No. 10-1259

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

ANTOINE JONES,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE FIRST AMENDMENT LAWYERS ASSOCIATION, THE DISTRICT OF COLUMBIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit professional bar association that represents the nation's criminal defense attorneys. Its mission is to promote the proper and fair administration of criminal justice and to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of approximately 10,000 direct members and an additional 35,000 affiliate members in all 50 states and 30 nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest courts of numerous states.[1]

In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association frequently appears as *amicus curiae* in cases involving the Fourth Amendment, and its state analogues, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests. Particularly, as relates to the issues before the Court in this case, NACDL has an interest in protecting both privacy and associational rights from

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of records for both parties received timely notice of *amici curiae's* intent to file this brief and have consented to its filing in letter on file with the Clerk's office.

unwarranted and unreasonable government intrusion, precisely that area in which the First and Fourth Amendments intersect. Notably, NACDL filed an *amicus curiae* brief with the New York State Court of Appeals in *People* v. *Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (N.Y. 2009), arguing that the surreptitious installation of a GPS device and subsequent around-the-clock electronic tracking and recording of movements without spatial or temporal limitations is impermissible absent a warrant based upon probable cause. NACDL also filed as an *amicus curiae* in June 2011, making the same argument under the U.S. Constitution, in *State* v. *Johnson*, No. 2011-0033, (Ohio filed Jan. 6, 2011) (case below 190 Ohio App.3d 750 (Ohio App. 12 Dist., 2010)).

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute focused on fundamental issues of democracy and justice, including access to the courts and the limits of executive power in the fight against terrorism. The Brennan Center's Liberty and National Security (LNS) Program fights to ensure that our nation's commitment to national security comports with the rule of law and fundamental freedoms through innovative policy recommendations, litigation, and public advocacy. The Center's LNS Program is particularly concerned with domestic counterterrorism policies, including the use of increasingly powerful surveillance tools and tactics, and their effects on privacy and First Amendment freedoms. As part of this effort, the Center recently published a report on the 2008 Attorney General's Guidelines for Domestic FBI Investigations. See EMILY BERMAN, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS (2011). It

has also filed numerous *amicus* briefs on behalf of itself and others in cases involving electronic surveillance and privacy issues, including *Amnesty Int'l USA* v. *Clapper*, 638 F.3d 118 (2d Cir. 2011), *Hepting* v. *AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008), and *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 2d 1109 (N.D. Cal. 2008).

The First Amendment Lawyers Association (FALA) is an Illinois-based, not-for-profit organization comprised of over 150 attorneys who routinely represent businesses and individuals that engage in constitutionally protected expression and association. FALA's members practice throughout the United States in defense of First Amendment freedoms and, by doing so, advocate against government forms of censorship and intrusion. Member attorneys frequently litigate the constitutionality of police activity, often examining the intersection between the Fourth Amendment warrant requirement and the right to First Amendment expression and association. Given the nationwide span of their experience and the particularized nature of their practices, FALA attorneys are uniquely poised to comment on the important constitutional issues raised in this case.

The District of Columbia Association of Criminal Defense Lawyers (DCACDL) is, as its name implies, the local District of Columbia affiliate of the National Association of Criminal Defense Lawyers. Its members practice criminal law in the District of Columbia, both in local and federal courts, and include private practitioners, public defenders, attorneys accepting court appointments and law professors. The goals of DCACDL include promoting the proper administration of criminal justice in the District of Columbia; fostering, maintaining and encouraging integrity, independence and expertise of

defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; enlightening the public on such issues; and promoting the exchange of ideas and research. In *United States* v. *Maynard*, 615 F.3d 544 (D.C. Cir.), *rehearing en banc denied*, 625 F.3d 766 (2010), our D.C. Circuit Court of Appeals (2010) found a warrant requirement for GPS surveillance. As such, DCACDL has a keen interest in preserving the First and Fourth Amendment as applied to law enforcement activities in the District of Columbia.

