No. 10-1259

IN THE

Supreme Court of the United States

UNITED STATES, *Petitioner*,

v.

ANTOINE JONES*, Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, U.S. JUSTICE FOUNDATION, INSTITUTE ON THE CONSTITUTION, CENTER FOR MEDIA AND DEMOCRACY, FREE SPEECH COALITION, INC., FREE SPEECH DEFENSE AND EDUCATION FUND, INC., DOWNSIZEDC.ORG, DOWNSIZE DC FOUNDATION, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, DECLARATION ALLIANCE, RESTORING LIBERTY ACTION COMMITTEE, THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, POLICY ANALYSIS CENTER, CONSTITUTION PARTY NATIONAL COMMITTEE, AND LIBERTARIAN NATIONAL COMMITTEE, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, Institute on the Constitution, Center for Media and Democracy, Free Speech Coalition, Inc., Free Speech Defense and Education Fund, Inc., DownsizeDC.org, Downsize DC Foundation, Conservative Legal Defense and Education Fund, Declaration Alliance, Restoring Liberty Action Committee, The Lincoln Institute for Research and Education, and Policy Analysis Center are an ideologically diverse group of educational organizations interested in the proper interpretation of the U.S. Constitution.

Amici Constitution Party National Committee and Libertarian National Committee, Inc. are national political parties.

Most of these *amici* have filed numerous *amicus curiae* briefs in prior litigation, including in cases before this Court.

Eleven of these sixteen *amici* filed the only *amicus curiae* brief at the Petition stage in the instant case, at that time filing in support of neither party. In this brief, *amici* file in support of Respondent Antoine Jones.

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[1] It is hereby certified that the parties have consented to the filing of this brief and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Government does not seek a resolution of this case tailored to its facts. Rather, it strives for total victory — a judicial declaration that the Fourth Amendment does not ever apply to Global Positioning System ("GPS") monitoring, without regard for the facts that the Government committed an illegal trespass to attach the GPS device onto private property, and then indiscriminately monitored the movement of the Jones vehicle, no matter the identity of the driver, the destination of the vehicle, or the length of time.

The Government's extreme view that the Fourth Amendment is completely irrelevant is made possible only by this Court's mistaken jurisprudence that the Fourth Amendment only applies to situations wherein persons have a "reasonable expectation of privacy." This 44-year old doctrine — grafted onto the Fourth Amendment by a judicial rejection of a time-honored rule that protected the people from a "mere evidentiary" search — has proved, as its critics on the court predicted, unfit to secure the liberties of the people.

As the Government has taken advantage of new technologies enabling its agents to penetrate ever more deeply into the private lives of citizens, "society's" expectations of privacy have correspondingly shrunk. Had previous Courts adhered to the original text of the Fourth Amendment, rather than substituting their own language, the right of the people to be "secure in their persons, houses, papers, and effects" would have

preserved their privacy by a permanent wall of the unalienable right of private property.

As this 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. Thus, even if the Government could meet the warrant, probable cause, and particularity requirements of the Amendment, it could not search for, or seize, property, unless that property was shown to be the fruit of a crime, an instrumentality of a crime, or contraband.

Had this ban on searching for and seizing "mere evidence" held, wiretapping and other forms of surreptitious eavesdropping by sophisticated technological means would have been prohibited by the Fourth Amendment, the foremost purpose of which is to protect the inherent property right that each individual human being has in his own person — including his communications and his movements.

As applied here, the property-based principles of the original Fourth Amendment protects against both the installation and the use of the GPS tracking device. By attaching the device to the Jones vehicle without the owner's knowledge or consent, the Government unlawfully trespassed on Mr. Jones' indefeasible right of private property. And, by monitoring the movement of the Jones vehicle, the Government indiscriminately seized "mere evidence." Not only did the Government's action violate these inherent, God-given unalienable

rights, but the indiscriminate search and seizure of the movement of the vehicle regardless of the identity of the driver or the destination of the vehicle violated the Fourth Amendment ban on general warrants.

ARGUMENT

I. THE GOVERNMENT'S EXTREME POSITION THAT THE FOURTH AMENDMENT DOES NOT EVER APPLY TO GPS SURVEILLANCE ON PUBLIC ROADWAYS IS INSUPPORTABLE.

