No. 10-1259

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Petitioner*,

v.

ANTOINE JONES,
*Respondent.*

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

## BRIEF OF OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF THE *AMICUS CURIAE* [1]

The Owner-Operator Independent Drivers Association ("OOIDA") is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional truck drivers. The 151,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. Single-truck motor carriers represent nearly half of the total of active motor carriers operated in the United States. The Association actively promotes the views of professional drivers and small-business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of professional drivers and small-business truckers in numerous committees and various forums on the local, state, national, and international levels. OOIDA's mission includes the promotion and protection of the interests of independent truckers on any issue which might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways.

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[1] Counsel for both parties have consented to the filing of this brief, and their letters of consent are filed with this brief. No counsel for a party authored this brief in whole or in part, and no such counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The Court's resolution of the Fourth Amendment questions presented in this case will have a direct and immediate impact on warrantless electronic surveillance activities currently being advocated or conducted by federal governmental agencies in a variety of regulatory settings. Contrary to Petitioner's assertion that "[n]o evidence exists of widespread, suspicionless GPS monitoring, and practical considerations make that prospect remote," Pet. Br. at 14, the Federal Motor Carrier Safety Administration (FMCSA) is currently promulgating regulations that would mandate the installation of electronic onboard recorders ("EOBRs") – equipped with global positioning system ("GPS") technology[2] – for the purpose of monitoring the movements of four million (4,000,000) drivers; operating for five hundred thousand (500,000) motor carriers; using 3,637,000 vehicles, twenty four hours a day, seven days a week.[3] The government's rapidly expanding use of such warrantless and intrusive surveillance is troubling from a host of constitutional and policy perspectives. OOIDA files this amicus curiae brief because of its serious concern that the government's indiscriminate, relentless and intrusive use of warrantless surveillance devices such as EOBRs would violate the constitutional rights of drivers.

The government's attempt to mandate the installation of EOBRs raises the precise question envisioned

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[2] *See* Notice of Proposed Rules, "*Electronic On-Board Recorders for Hours-of-Service Compliance*," 76 Fed. Reg. 5537 (February 1, 2011), available at 2011 WL 290639.

[3] Electronic On-Board Recorders and Hours-of-Service Supporting Documents, *Preliminary Regulatory Evaluation*, at 6, Regulatory Docket No. FMCSA-2010-0167-0003, January 24, 2011.

by this Court in *United States v. Knotts*, 460 U.S. 276 (1983), that "if such dragnet type law enforcement practices…should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 284. Regrettably, that day has now arrived. For if there are no constitutional protections against the government's warrantless monitoring of a single citizen on a virtual 24-7 basis, then there are serious questions as to whether there are any constitutional protections against the government's use of such "dragnet type law enforcement practices" against massive groups of citizens such as the 4 million truck drivers who stand to be swept up in the FMCSA's dragnet. OOIDA submits this brief in support of the Respondent because of the wide-ranging and potentially adverse implications the Court's ruling in this case may have on the constitutional rights of several million truck drivers and motor carriers, including members of OOIDA.

## BACKGROUND

### A. The Government's Use of Widespread, Suspicionless GPS Monitoring is Imminent.

In its brief, the government states: "No evidence exists of widespread, suspicionless GPS monitoring, and practical considerations make that prospect remote." Pet. Br. at 14. Not so. The specter of such surveillance is both disturbingly "practical" and demonstrably imminent. Federal governmental agencies are currently engaged in, or seeking authority to engage in, widespread warrantless GPS surveillance of millions of American citizens.

As an initial matter, it should be noted that accurate information about the ways in which federal and state agents utilize GPS technology has not been

publically or candidly revealed by the government. *See* Pet. 24 (asserting it now "frequently use[s] tracking devices early in investigations," but with no elaboration); *ACLU v. DOJ*, —F.3d—, 2011 WL 3890837, at *2 (D.C. Cir. Sept. 6, 2011) (refusing, on privacy grounds, to release docket information about cases in which GPS data were already produced to a court).

At the other end of the spectrum, however, various governmental agencies such as the FMCSA are actively seeking to mandate installation of GPS devices on motor vehicles for the purpose of maintaining warrantless round-the-clock surveillance – precisely the sort of "extended recordation of a person's movements" which the court of appeals found unconstitutional in this case. *See United States v. Maynard*, 615 F. 3d 544, 563 (D.C. Cir. 2010), *cert. granted sub nom. United States v. Jones*, 131 S. Ct. 671 (2011).