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a not-for-profit corporation with a subscribed membership of more than 600 attorneys, which includes private practitioners, public defenders and law professors. It is a recognized State Affiliate of the National Association of Criminal Defense Lawyers. The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and the related disciplines. Its goals include promoting the proper administration of criminal justice; fostering, maintaining and encouraging integrity, independence and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; enlightening the public on such issues; and promoting the exchange of ideas and research, to include appearing as *amicus curiae* in cases of significant public interest or of professional concern to the criminal defense bar. Indeed, NYSACDL has a keen interest in this issue and appeared as an *amicus curiae* before the New York Court of Appeals in 2009 in *People* v. *Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (N.Y. 2009). In that case, the court found a warrant

requirement for GPS surveillance under New York's state constitution.

The Ohio Association of Criminal Defense Lawyers (OACDL) is a membership organization of 723 lawyers working together to: defend the rights people accused of committing a crime; educate and promote research in the field of criminal defense law and the related areas; train attorneys through lectures, seminars and publications to develop and improve their abilities; advance the knowledge of the law as it relates to the protection of the rights of persons accused of crimes; and educate the public about the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties. OACDL recently appeared as an *amicus curiae* in the GPS warrant case *State* v. *Johnson*, No. 2011-0033, (Ohio filed Jan. 6, 2011), arising under the U.S. Constitution and currently pending before the Supreme Court of Ohio (case below 190 Ohio App.3d 750 (Ohio App. 12 Dist., 2010)).

ARGUMENT

I. WARRANTLESS GPS SURVEILLANCE IMPOSES AN UNACCEPTABLE BURDEN ON FIRST AMENDMENT ASSOCIATIONAL RIGHTS, AS WELL AS FOURTH AMENDMENT PRIVACY RIGHTS

Americans enjoy a constitutionally protected, fundamental right of freedom of association as much as they enjoy a fundamental right to be free from unreasonable searches and seizures. See U.S. Const. amends. I. and IV. "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."

Marcus v. *Search Warrants of Property at 104 E. Tenth St.,* 367 U.S. 717, 729 (1961). Thus, the Fourth Amendment's protection of privacy rights also serves the important function of protecting associational rights. See *Katz* v. *United States*, 389 U.S. 347 (1967) (noting that Fourth Amendment concerns are heightened where associational interests are also at stake). Clandestine installation of GPS tracking devices and their surreptitious data collection without judicial oversight imperils both of those fundamental rights.

As this Court has long recognized, "[t]he commands of our First Amendment (as well as the prohibitions of the Fourth and Fifth) . . . are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965) (internal citations omitted). A critical and essential aspect of both of these freedoms is the right to keep one's associations private. *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958) (recognizing "the vital relationship between freedom to associate and privacy in one's associations."). Therefore, even setting aside the Fourth Amendment privacy invasion inherent in round-the-clock clandestine monitoring and recording of one's movement without spatial or temporal limitation, in the absence of a warrant supported by probable cause, government actions that reveal lawful and private associational relationships violate the First Amendment's guarantee of freedom of association. See *id.* (holding that Alabama could not constitutionally compel the NAACP to reveal the identities of its members).

Surreptitious GPS surveillance by law enforcement officials, particularly over time, reveals exactly these kinds of associational relationships. With the secret use of around-the-clock GPS surveillance, the government can ascertain, compile, and collect information concerning membership and attendance at both private and public gatherings as effectively as if compulsory disclosure of membership data were required. Indeed, "[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." *United States* v. *Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010).

Additionally, the Fourth Amendment prohibits this technologically enabled, unlimited, and unprecedented incursion on privacy that GPS tracking facilitates. The technology used here permits law enforcement to monitor more than simply an individual's travel from point A to point B, and it has far greater capacity than mere enhancement of visual surveillance. Rather, it permits law enforcement to remotely track and record an individual's complete, uninterrupted pattern of movement for an unlimited duration, in an unlimited space, both public and private. It permits the creation of a complete, virtual profile that is compiled and maintained by the government.

> The fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on

> this Court in its supervision of the fairness of procedures in the federal court system.

Lopez v. *United States*, 373 U.S. 427, 441 (1963) (Warren, C.J. concurring).