The Government's petition for certiorari asked the Court to resolve a single issue: "Whether the warrantless **use** of a tracking device on [Respondent's] vehicle to monitor its movement on public streets violated the Fourth Amendment." (Emphasis added.) The Government declined to seek review of the **installation** of the device on Respondent's car, which had been described by Judge Kavanaugh in his dissent from the denial of rehearing *en banc* as Respondent's "property-based *Fourth Amendment* argument concerning the installation" of the GPS device. United States v. Jones, 625 F.3d 766, 770 (D.C. Cir. 2010) (italics original). In granting certiorari, however, this Court placed the property issue front and center by directing the parties also to brief and argue that very issue: "Whether the government violated respondent's Fourth Amendment rights by **installing** the GPS

tracking device on his vehicle without a valid warrent [sic] and without his consent."[2] (Emphasis added.)

In response to this invitation, Respondent Jones traced the property roots of both the Fourth Amendment's search (Resp. Br. pp. 16-23) and seizure doctrines (Resp. Br. pp. 46-52). Beginning with Entick v. Carrington ("The great end, for which men entered into society, was to secure their property") and continuing through Soldal v. Cook Cty., Ill., 506 U.S. 56, 62 (1992) ("[T]he Amendment protects property as well as privacy"), Respondent explained the importance of possessory, not just privacy, interests. *See, e.g.,* Resp. Br. pp. 46-47.

In contrast, the Government mentioned the property issue only briefly, asserting that there was no meaningful interference with Respondent's possessory interests in his car — that the attachment of a GPS device is, at most, a "technical trespass." Pet. Br. pp. 42-45. The Government devotes almost all of its brief to advancing its theory that the Fourth Amendment does not apply at all (Pet. Br. pp. 17-46), and only in the last few pages arguing, in the alternative, that the instant search and/or seizure was "reasonable" (*id.,* pp. 47-51).

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[2] This is not the first time that a court has been required to raise an issue involving the legality of a search not raised by the parties. In Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (KB 1765), the Lord Chief Justice addressed a matter involving the government's authority for the search which he described as having "slipped the sagacity of the counsel on both sides, that it may be taken notice of upon the next argument."

Having brushed aside the property issue, the Government's principal argument is that surreptitious use of GPS tracking devices on private vehicles, while traveling on public roads,[3] constitutes neither a search nor a seizure, and, therefore, that law enforcement is not constrained in any way by the Fourth Amendment in either the installation or use of GPS tracking equipment on private automobiles. Pet Br. pp. 17-42. The Government's brief contains no textual analysis of the Fourth Amendment or any discussion of its historical context. Instead, the Amendment's text appears only as a ritual recitation of the "Constitutional Provision Involved." Pet. Br. p. 2.

Indeed, the Government impliedly disavows that its theory is either historically or textually based, arguing solely that: "**[u]nder current constitutional principles**, the government's investigation in this case did not amount to a search." *Id.*, p. 35 (emphasis added). Under this reading of Fourth Amendment jurisprudence, there would be no need for law enforcement to establish probable cause, or obtain a judicially issued warrant, or even have reasonable suspicion prior to installing a GPS tracking device on any person's automobile — or his clothes, notebook computer, iPad, telephone, or briefcase. Further, if the Fourth Amendment were deemed wholly inapplicable,

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[3] The Government appears not to contest the district court's exclusion of GPS data relating to the Jones vehicle while garaged at his residence, apparently conceding that to be a Fourth Amendment violation, but apparently not having any problem with continuing such violations in the future. Pet. Br. p. 5. *See also* Resp. Br. pp. 4-5.

then, logically, there could be no "unreasonable" use of GPS tracking equipment, although the Government includes a passing reference to the supposed lack of demonstrated "abuse" of this asserted power to track Americans round the clock. Pet. Br. pp. 14, 35. In sum, the Government swings for the fences, seeking the broadest possible victory, disclaiming any constitutional constraint on its dream of establishing a surveillance society limited, if at all, only by "the legislative process." Pet. Br. p. 35.

In sum, the Government's theory of Fourth Amendment jurisprudence would drive the final nail in the coffin of a once robust constitutional "right of the people to be secure in their persons, houses, papers, and effects." If this theory were to prevail, it would be in no small part due to a switch from the original **"property" principles** embedded in the Fourth Amendment's protections to a judicially devised **"privacy" rationale** grafted into the Amendment. Taking full advantage of this Court's Fourth Amendment standard of a "reasonable expectation of privacy" (Katz v. U.S., 389 U.S. 347, 360 (1967)), the Government has shown that the bar on "unreasonable searches and seizures" has already deteriorated into a weak and anemic parchment barrier, unfit to protect the people against the demands of law enforcement for increasingly intrusive forms of surveillance.