### B. The FMCSA is Currently Seeking to Mandate GPS Tracking of Millions of Commercial Motor Vehicle Drivers.

The Court's decision in this case will not only affect Respondent's rights, but potentially the rights of millions of truck drivers who are the subject of a pending rule by the FMCSA to use GPS technology installed in EOBRs to monitor drivers 24 hours a day. The Court's answer to the question in this case as to whether a warrant is required before the government can attach a GPS device to a vehicle may therefore have an indelible impact on the Fourth Amendment issues which OOIDA, and the FMCSA in response, have raised in those regulatory proceedings.

The FMCSA is the agency within the United States Department of Transportation with primary respon-

sibility for the regulation of commercial motor vehicles and their operators. FMCSA regulates the number of hours during a day and during a week that a commercial motor vehicle driver can work and drive a truck. 49 C.F.R. Part 395. The "hours-of-service" ("HOS") rules require drivers to keep track of their four possible categories of "duty status:" (1) driving; (2) on-duty, not driving; (3) in the sleeper berth of the truck; and (4) off-duty. *See* 49 C.F.R. §395.8(b). The rules require drivers to use paper logbooks to record several pieces of information, including their duty status and their geographic location at each change in duty status. *See* 49 C.F.R. §395.8.

In 2010, the FMCSA published a Final Rule requiring *some* motor carriers, and permitting *all* motor carriers, to use EOBRs in lieu of paper logs to record a driver's duty status. *See* Final Rules, Electronic On-Board Recorders for Hours-of-Service Compliance, 75 Fed. Reg. 17208 (Apr. 5, 2010)("EOBR I"). In *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, __ F.3d __, 2011 WL 3802728 *2 (7th Cir. 2011), the Seventh Circuit summarized the technical capabilities of the EOBRs required by the rule as follows:

> The Agency defines an EOBR as "an electronic device that is capable of recording a driver's hours of service and duty status accurately and automatically." 49 C.F.R. § 395.2 (2011). An EOBR must be "integrally synchronized" with a truck's engine, *id.*; this allows the device to be linked simultaneously with both the engine and the driver's telephone so that contemporaneous updates can be sent either through cellular technology or via satellite to a remote server. To meet the Agency's performance requirements,

> the amount of data an adequate EOBR must be capable of recording is extensive: the truck's registration number, the date and time, the location of the truck, the distance traveled, the hours in each duty status for a 24–hour period, the motor carrier's name and Department of Transportation number, the weekly basis used by the motor carrier (either seven or eight days) to calculate cumulative driving time, and even the document numbers or name of the shipper and goods being shipped. *Id.*; 49 C.F.R. § 395.16 (2010). At a less technical level, an EOBR is essentially a device implanted into a truck that records significant amounts of data about the truck's location, how it is being used, how it has been used over time, and that uses satellite technology to allow nearly instant electronic transmission of this data to the trucker's employer (that is, the motor carrier).

*Id.*

The government's proposed EOBR program is thus equally intrusive, and certainly far more pervasive, than the GPS surveillance used in the case at bar. FMCSA would require that the EOBR track a driver's location with no less frequency than once every 60 minutes. *See* 49 C.F.R. § 395.16(f). FMCSA would further require that EOBRs employ satellite or ground based positioning technology, or a combination of the two. *See* 49 C.F.R. Part 395 Appendix A, 3.1.1.1 and 3.1.1.3.

Shortly after EOBR I was published, OOIDA filed a petition for review by the Seventh Circuit on the grounds, *inter alia*, that: (1) FMCSA's action was arbitrary and capricious; and (2) mandatory use of EOBR's violated the Fourth Amendment. While that petition was pending, FMCSA proposed a *new* EOBR

rule ("EOBR II") with the primary purpose of requiring *all* regulated truck drivers to install EOBRs in their trucks to monitor hours-of-service compliance. *See* 76 Fed. Reg. 5537. OOIDA has submitted extensive comments to the docket in that rulemaking at FMCSA-2010-0167-0374. A Final Rule in EOBR II is pending.

There are an estimated 4 million commercial drivers license holders who would be required to adopt and use EOBRs under the proposed EOBR II rule. In an August 30, 2011 letter from President Obama to Speaker of the U.S. House of Representatives, John Boehner, the President disclosed that the EOBR II rule would impose a burden of *$2 billion* to the public – one of the top seven most economically burdensome proposed rules.[4]

On August 26, 2011, the Seventh Circuit vacated the EOBR I Rule, holding that it was "*arbitrary and capricious*" because the FMCSA failed to comply with the mandate of Congress under 49 U.S.C. § 31137(a) to ensure that such devices are not used to harass drivers. 2011 WL 3802728 *8. Having disposed of the rule on this question, the Court declined to address the question of whether the mandated use of EOBRs violated the Fourth Amendment.

