURTH AMENDMENT

Even assuming that the use or attachment of the mobile tracking device was a search or seizure, respondent's Fourth Amendment rights were not violated. Not every Fourth Amendment intrusion requires a warrant or probable cause; to the contrary, the general test is one of reasonableness. Because installation and use of a GPS device is, at most, only minimally intrusive, and because GPS surveillance is a critically important law enforcement tool that often may be most important in the inception of an investigation when probable cause is lacking, the Fourth Amendment balancing test should

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U.S. 747 (1952)—on the ground that the eavesdropping in those cases "had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area." *Silverman*, 365 U.S. at 510. In *Katz*, however, the Court made clear that the underpinnings of cases like *Goldman* and *On Lee* "have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353. The Court explained that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure,' but it instead turns upon whether the government's surveillance "violated the privacy upon which [the defendant] justifiably relied." *Ibid.* In any event, temporarily attaching a nonintrusive GPS device to the exterior of respondent's vehicle and using the device did not penetrate or occupy any "constitutionally protected area"; it made only ephemeral contact with the exterior of respondent's vehicle.

not require probable cause or a warrant as a prerequisite to the attachment and use of a GPS tracking device.[7]

1. This Court has stated that under its "general Fourth Amendment approach," it "examine[s] the totality of the circumstances" to determine whether a search or seizure is reasonable under the Fourth Amendment." *Samson* v. *California*, 547 U.S. 843, 848 (2006) (internal quotation marks and citation omitted). Under that analysis, the reasonableness of a search or seizure is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Ibid.*

Since *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court has identified various law enforcement actions that qualify as Fourth Amendment searches or seizures, but that may nevertheless be conducted without a warrant or probable cause. In *Terry*, the Court noted that an officer who stops a person on the street and frisks him for weapons has effected a "seizure" and "search" within the meaning of the Fourth Amendment. But because "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security,"

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[7] Even though the government did not raise this argument below, in the event that the Court holds that the use or installation of GPS technology is a search or seizure—or chooses not to reach that question—it can uphold the validity of the police action in this case based on reasonable suspicion to use the GPS device. The Court followed a similar course in *United States* v. *Knights*, 534 U.S. 112, 118-121 (2001), in which the Court upheld the search of a probationer's house on grounds of reasonable suspicion, even though the court of appeals had not addressed a reasonable-suspicion argument, and the government's argument in favor of the search rested on the broader ground of consent to a search as a condition of probation.

id. at 19, the Court concluded that a stop and frisk, which is considerably less intrusive than a full-blown arrest and search of a person, may be undertaken on less than probable cause, although the facts known to the officer must at least support a reasonable inference of unlawful activity and, for the frisk, that the person may be armed, *id.* at 29.

In subsequent cases, the Court has continued to recognize various types of police activities that amount to searches or seizures, but need not be justified by a warrant or probable cause. See, *e.g.*, *Samson*, 547 U.S. at 847 (individualized suspicion not required for search of parolee's home or person); *United States* v. *Knights*, 534 U.S. 112, 118-121 (2001) (upholding search of probationer's home based on reasonable suspicion); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 341-342 (1985) (upholding search of public school student based on reasonable suspicion); *United States* v. *Place*, 462 U.S. 696, 706 (1983) (upholding seizure of traveler's luggage on reasonable suspicion that it contains narcotics); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554-555 (1976) (upholding suspicionless vehicle stops at fixed border patrol checkpoints).

2. Applying the Court's balancing test to GPS tracking of vehicles on public roads, neither a warrant nor probable cause should be required. The privacy interest, if any, is minimal. A GPS tracking device does not conduct either a visual or aural search of the item to which it is attached. See *Smith*, 442 U.S. at 741-742 (noting that pen register records only the numbers dialed from a phone and not the contents of any conversation). The device does not reveal who is driving the car, what the occupants are doing, or what they do when they arrive at their destination; it provides information

only about the vehicle's location. And the information that the tracking device reveals about the vehicle's location could also be obtained (albeit less efficiently) by means of visual surveillance. This Court "has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); see also *Cardwell*, 417 U.S. at 590; *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976). Accordingly, GPS monitoring does not require the protection of a warrant. The intrusion occasioned by attachment of a tracking device on a vehicle is also minimal. Attachment is much less intrusive than the typical stop and frisk. Nothing from the vehicle is removed, nor is any enclosed area entered.

On the other side of the ledger, the minimal protection of an individual's privacy, if any, resulting from the necessity of obtaining a warrant before using a tracking device on a vehicle would come at great expense to law enforcement investigations. If a warrant and probable cause were required before officers could attach a GPS device to a vehicle, the court of appeals' decision would seriously impede the government's ability to investigate leads and tips on drug trafficking, terrorism, and other crimes. Law enforcement officers could not use GPS devices to gather information to *establish* probable cause, which is often the most productive use of such devices.

If a Fourth Amendment balancing test were held applicable here, no violation would exist on the facts of this case. As determined by the district judge who issued the tracking-device warrant, the officers had rea-

sonable suspicion, and indeed probable cause, to believe that respondent was a leader in a large-scale cocaine distribution conspiracy. See J.A. 21-34; Pet. App. 38a-39a; Resp. C.A. App. 350-412. Because the substantial law enforcement interest in investigating such an offense outweighs the very limited Fourth Amendment privacy interests that are assertedly implicated by GPS surveillance, that particularized suspicion was more than adequate to support the warrantless attachment of a mobile tracking device to respondent's vehicle and the subsequent use of the device to monitor the vehicle's movements on public roads.[8]

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[8] In *Karo*, the Court required a warrant for the beeper surveillance in that case, rejecting the government's argument that "the beeper constitutes only a miniscule intrusion on protected privacy interests." 468 U.S. at 717. But *Karo* does not suggest the need for a warrant here, for at least two reasons. First, *Karo* involved a search inside a private residence, which lies at the core of Fourth Amendment protection, while this case involves travel on public roadways, which lies (at best) on the periphery. Second, the Court left open in *Karo* whether reasonable suspicion would be sufficient for beeper monitoring, see *id.* at 718 n.5, which casts doubt on any categorical warrant requirement for electronic monitoring of location. If a warrant would always be required, so would probable cause, because the Fourth Amendment permits issuance of a warrant only on probable cause. See *Griffin* v. *Wisconsin*, 483 U.S. 868, 877-878 (1987).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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