According to the historical and textual principles of private property that undergird the Fourth Amendment, however, Government installation of GPS devices on private vehicles to track the movement of such vehicles in any place, including a public roadway,

is absolutely prohibited. Such monitoring of the movement of such vehicles is an "unreasonable search[] and seizure[]" because it "violates" the rights of the people to be secure in their "persons" and "effects." Such installed GPS tracking devices are "unreasonable" *per se*, an impermissible means of investigation or surveillance, unavailable to the Government even if the Government obtains a warrant upon probable cause supported by oath or affirmation, and describing with particularity the persons or things to be seized. While it may not be possible for any one judicial decision to reconstruct completely the Court's Fourth Amendment jurisprudence, this case presents the opportunity for the Court to return to the text of the Amendment, to acknowledge its property basis, and to review the decision of the U.S. Court of Appeals for the D.C. Circuit within that framework.

II. THE "EXPECTATION OF PRIVACY" TEST FOR SEARCHES AND SEIZURES AROSE WITHOUT SUPPORT IN THE TEXT OR HISTORICAL CONTEXT OF THE FOURTH AMENDMENT, AND HAS PROVEN WHOLLY INADEQUATE TO PROTECT THE AMERICAN PEOPLE FROM THEIR GOVERNMENT.

Only 44 years ago, in Warden v. Hayden, 387 U.S. 294 (1967), this Court formally abandoned the "mere evidence rule," together with its well-established Fourth Amendment jurisprudence based upon "property rights," in favor of one rooted in an emerging right of "privacy." The Court's motivation for the

change was not some new insight or scholarship as to the original meaning of the Fourth Amendment in 1791. Indeed it could not have been, as the seed of what has become the "right of privacy" was contained in a law review article by Samuel D. Warren and Louis D. Brandeis published nearly a century after its ratification. In "The Right to Privacy," 4 HARV. L. REV. 193 (1890), Warren and Brandeis proposed the "next step" in the development of common law was to **create** a cause of action for violation of a person's "right to privacy." The right of privacy was discussed not as being then in existence (in the common law or as a right contemplated by the authors of the Constitution) but as one that should be fashioned for the future.

In Hayden, Justice William J. Brennan — writing for a bare majority of five justices — jettisoned the time-honored rule that a search for "mere evidence" was *per se* "unreasonable" because of supposed dissatisfaction with the "fictional and procedural barriers rest[ing] on property concepts." Hayden, 387 U.S. at 304. Justice Brennan claimed that the distinction between (i) "mere evidence" and (ii) "instrumentalities [of crime], fruits [of crime] and contraband" was "**based on premises no longer accepted** as rules governing the application of the Fourth Amendment." *Id.* at 300-01 (emphasis added). Discarding the notion that the Fourth Amendment requires the Government to demonstrate that it has a "superior property interest"[4] in the thing to be seized, Justice Brennan promised that his new privacy rationale would free the Fourth

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[4] *Id.* at 303-04.

Amendment from "irrational,"[5] "discredited,"[6] and "confus[ing]"[7] decisions of the past, and thereby would provide for a more meaningful protection of "the principal object of the Fourth Amendment [—] the protection of privacy rather than property." *Id.* at 304.[8]

Concurring in the result, but not in the reasoning, Justice Fortas (joined by Chief Justice Earl Warren) stated that he "cannot join in the majority's broad — and ... totally unnecessary — repudiation of the so-called 'mere evidence' rule." *Id.* at 310 (Fortas, J., concurring). Resting his concurrence on the time-honored "'hot pursuit' exception to the search-warrant requirement,"[9] Justice Fortas sought to avoid what he called "an **enormous and dangerous hole** in the Fourth Amendment"[10]:

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[5] *Id.* at 302.

[6] *Id.* at 306.

[7] *Id.* at 309.

[8] In abandoning the "mere evidence" rule, the Hayden Court also did away with the linkage between the Fourth Amendment and the prohibition against compelled self-incrimination of the Fifth. In Boyd, the Court viewed the two amendments as linked: "For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of **compelling a man to give evidence against himself**...." Boyd, 116 U.S. at 633 (emphasis added).

[9] *Id.* at 312 (Fortas, J., concurring).

[10] *Id.* (Fortas, J., concurring) (emphasis added).

> [O]pposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to "**writs of assistance**," were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. **I fear that in gratuitously striking down the "mere evidence" rule**, which distinguished members of this Court have acknowledged as **essential** to enforce the Fourth Amendment's prohibition against general searches, the Court today **needlessly destroys, root and branch, a basic part of liberty's heritage**. [*Id.* at 312 (Fortas, J., concurring) (emphasis added).]