> We could say more about the other issues raised by the petitioners[…] But this area of regulation is moving quickly. We note, for example, that the FMCSA has already proposed a rule requiring EOBRs for all motor carriers, that the technology and markets are rapidly changing, and that the Agency is apparently conducting new case stu-

[4] Available at http://www.politico.com/static/PPM169_110830_boehner.html.

> dies on EOBR use. Rather than reach beyond what is strictly necessary here, prudence dictates that we leave for another day any questions that might arise in connection with whatever new rule the Agency decides to adopt.

*Id*. Accordingly, the same Fourth Amendment issues presented by the EOBR I rule persist in the pending EOBR II rulemaking.

The Fourth Amendment issues implicated by the FMCSA's attempt to mandate EOBRs may be shaped by the Court's ruling in this case because they share the same essential question: whether the government is required to obtain a warrant before attaching an electronic monitoring device to an individual's vehicle, and thereafter monitoring and tracking his movements on a perpetual basis. The Court's resolution of this issue will thus not only set forth a declaration regarding the Respondent's constitutional rights, but potentially the rights of millions of truck drivers governed by FMCSA's mandate – and indeed, countless millions of other individuals who may soon, or who may already be, the subjects of warrantless GPS tracking by the government.

## SUMMARY OF ARGUMENT

The government's warrantless installation and usage of satellite tracking devices to continuously monitor and record the movements of citizens in their motor vehicles violates the Fourth Amendment.

I. A. Warrantless surveillance through use of GPS tracking technology is a search within the meaning of the Fourth Amendment. The driver of a motor vehicle has a "justifiable," "reasonable," and "legitimate expectation of privacy" against the government conducting warrantless surveillance through GPS track-

ing devices. *Katz v. United States*, 389 U.S. 347 (1967); *Smith v. Maryland*, 442 U.S. 735 (1979). Further, that expectation of privacy is objectively reasonable and justifiable. *Id*.

B. In *United States v. Knotts*, 460 U.S. 276 (1983), the Court held that police officers were not required to obtain a warrant before using a radio-signal beeper to track an individual on a single trip, as he travelled by "automobile on public streets and highways." However, the Court declined to address the Fourth Amendment implications of "twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision," which it expressly left for another day. *Id*., 460 U.S. at 283. This case beckons the Court to resolve the question reserved in *Knotts* as to whether the government's warrantless use of technologically sophisticated tracking devices to conduct round-the-clock surveillance of citizens violates the Fourth Amendment.

C. Federal governmental agencies are currently engaged in, or seeking authority to engage in, warrantless GPS surveillance of millions of American citizens. As one example, the FMCSA is currently promulgating regulations requiring the installation of EOBRs for the purpose of monitoring the movements of 4 million drivers – twenty four hours a day, seven days a week. This is precisely the sort of "twenty-four hour" surveillance which this Court deferred to another day in *Knotts*, but which may very well become authorized in the event this Court reverses the court of appeals' judgment in this case. This case thus presents an opportunity for the Court to resolve the question reserved in *Knotts* as to whether such surveillance is constitutional.

II. The warrantless installation of GPS tracking device on a vehicle is a seizure in violation of the Fourth Amendment. *Silverman v. United States*, 365 U.S. 505 (1961).

III. The Government's use of GPS surveillance without a warrant is unreasonable. *Mincey v. Arizona*, 437 U.S. 385 (1978).

IV. Blanket approval of warrantless GPS surveillance would upset longstanding Fourth Amendment jurisprudence. *New York v. Burger*, 482 U.S. 691 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

## ARGUMENT

### I. THE GOVERNMENT'S WARRANTLESS USE OF GPS SURVEILLANCE TO MONITOR AND RECORD THE MOVEMENTS OF CITIZENS VIOLATES THE FOURTH AMENDMENT.

#### A. General Fourth Amendment Protections.

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...." U.S. CONST. amend. IV. Whether Government action constitutes a search depends upon whether "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). In *Katz v. United States*, 389 U.S. 347 (1967), the Court set forth a two part standard for when a Fourth Amendment search has occurred: (1) the

individual has "manifested a subjective expectation of privacy" in the thing searched; and (2) "society is willing to recognize that expectation as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). The first element addresses whether the individual's conduct has "exhibited an actual (subjective) expectation of privacy ... [which is demonstrated by] whether ... the individual has shown that he seeks to preserve something as private." *Knotts*, 460 U.S. 276, 281 (1981) (internal citations and quotation marks omitted). The second element looks to whether the "individual's expectation, viewed objectively, is justifiable under the circumstance." *Id.* (internal citations and punctuation omitted).

It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 530 (1967). "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613-614 (1989).