Judicial oversight is an essential safeguard for ensuring that such surveillance does not impinge on associational rights or privacy rights. Because of the important and fundamental rights at stake, government "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP*, 357 U.S. at 460–61. Therefore, law enforcement officials bear the burden of proving that prolonged GPS monitoring is a "narrowly tailored measure[] that further[s] compelling governmental interests." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995); *accord NAACP*, 357 U.S. at 464 (requiring "substantial[]" governmental interests). Only a neutral adjudicator can determine if this burden has been met, by requiring law enforcement officials to show probable cause before issuing them a warrant.

A. GPS surveillance burdens and reveals constitutionally protected associational information in violation of First Amendment rights.

Freedom of association, a fundamental and constitutionally protected right, includes the right to keep those associations private. *NAACP*, 357 U.S. at 462 (recognizing "the vital relationship between freedom to associate and privacy in one's associations" (internal quotation marks omitted)); *accord Katz*, 389 U.S. at 350 n.5 ("The First Amendment, for example, imposes limitations upon governmental abridgment of freedom to associate and privacy in one's associations." (internal quotation

marks omitted)). Thus, searches or seizures that reveal private associations unconstitutionally infringe on the freedom of association. See *NAACP*, 357 U.S. at 462.

In *NAACP*, an Alabama court entered a contempt judgment against the NAACP for failing to disclose the names and addresses of its members. *Id.* at 453–54. In reversing the contempt judgment, this Court held that "the immunity from state scrutiny of membership lists . . . is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of" the First Amendment. *Id.* at 466. The Court further held that compelling the NAACP to disclose the names and addresses of its members was a "substantial restraint upon the . . . right to freedom of association," because "it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure . . . ." *Id.* at 462–63.

Even short-term GPS data collection, especially when combined with publicly available information, *e.g.*, Google Maps, http://maps.google.com, can reveal private associational relationships based on whom an individual visits over the course of a day, be it a chapel or a mosque; a Sierra Club protest or a Tea Party rally; the offices of the NAACP or those of the NRA.

The facts revealed by GPS monitoring comprise precisely the sort of private associational information that is constitutionally protected by the First Amendment. Surreptitious GPS monitoring that reveals an individual's church-going habits or political activities, for example, operates as effectively to reveal private associations as would a "requirement that adherents of particular religious

faiths or political parties wear identifying arm-bands." *NAACP*, 357 U.S. at 462 (internal quotation marks omitted).

Unlimited, twenty-four-hour GPS surveillance "reveals the habits and patterns that mark the distinction between a day in the life and a way of life . . . . " *Maynard*, 615 F.3d at 562. Giving law enforcement officials free rein to conduct such surveillance, without any oversight whatsoever, allows the government to combine information about the private habits and patterns of multiple individuals. In so doing, the government forms a detailed and overarching composite picture of private associational relationships.

Given the ability to track, download, store, and retrieve vast historical detail of one's life without judicial oversight (i.e., in the manner urged by Petitioner) the government will have free rein to harvest volumes of data about individuals' habits and patterns. Sustained, unlimited 24-hour surveillance without temporal or spatial limitation reveals not just public exposure of one's location at a discrete point in time, but also patterns, practices, affiliations, and constitutionally protected associations. The balance between this liberty-and-privacy interest and legitimate law enforcement objectives can be preserved only by requiring that law enforcement demonstrate probable cause to undertake far-reaching and invasive surveillance.

B. In the absence of a warrant supported by probable cause, the surreptitious installation of a GPS device that tracks and logs an automobile's travels around the clock without spatial or temporal limitation is a search in violation of the Fourth Amendment.

This Court has "uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable [and] reasonable . . . expectation of privacy . . . ." *United States* v. *Knotts*, 460 U.S. 276, 280 (1983) (internal quotation marks omitted). The surreptitious installation of a GPS device combined with unlimited, remote, 24/7 monitoring and recording of a driver's movements infringes on the level of privacy that a technologically maturing society expects and is prepared to recognize as reasonable.