Justice Brennan frankly admitted that, by erasing the property protection from the Fourth Amendment, his newly-minted privacy-based Hayden rule "**does enlarge the area of permissible searches.**" Hayden, 387 U.S. at 309 (emphasis added). He apparently assumed that the newly-permitted intrusions for "mere evidence" would be checked by the warrant, probable cause, and magistrate requirements of the Amendment's second phrase. *See id.* However, as the instant case dramatically illustrates, Justice Brennan's Fourth Amendment revolution has actually undermined the warrant, probable cause, and magistrate requirements of the Amendment.

Having abandoned the property-based "mere evidence" rule in favor of the "reasonable expectation of privacy" guideline, the Hayden Court opened the

door not only to a search warrant authorizing the installation of a GPS device, but also to the Government's theory in the instant case that such a device may be implanted even **without a search warrant** on the theory that there is **no Fourth Amendment search or seizure because there is no expectation of privacy** as to a person's movements on a public highway. Moreover, the Government argues that there is no need for probable cause or even reasonable suspicion to place a tracking device on any automobile. *See* Pet. Br. pp. 15-16.

The expectation of privacy rationale is deeply problematic. If the Government were to announce and make known that it was recording all cell phone calls, preserving copies of all e-mails, intercepting all faxes, using cell phones to monitor conversations in a room even when no call was in progress, and that it had entered into an agreement with OnStar, TomTom, and Garmin to monitor in real time the position of all cars using that GPS equipment, one could say that no American would have any reasonable expectation of privacy. According to the Government's theory then, no American would be able to claim that a Fourth Amendment search or a seizure of those communications or data transmissions had occurred.

Moreover, if the Government has the right to place a GPS device on a citizen's automobile to gather movement data, because no citizen has any reasonable expectation of privacy, why would that not automatically grant to all citizens a reciprocal right to place a GPS device on their neighbor's car, or even on a government official's car? Surely neither the

neighbor nor the government official would have any different expectation of privacy. No doubt, however, if any citizen were to be so bold, the Government would be quick to indict him, *inter alia*, for trespassing on government property — a trespass that the Government would certainly not consider "technical." In a country where the people are sovereign, government officials cannot be considered above the law.

Over the years, the Court has gradually relied more and more upon the right to privacy as one of the "penumbras, formed by emanations from" the Fourth Amendment. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). It eventually eliminated any reliance on property rights in Katz, relying only on the "reasonable expectation of privacy" test. *See* U.S. v. Knotts, 460 U.S. 276, 280 (1983). In Knotts, Chief Justice Rehnquist revealed unmistakably that Brandeis' privacy right had been grafted onto the Fourth Amendment.

Under the reasonable expectation of privacy test this Court has overridden property rights by allowing warrantless searches of commercial property,[11] closely regulated industries,[12] and a private residence for

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[11] *See* Donovan v. Dewey, 452 U.S. 594 (1981).

[12] *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor industry); United States v. Biswell, 406 U.S. 311 (1972) (federal firearms dealers); New York v. Burger, 482 U.S. 691 (1987) (junkyard).

violations of a housing code,[13] among others. This Court's "expectation of privacy" test has proven wholly inadequate to the task of protecting the American people against invasions of their privacy through unreasonable searches and seizures. Paradoxically, a return to the text and property basis of the Fourth Amendment would provide much greater protection for what are thought of as privacy rights.

III. THE FOURTH AMENDMENT SECURES TWO RELATED, BUT DISTINCT, PROPERTY RIGHTS.

It has become commonplace in modern American legal practice to address constitutional issues with only passing reference to the constitutional text and the historical and legal context. This tendency has been especially pronounced in Fourth Amendment litigation which, since Warden v. Hayden and Katz v. United States, has been dominated by the judge-created standard of a "reasonable expectation of privacy." The word, "privacy," however, is not found anywhere in the Fourth Amendment text. Yet, by habitual use, "privacy" terminology has overshadowed, indeed even replaced, the actual text to the point that the original purpose of the Fourth Amendment — the protection of private property against "unreasonable searches and seizures" — has been lost.

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[13] *See* Camara v. Municipal Court, 387 U.S. 523 (1967),

It is, therefore, the purpose of this section first to reconstruct the text and its history and second to analyze the private property right protected be each of the Fourth Amendment's two distinct prohibitions — one against government seizures of private property to which the government has no superior rights, and the other against "general warrants."

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. [5 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,[14] setting forth two distinct, albeit

[14] *See* W. Strunk and E.B. White, The Elements of Style, pp. 5-6 (3d ed. 1979).

related, 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."