### B. Governmental GPS Tracking and Recording of Persons in Their Motor Vehicles Constitutes a Search.

In *Knotts*, the Court held that short term use of a simple beeper device to track the movement by truck of a five gallon drum of chloroform used in drug manufacture from its place of purchase to its place of use was not a search. Police officers supplemented their visual observations of the truck's movement with tracking signals from the beeper device. 460

U.S. at 278-79. The record did not disclose any use of the beeper after the truck reached its final destination. *Id.* at 284-85. The Court's holding, relying on the "limited use which the government made of the signals," was appropriately narrow:

> Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

*Id.* at 284.

*Knotts* explicitly left unresolved the question of whether electronic surveillance of movements in public for an extended period can constitute a search, stating:

> Respondent … expresses the general view that the result of the holding sought by the government would be that "twenty-four hour surveillance of any citizen ... without judicial knowledge or supervision will be possible, without judicial knowledge or supervision." * * *; if such dragnet type 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 283-84.

One year later, in *United States v. Karo*, 468 U.S. 705 (1984), the Court considered "whether the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence." *Id*. 468 U.S. 713–18. There, the Court held that use of an elec-

tronic tracking device *does* constitute a Fourth Amendment search if the tracking device enables the Government to "obtain information that it could not have obtained by observation from outside the curtilage of the house." *Id.* at 715. Notably, the Court observed: "It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." *Id*. at 712.

In *Kyllo v. United States*, 533 U.S. 27 (2001), the Court examined the use of a sensing device that was employed to detect heat from electric lamps used to promote the indoor cultivation of marijuana in a residence to determine "what limits there are upon this power of technology to shrink the realm of guaranteed privacy." 533 U.S. at 34. The Court distinguished technology that merely supplemented sensory observations of the kind implicated in *Knotts* (visual observation of a vehicle) with technology that provided information regarding the interior of a home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area …." *Id*. "Technology that does more than merely supplementing sensory observations constitutes a search at least where … the technology in question is not in a general public use." *Id*. Such a search is presumptively unreasonable without a warrant. *Id*. at 40. Importantly, the Court observed that advances in "police technology [can] erode the privacy guaranteed by the Fourth Amendment," *id*. at 34, and that "we must take the long view, from the original meaning of the Fourth Amendment forward." *Id*. at 40.

The sophistication of GPS devices such as EOBRs presents a very different surveillance technology than that used in *Knotts*. The beeper used in *Knotts* was a simple tool that was approved because it

provided only a modest sensory-enhancement to real-time visual surveillance. *Id*., 460 U.S. at 277. Beepers could neither determine location nor store location data. By contrast, a GPS device such an EOBR does not enhance human senses – it replaces them with remote collection and storage of data reflecting time, location, movement and speed.[5]

Further, the use of GPS tracking equipment operating 24 hours a day, seven days a week over prolonged periods of time and covering potentially millions of trucks and drivers presents precisely the "dragnet type law enforcement practices" that this Court reserved for a later day in *Knotts*. 460 U.S. at 284.

In this case, the court of appeals addressed the question left unresolved by *Knotts* – "whether different constitutional principles may be applicable" where the government has engaged in "twenty-four hour surveillance of any citizen ... without judicial knowledge or supervision." *Maynard*, 615 F.3d at 558. In September 2005, the Government attached a GPS tracking device to Respondent's vehicle without a warrant and tracked his movements in the vehicle

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[5] *See* Lenese Herbert, "Challenging the (Un)Constitutionality of Governmental GPS Surveillance," 26 CRIMINAL JUSTICE 34, 35 (Summer 2011):

> Once a GPS receiver is outfitted with a transmitter or recording device, third parties interested in determining the whereabouts of the GPS device may remotely and unblinkingly surveil its location continually virtually anywhere on the globe. Quantitatively and qualitatively, then, GPS-enabled surveillance is far cheaper and vastly superior to visual surveillance, as no one human or organization of human observers is currently capable of such comprehensive, continuous, and accurate information regarding location and movement monitoring.

continuously for four weeks. *Id.* at 555. The court of appeals held that this prolonged electronic surveillance of an individual's location constituted a Fourth Amendment search. *Id.* at 555–68. The court noted two important distinctions between the short-term surveillance in *Knotts* and the prolonged surveillance at issue here. First, the court concluded that while the individual in *Knotts* did not have a reasonable expectation of privacy over his location while traveling from one place to another, the Respondent here had a reasonable expectation of privacy over the *totality* of his movements over the course of a month. *Id.* The court reasoned that the totality of one's movements over an extended time period is not actually exposed to the public "because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil." *Id*. at 560. Second, the court concluded that people have an objectively reasonable expectation of privacy in the totality of their movements over an extended period because an individual's privacy interests in the totality of his movements far exceeds any privacy interest in a single public trip from one place to another.