There is ample evidence that the non-consensual monitoring of a complete pattern of an individual's movement is something that society expects the law to protect throughout the country, including but not limited to civil suits, criminalization of the conduct, legislative regulation, public commentary and judicial opinions. See *e.g.* Res. Br. at 2, 3, 22 n.4. Clandestine, around-the-clock technological monitoring of the type at issue here, whether on public or private property, is a search that violates the Constitution in the absence of a warrant supported by probable cause.[2]

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[2] While Petitioner and other courts take great pains to distinguish tracking of a vehicle on public roads versus private property, such distinctions are constitutionally and practically flawed. First, in reality the devices do not determine much less

The organizations joining on this brief, however, also have a particular concern about automobiles and their susceptibility to unwarranted intrusion by law enforcement. The ubiquity and reliance on the automobile in American society, coupled with the physical inability of an individual to personally shield oneself from such intrusion, establishes a subjective expectation of privacy. That is all the more reason for judicial oversight of GPS monitoring.

The widespread dependence on automobiles makes protecting owner privacy even more critical. In *Katz*, this Court stated that there is no reasonable expectation of privacy where a person has not taken measures to exhibit an actual expectation of privacy. *Katz*, 389 U.S. at 359, 361. This test cannot apply to a target of secret GPS surveillance because there is no reasonable method for one to exhibit an expectation of privacy. It is unreasonable to expect drivers to check under their vehicles, in the wheel wells, under the hood, etc., each time they get behind the wheel.

Likewise, it is also unreasonable to expect or require citizens to demonstrate their expectation of privacy by forfeiting the use of private transportation by using alternative means such as walking or taking public transportation. This is especially so when

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anticipate when they will cross from the public to private property any more than they anticipate crossing state lines. They continue to track, record, and download regardless of their global position. Furthermore, the public–private road distinction ignores the development of Fourth Amendment jurisprudence away from neat "locational" boundaries, particularly in the technological arena. *See Katz,* at 352 n.9 ("It is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas' but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem." (internal citation omitted.)

such alternatives are impracticable and in many locations non-existent. Automobiles are such a vital and essential part of life for Americans that we have one of the highest number of vehicles per capita in the world. See William Pentland, *The World's Top Car-Owning Countries*, Forbes.com (July 30, 2008, 1:00 PM), http://www.forbes.com/2008/07/30/energy-europe-automobiles-biz-energy-cx_wp_0730cars.html (last visited on Oct. 2, 2011). Given the role of the automobile in public life, it is unreasonable to expect vehicle owners to take extraordinary steps to broadcast their expectations of privacy. The secret conversion by law enforcement of a modern life necessity into a transmitter of an individual's movements, without probable cause and absent judicial oversight, exploits the vital role of the car in everyday life and foreshadows broader and stealthier intrusions as society becomes increasingly technology-dependent for even the most basic of daily activities.

Law enforcement's ability to recreate an historical record of where an individual travelled, to monitor the frequency, duration, and destination of the individual's travels for time immemorial, is an intrusion of an unprecedented scope and scale. Its use by law enforcement requires the reasonable oversight that the limitations of the Fourth Amendment provide.

The GPS technology at issue in this case is merely the leading edge of previously unimaginable methods of monitoring individual movements and behavior. See*, e.g.*, Jennifer Valentino-Devries, *"Stingray" Phone Tracker Fuels Constitutional Clash*, Wall St. J. (Sept. 22, 2011), http://online.wsj.com/article/SB10001424053111904194604576583112723197574.html (last visited on Oct. 2, 2011) (reporting on a

secret law enforcement device used to mimic cell phone towers and locate individuals even when they aren't making a call). If the Fourth Amendment's proscription against unreasonable searches and seizures remains "designed to protect people and not places" in a world of advancing technologies, this Court must construe the clandestine installation, 24/7 remote surveillance, and digital recording of an individual's every move without limitation as to duration or location as a search mandating Fourth Amendment protection. *Katz*, 389 U.S. at 351.

C. Judicial oversight is the only way to ensure that these First and Fourth Amendment rights are protected.

Judicial oversight is an essential safeguard for ensuring that GPS surveillance does not impinge on associational rights. Any incursion by the government into constitutionally protected associational rights is subject to strict scrutiny. *NAACP*, 357 U.S. at 460–61 (holding that governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny"); *accord Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963) ("[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State *convincingly show a substantial relation* between the information sought and a subject of *overriding and compelling* state interest." (emphases added)).