Thus, in the seminal Fourth Amendment case of Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court considered the threshold question to be:

> Is a search and seizure ... **of a man's private papers**, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud

> against the revenue laws ... an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Constitution? [*Id.* at 622 (emphasis added).]

In answer to that question, the Court did not explore whether the subpoena in Boyd met the Amendment's second phrase — the warrant requirement. Rather, the first guarantee stood on its own. Thus, the Court asked whether the "papers"sought by the Government were subject to seizure at all, no matter how specifically identified, and no matter how supported by evidence of probable cause. After all, the right to "private property," like the rights to "personal security" and "personal liberty," was "indefeasible." [*Id.* at 630.]

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, the Boyd Court began its analysis with a quote from the 1765 English case of Entick v. Carrington[15]:

> The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. [Boyd, 116 U.S. at 627.]

From this constitutional premise, the Boyd Court found that a

> [S]earch for and seizure of **stolen or forfeited goods, or goods liable to duties** and concealed to avoid the payment thereof [were] totally different things from a search and seizure of a man's private books and papers for the purpose of obtaining **information** therein contained, or of using them as **evidence** against him. The two things are toto coelo. In the one case, the Government is **entitled**

[15] 19 Howell's State Trials 1029 (1765).

> **to possession of the property**; in the other **it is not**. [*Id.*, 116 U.S. at 623 (emphasis added).]

From this principled distinction, it follows that any Government search for, or seizure of, any person, house, paper or effect for the purpose of obtaining either **information or evidence**, without any claim of a superior property interest is **unreasonable *per se*** and a violation of the Fourth Amendment — with or without a properly issued and verified warrant. *See* Berger v. New York, 388 U.S. 41, 67 (1967) (Douglas, J., concurring). As a unanimous Supreme Court ruled in Gouled v. United States, 255 U.S. 298 (1921):

> [S]earch **warrants** ... may **not be used** as a means of gaining access to a man's house or office and papers **solely for the purpose of making search to secure evidence to be used against** him.... [*Id.*, 255 U.S. at 309 (emphasis added).]

And, as this Court also ruled in Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385 (1920), the Fourth Amendment condemns any Government search or seizure of a man's property solely "to avail itself of the **knowledge** obtained by that means which otherwise it would not have had." *Id.*, 251 U.S. at 391.

Applied thusly, the Fourth Amendment serves as a robust means to ensure protection of a property owner's Fifth Amendment's privilege against self-incrimination. *See* n.8, *infra*. To the Boyd Court, this was both obvious, and intentional. *Id.*, 116 U.S. at 633. And it reinforced the **"mere evidence" rule**, as stated in Gouled, that "warrants that authorized seizures of

items other than fruits of a crime, instrumentalities of a crime, or contraband were invalid." *See* C. Whitebread, Criminal Procedure, § 5.04(a), p. 119 (Foundation Press: 1980).

2. The Fourth Amendment Secures an Indefeasible Property Right to One's Person.

Unquestionably, the plain language of the Fourth Amendment concerns the right to private property — both real and personal. In the parlance of the founders, even the reference to "persons" connoted the property right that each individual human being has in his own person. In his Second Treatise, John Locke begins his chapter on property with the proposition that "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself." J. Locke, Two Treatises of Government, II, § 27 (Cambridge Univ.: 2002) (italics original). Indeed, according to Locke, one's person is "*the Great Foundation of Property*," for by an individual's "being master of himself and *Proprietor of his own Person,"* an individual human being accumulates property by his "labour," and thus, title to it. *Id.* at §§ 44 and 51 (italics original). For Locke, the right to private property was a gift of "God and Reason," which commanded him "to subdue the earth" and by his labor to annex the property produced and accumulated to which "another had no Title to, nor could without injury take from him." *Id.*, § 32.

In a 5 to 4 decision, however, this Court refused to apply this founding property principle to a wiretap on

a person's telephone line on the sole ground that the Fourth Amendment protected **only** "material things." Olmstead v. United States, 277 U.S. 438 (1928). While this Court has overruled Olmstead, it did so on the ground that it was inconsistent with this Court's Fourth Amendment privacy doctrine.[16] Instead, the Olmstead ruling was an egregious violation of the Fourth Amendment's property principles. When subjected to a historical and textual property analysis, Olmstead was surely wrong to have concluded that the Fourth Amendment protects only "material things."

Foremost, the Fourth Amendment protects "persons." As Justice Butler pointed out in his Olmstead dissent:

> Telephones are used generally for transmission of messages concerning official, social, business, and personal affairs including communications that are private and privileged — those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications **belong to the parties between whom they pass.** During their transmission the exclusive **use** of the wire **belongs** to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a

[16] *See* United States v. Knotts, 460 U.S. 276, 280 (1983).