> The whole of one's movements over the course of a month is not constructively exposed to the public because, like a rap sheet, that whole reveals far more than the individual movements it comprises. The difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life, nor the departure from a routine that, like the dog that did not bark in the Sherlock Holmes story, may reveal even more....

> ... Prolonged 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. These types of information can each reveal more about a person than does any individual trip viewed in isolation.

*Id.* at 561–62. Finally, the court concluded that society recognizes an individual's "expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation." *Id.* at 563. *Accord United States v. Moore*, 562 F.2d 106, 110 (1st Cir.1977) ("[c]itizens have a reasonable expectation of privacy in their movements, and that the possibility of being followed about in public by governmental agents does not mean that they anticipate that their every movement will be continuously monitored by a secret transmitter"). *But cf. United States v. Pineda–Moreno*, 591 F.3d 1212 (9th Cir.2010) (holding that GPS tracking of defendant's car did not invade defendant's reasonable expectation of privacy and did not constitute a Fourth Amendment search because it revealed only information the agents could have obtained by physically following the car). Although the Ninth Circuit denied rehearing *en banc* in *Pineda–Moreno*, five judges dissented from the denial by published opinion. *United States v. Pineda–Moreno, reh'g en banc denied*, 617 F.3d 1120 (9th Cir.2010). In the lead dissent, Chief Judge Alex Kozinski argued that GPS tracking is much more invasive than the use of beepers discussed in *Knotts*, which merely augmented visual surveillance actually being conducted by the police; the combination of GPS tracking with other technologies in common use by law enforcement

amounts to a virtual dragnet in dire need of regulation by the courts; and such "creepy and un-American" behavior should be checked by the Fourth Amendment. *Id.* at 1126 (Kozinski, C.J., dissenting from the denial of *reh'g en banc*).

### C. Reversal of the Court of Appeals Would Have the Inevitable Effect of Sanctioning Widespread Warrantless GPS Surveillance.

The court of appeals' decision carefully balances the Fourth Amendment implications in cases involving the comparatively primitive type of surveillance at issue in *Knotts*, with the dramatically different, sophisticated and intrusive surveillance now enabled by GPS technology. Ongoing efforts by federal governmental agencies like the FMCSA to mandate installation of GPS tracking systems such as EOBRs illustrate the domino effect that likely could result from a ruling by this Court authorizing warrantless GPS surveillance.

Under *Knotts*, it is understood that a truck traveling over public highways can generally be observed by others and, under many circumstances, the driver would have no reasonable expectation of privacy. But circumstances change when a vehicle is exposed to continuous surveillance over a long period of time. The court of appeals' analysis of the privacy implications of prolonged GPS tracking is instructive in distinguishing such long-term surveillance from the comparatively rudimentary surveillance presented in *Knotts*:

> Applying the foregoing analysis to the present facts, we hold 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 not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.

615 F.3d at 560. The court of appeals went on to recognize that the prolonged monitoring of Respondent through GPS surveillance violated his reasonable expectation of privacy:

> Society recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation. As we have discussed, prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have-short perhaps of his spouse. The intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts;* indeed it exceeds the intrusions occasioned by every police practice the Supreme Court has deemed a search under [*Katz v. United States*, 389 U.S. 347 (1967)].

*Id.* 615 F.3d at 563 (citations omitted).[6]

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[6] *See also* Renee McDonald Hutchins, "Tied up in Knotts. GPS Technology and the Fourth Amendment," 55 UCLA L. REV. 409, 415-17 (2007):

These precepts become all the more acute when considering that the government is now actively seeking to monitor the movements of millions of motor vehicles on a 24/7 basis with GPS devices. Federal judges on both sides of the divide regarding the constitutionality of limited GPS surveillance have *all* expressed caution over the dangers inherent in unbounded electronic surveillance. For example, in *United States v. Cuevas-Perez*, 640 F. 3d 272, 275 (7th Cir. 2011), the majority opinion acknowledged:

> The use of GPS by law enforcement is a Fourth Amendment frontier. Undoubtedly, future cases in the tradition of *Maynard* will attempt to delineate the boundaries of the permissible use of this technology – a technology surely capable of abuses fit for a dystopian novel.

*Id.* In her dissenting opinion in *Cuevas-Perez*, Judge Wood stated:

> This case presents a critically important question about the government's ability constantly to monitor a person's movements, on and off the public streets, for an open-ended period of time.