Nevertheless, Petitioner urges a rule of law whereby *absolutely no showing whatsoever* is required to use GPS monitoring to indirectly gather the kind of information that the law clearly proscribes it from gathering directly without judicial

oversight. Such sweeping discretion to law enforcement absent even the slightest judicial oversight is reminiscent of the very inspiration from which the Fourth Amendment has its genesis: the writs of assistance that gave blanket authority for officials to search where they pleased. See *Stanford*, 379 U.S. at 481. Those blanket writs were rightly described as "the worst instruments of arbitrary power, the most destructive of . . . liberty . . . and [of] the fundamentals of law, . . . because they placed the liberty of every man in the hands of every petty officer." *Id.* (internal quotation marks omitted).

Furthermore, individuals whose associational rights have been violated in this manner would have no recourse to vindicate their rights, because they would be unaware of the violation in the first place. Without a warrant requirement, law enforcement officials would only need to divulge their surreptitious GPS surveillance *after* it has yielded incriminating information—which would then serve as a *post hoc* showing of probable cause. See Pet'r's Br. at 16 ("[A] critically important use of GPS surveillance is . . . to *establish* probable cause."). Or, law enforcement could continue their fishing expeditions in silence, collecting volumes of information that may or may not be of use in future investigations. A warrant requirement, backed by a showing of probable cause, is a necessary check on what would otherwise be an unprecedented, unchecked investigatory power.

II. THE WARRANT REQUIREMENT IS MINIMALLY BURDENSOME, AS ILLUSTRATED BY THE FACTS OF THIS CASE.

Law enforcement can make no plausible argument of unreasonable burden justifying prolonged,

warrantless GPS surveillance, given the ease and speed with which search warrants can now be obtained. The vast majority of states—and the District of Columbia—have statutes or rules permitting warrant applications by telephonic or electronic means. And nearly half of the states have crafted procedural rules with broad language anticipating and embracing technological advancements that can further simplify the warrant-application process. Notably, the District of Columbia allows search warrant applications by virtually any electronic means.[3] It is therefore no surprise that the officers in this case did in fact obtain a warrant—one whose terms they proceeded to violate. See Pet'r's Br. at 3.

A. Advancements in technology have significantly streamlined the process of obtaining a search warrant.

In 1981, long before words like "smartphone" and "PDF" entered our collective vocabulary, this Court recognized that "[t]he additional burden imposed on the police by a warrant requirement is minimal." *Steagald* v. *United States*, 451 U.S. 204, 222 (1981). Thirty years and countless technological advancements later, that statement rings truer than ever. Indeed, many of the same technologies that help law enforcement detect criminality can also simplify and expedite police compliance with the warrant requirement.

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[3] *See* D.C. Code § 23-522 (2011) ("Each application for a search warrant shall be made in writing, or by telephone or *other appropriate means*, including facsimile transmissions or *other electronic communications*, upon oath or affirmation to a judicial officer, pursuant to the Superior Court Rules of Criminal Procedure." (emphasis added)).

Today, thirty-four states and the District of Columbia have codified procedures allowing law enforcement to apply for warrants remotely, using electronic or telephonic means.[4] Each of these jurisdictions has embraced one or more of the following technologies in an effort to streamline the warrant process:

Number of Jurisdictions Allowing Remote Warrant Application

Telephone	Facsimile	Radio	Video Conference	E-mail	Other Remote Means
24	18	6	2	2	23

The "other" category is particularly instructive in that it anticipates those future technologies that defy *ex ante* categorization. Vermont, for example, allows warrants to be issued "based on information communicated by reliable electronic means"—a term defined to include "facsimile transmission, electronic mail, *or other method[s]* of transmitting a duplicate of an original document." Vt. R. Crim. P. 41(c)(4)(A), 41(g)(2) (2011) (emphasis added). Today, this language could easily encompass warrant applications generated and signed on an officer's

[4] These states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Vermont, Virginia, Washington, and Wisconsin, in addition to the District of Columbia. This list does not include any states that may, through judicial decision only, allow remote warrant application.

iPad, saved as PDFs, and transmitted to the magistrate by e-mail. And it can likely accommodate the digital paper of tomorrow.