> search for **evidence**. As the communications passed, they were heard and taken down. [*Id.*, 277 U.S. at 487 (Butler, J., dissenting) (emphasis added). *See also* Berger, 388 U.S. at 64 (Douglas, J., concurring) ("my overriding objection to electronic surveillance [is] that it is a search for 'mere evidence'...").]

Indeed, as Professor James B. White has insightfully observed, there is nothing in the language of the Fourth Amendment that dictates the Olmstead Court's conclusion that words cannot be "seized," especially in light of "[a]nalogies from **property** law [whereby] words can be made the object of **property** [so that] the right to say or write them can be bought and sold." J. B. White, "Judicial Criticism," 20 *GA. L. REV.* 835, 851-52 (1986) (emphasis added).

C. The Fourth Amendment's Prohibition against General Warrants Protects Persons and Their Property from Indiscriminate and Surreptitious Searches.

In his 1761 attack on Writs of Assistance, James Otis asserted that "one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."[17] Even to this day, the symbolism of a castle is powerful — privately owned property possessed to the exclusion of everyone else, strong walls, perhaps even a moat,

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[17] James Otis, "Against Writs of Assistance" (Feb. 1761). http://www.nhinet.org/ccs/docs/writs.htm.

evidencing the presence of another type of government behind those walls — the government of the family.[18] The civil government was not to trespass on the property of the family government except within remarkably narrow confines.

At the heart of the warrant requirement is the Fourth Amendment's complete ban on general warrants. As the Supreme Court observed in Weeks v. United States, 232 U.S. 383 (1914):

> Resistance to [general warrants and writs of assistance] established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers. [*Id.*, 232 U.S. at 390.]

As is true of the first guarantee of the Fourth Amendment, so it is true of the second — the warrant requirement was designed to protect the people's rights to private property. It does so in at least two significant ways.

First, the prohibition against general warrants is designed to particularize any government search and seizure to only such private property to which it may

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[18] The notion of the family as a type of government has deep roots. *See*, *e.g.*, Abraham Kuyper, "Lecture on Sphere Sovereignty" (Oct. 20, 1890). http://www.reformationalpublishingproject.com/pdf_books/Scanned_Books_PDF/SphereSovereignty_English.pdf.

lay a superior property or proprietary claim. *See* T. Cooley, A Treatise on Constitutional Limitations, pp. 371-72 (5th Ed. 1883). Thus, this Court ruled in Gouled that a warrant "may **not** be used [to justify a] search to secure evidence to be used against him," but **only** when the Government or complainant has a "primary right" in the property to be seized. *Id.*, 255 U.S. at 309 (emphasis added). By outlawing general warrants, government officials would be stopped from engaging in the practice of rummaging through one's private property looking for incriminating information or evidence. *See* Boyd, 116 U.S. at 625-26 ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of a public offense....").

Second, even as to a Government's particularized claim of "primary right," absent special circumstances, the warrant requirement interposes a judicial officer between an executive officer and private property owner, commanding the executive officer **prior to a search** to demonstrate, by oath or affirmation, to the satisfaction of the judicial officer that the executive officer has "probable cause" to seize a particularly described place to be searched, and a particularly described person or thing to be seized. As Justice Stevens observed, "this restraint [is] a bulwark against police practices that prevail in totalitarian regimes." California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting).

It was, indeed, meant to be so. In his Treatise on Constitutional Limitations, Thomas Cooley summarized the primacy of a person's property rights over lawless entries upon those rights:

> [T]he law favors the **complete and undisturbed dominion** of every man over his own premises, and protects him therein with such jealousy that he may **defend his possession** against intruders.... [*Id.* at 374 (emphasis added).]

Yet, even a"heightened expectation of privacy in one's home," has proved to be a weak substitute, unable to protect the common law right of a property owner to "resist an unlawful police entry into a home" — a right which the Indiana Supreme Court recently ruled to be "against public policy and ... incompatible with modern Fourth Amendment jurisprudence." *See* Barnes v. Indiana, 946 N.E. 2d 572 (Ind. 2011), *aff'd on reh'g*, 2011 Ind. LEXIS 815 (Ind. Sept. 20, 2011).