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Without doubt, this is not the vision of free society sanctioned by the framers. Anthony Amsterdam observed that "the authors of the Bill of Rights had known oppressive government. I believe they meant to erect every safeguard against it. I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit." GPS-enabled technology, when used with wireless transmitters and monitored by the police, fundamentally alters this expectation of privacy in ways that are not reasonable under our constitutional system. The Fourth Amendment mounts a defense against such an erosion of a free society. And for this reason, the use of GPS-enhanced technology cannot be countenanced without judicial oversight.

> The technological devices available for such monitoring have rapidly attained a degree of accuracy that would have been unimaginable to an earlier generation. They make the system that George Orwell depicted in his famous novel, *1984*, seem clumsy and easily avoidable by comparison.

*Id.* at 286.

In view of these uniform concerns it may no longer be satisfactory to say that there will be "time enough to determine" whether government should be free to engage in pervasive, indiscriminate, and intrusive GPS surveillance without a warrant. The Government is instituting such programs *now* – to wit – the FMCSA's efforts to mandate surveillance of millions of truck drivers through EOBRs. To be sure, the danger posed by the Court's deferral of these questions until a later day are best illustrated by Judge Sentelle's dissent from the court of appeals' order denying the petition for rehearing en banc in this case as follows:

> The reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero. The sum of an infinite number of zero-value parts is also zero.

*United States v. Jones*, 625 F. 3d 766, 769 (D.C. Cir. 2010)(Sentelle, J. dissenting). If the foregoing sentiment were adopted by this Court, either explicitly or implicitly, the government would potentially be free to engage in warrantless dragnet surveillance on *every* citizen without *any* restrictions whatsoever. Put another way, if this Court rules that there is "zero" protection for any *one* individual against prolonged warrantless GPS surveillance then, by extension of

such reasoning, there is "zero" protection for *everyone*. Even those who have endorsed limited use of GPS surveillance have cautioned against such an extraordinary deconstruction of Fourth Amendment protections. *See United States v. Garcia*, 474 F. 3d 994, 998-99 (7th Cir. 2007)(Posner, J.) ("It would be premature to rule that such a program of mass surveillance could not possibly raise a question under the Fourth Amendment ….").

The Court's ruling in this case should be informed by its earlier admonition in *Karo* that: "It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." 468 U.S. at 712. Similarly, in *Kyllo*, the Court cautioned that advances in "police technology [can] erode the privacy guaranteed by the Fourth Amendment," 530 U.S. at 34, and that "we must take the long view, from the original meaning of the Fourth Amendment forward." *Id*. at 40. So it is here. The Court should reject the extraordinary proposition advanced by the government that there is "zero" Fourth Amendment protection against warrantless and unbridled "Big Brother" satellite surveillance.

## II. THE GOVERNMENT'S INSTALLATION OF, AND SURVEILLANCE THROUGH, GPS DEVICES CONSTITUTES A SEIZURE.

This Court has stated that the Fourth Amendment "protects property as well as privacy." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992). In this case, the police not only engaged in surveillance by GPS but also intruded on the Respondent's personal property, namely his car, to install the GPS device on the vehicle. Because of that physical intrusion to install the GPS device, this case raises an issue that was not

presented in *Knotts*. The defendant in *Knotts* did not own the property in which the beeper was installed and thus did not have standing to raise any Fourth Amendment challenge to the installation of the beeper. But Justice Brennan's concurring opinion in *Knotts* foresaw the Fourth Amendment issue posed by the police's installing such a device: "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means." 460 U.S. at 286.

In *Silverman v. United States*, 365 U.S. 505 (1961) the Court concluded that installation of a listening device on the defendants' property (by accessing a heating duct in a shared wall of the defendants' row house) was subject to the Fourth Amendment. The Court reasoned that the Fourth Amendment applied because of the police's physical contact with the defendants' property, which the Court variously characterized as: "unauthorized physical penetration into the premises," "unauthorized physical encroachment within a constitutionally protected area," "usurping part of the petitioners' house or office," "actual intrusion into a constitutionally protected area," and "physically entrench[ing] into a man's office or home." *Id.* at 509–12. The Court further determined that a physical encroachment on such an area triggered Fourth Amendment protection regardless of the precise details of state or local trespass law. *Id.* at 511.

In Judge Kavanaugh's separate dissenting opinion from the court of appeals' denial of the petition for rehearing en banc below, he correctly observed:

> If *Silverman* is still good law, and I see no indication that it is not, then *Silverman* may be relevant to the defendant's alternative argument concerning the police's installation of the GPS device. Cars are "effects" under the text of the Fourth Amendment, *see United States v. Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), and are thus "constitutionally protected areas" for purposes of *Silverman.*
>
> The key *Silverman*-based question, therefore, is whether the police's installation of a GPS device on one's car is an "unauthorized physical encroachment within a constitutionally protected area" in the same way as installation of a listening device on a heating duct in a shared wall of a row house. *Silverman*, 365 U.S. at 510, 81 S.Ct. 679. One circuit judge has concluded that the Fourth Amendment does apply to installation of a GPS device: Absent the police's compliance with Fourth Amendment requirements, "people are entitled to keep police officers' hands and tools off their vehicles." *United States v. McIver*, 186 F.3d 1119, 1135 (9th Cir.1999) (Kleinfeld, J., concurring).