Utah's procedural rules contain even broader language. There, remotely issued search warrants are allowed where the magistrate and requesting party communicate by "voice, image, text, or any combination of those, or by *other means*." Utah R. Crim. P. 40(l)(1) (emphasis added). This rule allows Utah police to "get electronic warrants in about 20 minutes," according to one Utah County Sherriff.[5] Perhaps the most forward-looking language of all can be found in the laws of the District of Columbia, specifying that "[e]ach application for a search warrant shall be made in writing, or by telephone or *other appropriate means*, including facsimile transmissions or *other electronic communications* . . . ." D.C. Code § 23-522 (2011) (emphasis added).

To the extent that the government's preference for warrantless GPS surveillance in this case is "based upon its deprecation of the benefits and exaggeration of the difficulties associated with procurement of the warrant," *United States* v. *Karo*, 468 U.S. 705, 717 (1984), it ignores the reality that today's warrant requirement is a lighter burden than it has ever been. The days of cumbersome in-person assemblies to secure warrants are plainly long gone, and so too is any plausible argument of undue burden justifying warrantless GPS surveillance.

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[5] Janice Peterson, *Conflicting Views on No-warrant GPS Ruling*, Daily Herald (Sept. 5, 2010, 12:25 AM), http://www.heraldextra.com/news/local/article_6d44220a-e8d1-5d0b-a072-bce72e97a835.html (last visited on Oct. 2, 2011) (quoting Utah County Sheriff Jim Tracy).

B. The facts of this case undermine any claim that the warrant requirement impairs law enforcement's ability to establish probable cause.

Like *Karo*, "this is not a particularly attractive case in which to argue that it is impractical to obtain a warrant, since a warrant was in fact obtained in this case, seemingly on probable cause." *Karo*, 468 U.S. at 718. Here, FBI agents obtained a warrant authorizing covert installation and monitoring of the GPS device on respondent's car. See Pet'r's Br**.** at 3. And like *Karo,* this warrant was not invalidated for want of probable cause. See *Karo*, 468 U.S. at 718 n.5. We are assured by the government that these officers "had reasonable suspicion, and indeed probable cause" to support their warrant. See Pet'r's Br**.** at 50–51.

In essence, the constitutional issues here arise from an officer's violation of the warrant's terms as to timeliness and location. The warrant required installation in the District of Columbia within ten days. The officers, apparently untroubled by these express terms and sensing no urgency, took eleven days to install the device and did so a short distance away, in Maryland. In light of the subsequent four weeks of tracking and the known location of Mr. Jones, neither a sense of exigency nor uncertainty could have prompted the officers' decision to forego a renewed warrant.

Inconvenient facts aside, a warrant requirement poses an especially light burden where law enforcement officials foresee a need for extended GPS surveillance of a particular automobile. Indeed, because the value of the device as an investigative tool is only as it is used over a period of time, the time required to secure a warrant is surely de minimis in

comparison. Surely law enforcement in such situations can explain who the target is why the GPS device is necessary, where and when it will be installed, and for how long it will be monitored. Assuming probable cause can be demonstrated, there is simply no case for hardship given the inherent absence of urgency in such situations. The time required to install a GPS device is so minimal and the time to obtain a warrant so relatively insignificant (thanks to the technological advancements discussed above) that the warrant requirement poses no risk of significant investigative delay. Compared to the duration of anticipated surveillance, the minimal time required for Fourth Amendment compliance seems trivial indeed.

III. THERE IS NOTHING ABOUT THE NATURE OF MOTOR VEHICLES THAT JUSTIFIES A BLANKET EXCEPTION TO THE WARRANT REQUIREMENT, AND THE AUTOMOBILE EXCEPTION MANIFESTLY DOES NOT APPLY TO WARRANTLESS GPS TRACKING.

Wisely, Petitioner appears to have abandoned its reliance on the automobile exception to the warrant requirement at this stage of the litigation. Although several courts and Petitioner (in the case below) relied on a reduced expectation of privacy in automobiles to justify covert tracking without limit, plainly the exception does not apply.