Such erosion of the protections of the Fourth Amendment contributes in no small part to the growing loss of confidence in government by the American People.[19] Rather than seeing government as

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[19] In addition to innumerable news articles and web stories, a series of studies and popular books have focused renewed attention on the militarization of police, the increasing use of "dynamic entry" by SWAT teams into homes and businesses by law enforcement at all levels of government — estimated to be as high as 40,000 per year. *See* Radley Balko, Overkill: The Rise of Paramilitary Police Raids in America, CATO Inst. (2006), p. 11. Videos detailing abusive STAT Team Raids into homes and businesses circulate widely on the Internet. *See, e.g.,* WCCO

the protector of its rights, an astonishing 46 percent of Americans (and 66 percent of Republicans) now believe "the federal government poses an immediate threat to the rights and freedoms of ordinary citizens...."[20]

Television Report, "SWAT Team honored for raiding wrong house," (July 29, 2008) http://www.youtube.com/watch?v=oFnmZKl5WEA&feature=related; "Gibson Guitar Corp. Responds to Federal Raid" (Aug. 25, 2011). http://www.gibson.com/en-us/Lifestyle/News/gibson-0825-2011/. *See generally* Paul Craig Roberts and Lawrence M. Stratton, The Tyranny of Good Intentions: How Prosecutors and Law Enforcement are Trampling the Constitution in the Name of Justice, Three Rivers Press (2008); In the Name of Justice, CATO Inst. (Timothy Lynch, ed., 2009); Harvey A. Silverglate, Three Felonies a Day: How the Feds Target the Innocent, Encounter Books (2009); Paul Rosenzweig and Brian W. Walsh, One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty, Heritage Foundation (2010); and Go Directly to Jail: The Criminalization of Almost Everything, CATO Inst. (Gene Healy, ed., 2004).

[20] Gallup Poll, "Republicans, Democrats Shift on Whether Gov't is a Threat," (Oct. 19, 2010). http://www.gallup.com/poll/143717/Republicans-Democrats-Shift-Whether-Gov-Threat.aspx

IV. THE ATTACHMENT AND USE OF THE GPS TRACKING DEVICE VIOLATED THE FOURTH AMENDMENT BAN ON UNREASONABLE SEARCHES AND SEIZURES.

A. The Attachment of a GPS Tracking Device to Respondent's Vehicle Constituted an Unreasonable Search and Seizure.

The Government has argued that the "attachment" of a GPS tracking device on the "exterior" of the Jones' Jeep was at most a "technical trespass," and therefore, was neither a search nor a seizure within the meaning of the Fourth Amendment. *See* Pet. Br. pp. 39-46. The Government offers two reasons for its position. First, it contends that there was no search or seizure because Jones had "no reasonable expectation of privacy in the exterior of the vehicle." *Id.*, pp. 39-42. Second, it contends that there was no search or seizure because the attachment did not "meaningfully interfere with [Jones'] possessory interest in the vehicle." *Id.,* pp. 42-46. The Government's minimalist approach to search and seizure utterly fails to take into account the security afforded Jones' private property by the Fourth Amendment, as it was originally written and purposed.

The Government demonstrates its total disregard for the historic common law foundation upon which the Fourth Amendment ban on searches and seizures is based. In Entick v. Carrington, Lord Camden observed:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing....

At common law, a "technical trespass" would have been akin to a person walking across the corner of his neighbor's lawn — an almost unthinking or unintentional intrusion, and something that the average property owner would not have considered to be a "meaningful" interference with his right to exclusive possession. *See* W. Prosser, Law of Torts, 63-64 (4th ed. 1971). Attachment of the GPS device is hardly analogous to an unthinking "modest intrusion," as the Government asserts. *See* Pet. Br. p. 16. Rather, it was a deliberate act that the Government made every effort to keep secret, and had Jones known about the device, he would have removed it.

According to the Government's line of reasoning, however, a trespass is a technical one when the trespasser's interest is of greater importance than the property owner's. *See* Pet. Br. p. 16. Such a balancing act elevates the flagrant trespasser over the property owner. However, this Court has protected private property rights "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 435 (1982).

Furthermore, the Government has misstated the nature and extent of the intrusion upon Jones' property

rights by the attachment of the GPS device. The Government maintains that the only intrusion made by the attached device is to the "exterior" of Respondent's Jeep. *See* Pet. Br. pp. 39-41. The Government argues that there was neither a search nor a seizure because "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." *See* Pet. Br. p. 46 n.6 (emphasis added).

Again, the Government downplays the severity of its interference with Jones' dominion over his property. *See* Pet. Br. pp. 15-16. The Government insists that the attachment of a GPS tracking device provides no information about the movement of Jones' vehicle that could not be provided by eye witnesses along the public thoroughfares, and that the device only makes visual surveillance by government agents more "efficient" and less costly. *See* Pet. Br. pp. 18-20. But GPS tracking is dramatically and fundamentally different from conducting visual surveillance from outside a vehicle, such as the physical tailing of a suspect.