625 F. 3d 766, 770.

Turning these considerations to the FMCSA's efforts to mandate installation of EOBRs in commercial motor vehicles, one can more practically appreciate the property concerns implicated. For many truckers, their truck is not simply a vehicle – it is also an office, and indeed, a home away from home. In this instance, the FMCSA seeks – *by governmental mandate* – to compel millions of truck owners to surrender their property to the government for the installation of robotic satellite technology so that the

government can spy on them 24 hours a day, 7 days a week. Adding insult to that constitutional injury, the government seeks to require truck owners *to pay for the EOBRs*! In sum, it is difficult to fathom a more overreaching physical encroachment on a citizen's property than mandating installation of GPS devices in millions of privately owned trucks, effectively requiring their owners to allow the government to invade their property and compel them to put a governmental android into the passenger seat.

## III. WARRANTLESS GPS SURVEILLANCE IS UNREASONABLE.

The Fourth Amendment requires that searches normally be performed pursuant to a search warrant issued in compliance with the warrant clause. *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979).

> The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (footnotes omitted).

*Mincey v. Arizona*, 437 U.S. 385, 390 (1978). Thus, although a few "jealously and carefully drawn" exceptions exist, in the ordinary case a search of private property must be reasonable and must be made pursuant to a search warrant based on probable cause. *Sanders*, 442 U.S. at 758.

The court of appeals' conclusion that the warrantless surveillance of respondent was neither reason-

able, nor excused by any exception, was undoubtedly correct:

> Here, because the police installed the GPS device on Jones's vehicle without a valid warrant, the Government argues the resulting search can be upheld as a reasonable application of the automobile exception to the warrant requirement. Under that exception, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996).
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> * * *
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> [T]he 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. *See Delaware v. Prouse*, 440 U.S. 648, 662–63, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) ("Were the individual subject to unfettered governmental intrusion every time he entered his automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed").

615 F.3d at 566-67.

## IV. BLANKET APPROVAL OF WARRANTLESS GPS SURVEILLANCE WOULD UPSET LONGSTANDING FOURTH AMENDMENT JURISPRUDENCE.

The Court should reject any notion that warrantless GPS surveillance is permissible under one or

more of the limited exceptions to the warrant clause of the Fourth Amendment. The Court should also take great care in jealously guarding the jurisprudence governing those exceptions, *Sanders*, 442 U.S. at 758, to ensure that they are not implicitly undermined by a ruling which could be construed as allowing the government to engage in indiscriminate and relentless satellite surveillance without satisfying *any* standards established under the following Fourth Amendment jurisprudence.

### A. Pervasively Regulated Industry Jurisprudence.

In the EOBR I litigation, the government took the position that the use of GPS surveillance to monitor and enforce driver compliance with hours-of-service regulations met the requirements for a warrantless search under the pervasively regulated industry exception to the Fourth Amendment's warrant requirement. Brief of Respondent at 48-52, *Owner-Operator Independent Drivers Ass'n, Inc., et al. v. United States Dept. of Transportation, et al.*, No 10-2340 (7th Cir. Dec. 6, 2010). Where an individual elects to participate in a pervasively regulated business his "justifiable expectations of privacy" are necessarily diminished. *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). In such cases, reasonably defined inspection schemes accompanied by appropriate standards for implementation pose only limited threats to those limited expectations of privacy. *Id*. Later, in *New York v. Burger*, the Court reaffirmed the principles articulated in *Donovan*, noting that the privacy expectations of individuals are lower in "commercial premises" than in a home or other location. The Court concluded that where: (1) the business in question is closely regulated, and, (2) the warrantless

inspections are necessary to further the regulatory scheme – compliance with the Fourth Amendment turns on whether the inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 691, 702-703 (1987). Further, the regulatory program must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. *Id.* at 703.