The general proposition that a person has a diminished expectation of privacy in an automobile affords law enforcement reasonable leeway in the context of vehicle stops, but it is of dubious value in the context of GPS technology. The automobile exception allows law enforcement to search a vehicle without a warrant when there is a risk that the vehicle will be "quickly moved." *Carroll* v. *United*

States, 267 U.S. 132, 153 (1925); see also *California* v. *Carney*, 471 U.S. 386, 390 (1985) ("[O]ur cases have consistently recognized ready mobility as one of the principal bases of the automobile exception."). The reason for this exception is that by moving a vehicle, one can easily remove contraband, evidence, or people before police can obtain a warrant. *Carney*, 471 U.S. at 390. Absent such a risk, the exception does not apply. See *Arizona* v. *Gant*, 556 U.S. 332, 129 S. Ct. 1710, 1723–24 (2009) (holding that a search of respondent's vehicle is unreasonable where there was no risk of him accessing the vehicle).

The utility and efficacy of the GPS device is premised on the automobile's ready mobility, without which there would be no tracking. The mobility of the vehicle does not create a risk of the loss of evidence; rather, it is the vehicle's very mobility that creates the evidence in the GPS context. A tracking device that stands still and remains in "sleep mode" would be of little investigative use. GPS devices do not fit within the automobile exception because the automobile's movement creates the evidence that the surveillance hopes to uncover, compile, and record. So the justification for the exception does not apply to GPS tracking. A vehicle's movement creates no risk of loss of evidence when it is the movement itself that is the evidence.

Furthermore, this Court has held "that a motorist's privacy interest in his vehicle [may be] less substantial than in his home [but] is nevertheless important and deserving of constitutional protection." *Gant*, 129 S. Ct. at 1720. Courts have recognized a reduced expectation of privacy in an automobile that allows law enforcement to search for contraband without a warrant, under some circumstances.

However, a reduced expectation of privacy does not mean a complete lack of privacy.

Individuals may reasonably expect they might be pulled over, given a ticket, stopped at a sobriety check point, or even just intermittently be observed by law enforcement while on public roads. However, this does not mean that they expect to be relentlessly tracked and followed around the clock for weeks on end, unwittingly creating a detailed compilation of where they have travelled, how fast, how frequently, and for how long.

Indeed, several jurisdictions have criminalized the unauthorized use of automobile GPS surveillance by private individuals thereby indicating a demonstrable aversion to surreptitious electronic tracking.[6] Furthermore, the very existence since 2006 of a federal rule of criminal procedure outlining the process for obtaining an electronic tracking warrant not only underscores a societal expectation that such monitoring will not be done in secret but also demonstrates the practical ease by which parameters can be set, monitored, and overseen by a neutral, independent arbiter. Fed. R. Crim. P. 41(e)(2)(C) (specifying warrant requirements and limitations).

The regulatory expectations society recognizes in the automobile context are grounded in safety

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[6] *See, e.g., People* v. *Sullivan*, 53 P.3d 1181 (Colo. Ct. App. 2002) (Husband using a GPS against wife found guilty of harassment by stalking); *L.A.V.H.* v. *R.J.V.H.*, 2011 WL 3477016, at *4 (N.J. Super. Ct. Aug. 10, 2011) (ex-husband's use of GPS to follow and monitor ex-wife constitutes stalking); *M.M.* v. *J.B.*, 2010 WL 1200329 (Del. Fam. Ct. Jan. 12, 2010) (father convicted of felony offense of stalking for placing GPS device on mother's vehicle); *Heil* v. *State*, 888 N.E.2d 875 (Ind. Ct. App. 2008) (husband convicted of first degree stalking for using GPS device to track his wife).

justifications—not in arbitrary or indiscriminant application. Finally, the automobile exception dispenses with the necessity of a warrant prior to the automobile search. It does not eliminate the probable cause requirement, nor does it permit a vehicle search, the sole purpose of which is to help law enforcement "gather information to establish probable cause." See, Pet'r Br. at 50.

Accordingly, the automobile exception has no place in the unlimited GPS tracking analysis.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Circuit Court of Appeals of the District of Columbia.

Respectfully submitted,

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