By attaching the GPS tracking device to the Jones Jeep, the Government eliminated both the risk of human error and the risk of external interferences that accompany visual surveillance. It did so by virtually placing a trespassing robotic passenger onto the Jones Jeep without Jones' knowledge or consent in violation of Jones' right of exclusive possession of the vehicle. *See* Resp. Br. pp. 47-48. By obtaining information that it "could not otherwise have ... obtained without

physical 'intrusion into a constitutionally protected area,'" the attachment of the device itself violated the Fourth Amendment ban on unreasonable searches and seizures. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001). And that attachment was hardly transient, remaining on the Jones vehicle continuously for four full weeks.

B. The Use of the GPS Tracking Device Violated the Fourth Amendment.

There is no dispute in this case that the Government, by using the GPS tracking device, seeks and obtains data on the movement of the Jones Jeep. While utilization of the data may lead the Government to the fruits of a crime, contraband, or an instrumentality of a crime, the Government makes no pretense that it has any proprietary interest in the information generated by the GPS device. Rather, its interest then, and its interest now, is to use the GPS-generated data as evidence to secure Jones' conviction. As discussed above in Part III.B., *supra*, the Fourth Amendment, as written, protects against any coercive effort by the Government to search for, or to seize, "mere evidence." And for that reason, alone, the Government's use of the GPS data violates the Fourth Amendment. *See* Gouled, 755 U.S. at 309.

To be sure, this Court rejected the "mere evidence" rule in Warden v. Hayden, 387 U.S. 294 (1967). For the reasons stated in Part III, *supra*, *amici* urge the Court to overrule that determination in Hayden and reinstate the "mere evidence" rule embraced by this

Court for 81 years before being unwisely and erroneously discarded.

C. Attachment and Use of a GPS Tracking Device Is an Unlawful General Warrant.

The attachment and use of a GPS tracking device is akin to a general warrant, allowing federal agents to gather information without the Government having to meet the particularity requirements of the Fourth Amendment. As Respondent points out, "the government made no effort to stop or minimize the GPS device's indiscriminate tracking of the jeep in the event that Mrs. Jones, the Joneses' college-age son, or someone other than Jones were to use the vehicle." Resp. Br. p. 4.

When federal agents obtain wiretapping warrants to intercept a suspect's communications, they statutorily have been subject to strict minimization requirements. 18 U.S.C. Section 2518(5) requires that wiretapping "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter...." Thus, if the participants in the conversation are not the suspect, or the topic of the conversation does not involve the suspected illegal activity, agents must take steps to minimize their monitoring of such communications.

GPS tracking devices cannot similarly discriminate. As the Government points out, such devices do not determine who is driving the vehicle at any particular time, and do not stop tracking when the car is being driven by persons who are not suspected of any

wrongdoing. *See* Pet. Br. p. 4. Nor are the devices capable of distinguishing between the type of journey that is being surveyed — they are not able to differentiate between a trip to a stash house, and a family vacation to the beach. Rather, they indiscriminately target all movements by all persons who happen to be driving or riding in the targeted vehicle. Even in this case, the district court suppressed data tracking the movement of the Jones' Jeep on private property. Even if not in this case, such broad surveillance is sure to gather highly personal information that is unrelated to any investigation — such as the dates, times, and locations of an individual's social dates, a client's meetings with his lawyer, a patient's meetings with his doctor, and a politician meetings with his allies.

Thus, by the very nature of GPS tracking devices, there are no steps that the Government may take to particularize the "movements" of the vehicle — namely those of Mr. Jones — as required by the Fourth Amendment requirement that the "things to be seized" must be specifically identified by the warrant. Indeed, the movements of the Jeep are immune from seizure whenever there is an ancillary trespass because "no warrant could properly issue for them (since it would never be possible to meet the particularity requirements of the warrant clause)." *Cf.* J. B. White, "Judicial Criticism," 20 *GA. L. REV.* 835, 851 (1986).

CONCLUSION

Although crafted by the Court in Katz to strengthen the Fourth Amendment to protect legitimate privacy interests increasingly threatened by the technological revolution, the Court's insistence that one's privacy expectation be "reasonable" has undermined that protection. As this brief demonstrates, a return to the Amendment's original property principles promises greater protection to privacy interests.

For the reasons set out above, the judgment of the U.S. Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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