Assuming for the purposes of this analysis that the government's position in EOBR I is correct,[7] a ruling by this Court authorizing warrantless GPS surveillance on millions of truckers – and potentially every citizen in America – would be the undoing of the safeguards afforded by *Burger*. Such a ruling would surely be invoked by law enforcement and regulatory agencies to search persons and/or premises: (1) without the need for a regulation that provides for

[7] In EOBR I, the Seventh Circuit never reached the merits of the question of whether the use of a GPS device installed in a truck constituted a search of a *person* rather than a business *premises*. If so, it would be outside of the parameters of the *Burger* exception. 2011 WL 3802728 *8. *Burger* specifically noted that the statute authorizing the inspection "must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his *property* will be subject to periodic inspections undertaken for specific purposes.'" *Id*. at 703, quoting *Donovan*, 452 U.S. at 600 (emphasis added). In *Whren v. United States* Justice Scalia observed that *Burger* upheld the constitutionality of a warrantless administrative inspection defined as "the inspection of *business premises* conducted by authorities responsible for enforcing a pervasive regulatory scheme …." *Whren v. United States*, 517 U.S. 806, 811 n 2 (1996). (emphasis added).

the certainty or regularity of its application; (2) without notice to any individual that a search is being conducted; (3) without a defined scope, and (4) without limiting the discretion of the inspecting officers. OOIDA is concerned that without such constraints, law enforcement personnel will assert themselves into the private lives and affairs of drivers, beyond those purposes established in the EOBR II rule.

### B. Special Needs Jurisprudence.

This Court has held that searches conducted pursuant to administrative regulations are constitutional absent a search warrant, probable cause, or individualized suspicion if there is a "special need" for such a search and if the search is for a purpose distinguishable from ordinary enforcement purposes. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); s*ee also Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

The "special needs" exception is based upon a balance of the governmental interest, the expectation of privacy, and the nature of the intrusion. *Green v. Berge*, 354 F.3d 675, 677-78 (7th Cir. 2004)(citing *Skinner*, 489 U.S. 602). However, this Court has refused to allow the identification of "special needs" as a pretext for warrantless searches for law enforcement purposes. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). The government must identify some generalized purpose which justifies dispensing with the "individualized suspicion" usually required for a search. *Id.* at 41. That interest cannot be simply "crime control." *Id.* at 42; *City of Indianapolis*, 531 U.S. 32, 44.

Should the Court rule in this case that a warrant is unnecessary to conduct GPS surveillance of individuals in motor vehicles, it would effectively overrule the Court's prohibition on the use of warrantless searches and seizures for the ordinary needs of law enforcement. In the case of EOBRs, it is undisputed that FMCSA tailored the provisions of the EOBR rule for the purposes of helping law enforcement to enforce the hours-of-service rule. In the Notice of Proposed Rulemaking, the Agency states: "To assist in the enforcement of the HOS regulations generally, and thus improve driver safety and welfare, FMCSA proposes to require EOBR use by motor carriers…" In attempting to balance the private burdens and public interest in the Final Rule, the Agency acknowledges law enforcement as the governmental interest in the rule:

> No commenter has provided information demonstrating competitive harm-a showing mandated by FOIA-would occur from disclosure of EOBR data as proposed in the NPRM. In the absence of such a showing, the Agency has determined today's final rule, in conjunction with existing legal authorities, properly balances the need to safeguard proprietary information against the need to enforce safety statutes and regulations.

Electronic On-Board Recorders for Hours-of-Service Compliance, 75 Fed. Reg. 17208-01, 17221-2.

Under federal law, drivers who violate the federal motor carrier safety rules are liable for civil administrative fines, *see* 49 U.S.C. § 521(b)(2), and criminal sanctions up to $25,000 and imprisonment of not more than one year. *See* 49 U.S.C § 521(b)(6) and 49 U.S.C. § 526. But, "the individual states are the primary enforcers of the highway safety regulations at

roadside inspection." *National Tank Truck Carriers v. Federal Highway Administration*, 170 F.3d 203, 205 (D.C. Cir.1999). As the primary enforcers of federal motor carrier safety rules, and therefore the primary governmental users of EOBRs, states also impose sanctions, including criminal penalties, for violations of the hours-of-service rules.[8]

Notably, FMCSA's only stated purpose of the mandated use of EOBRs is to "increase compliance" with HOS requirements. The corollary to that purpose is to enforce compliance by sanctioning the issuance of civil and criminal and violations. The Final Rule in EOBR I and the proposed rule in EOBR II mandate that EOBRs have specific technical features so that local, state, and federal law enforcement officials may access and use EOBR data to discern violations of the hours-of-service rules and to impose civil and criminal sanctions directly against drivers who commit those violations. This regulatory scheme embraces no particularized suspicion that a crime has been committed. EOBRs do not fit into the

[8] *See e.g.*, Illinois statutes: 625 ILCS 5/18b-105 (adopting the federal hours-of-service Rules) and 625 ILCS 5/18b-107 and 625 ILCS 5/18b-108 (providing civil and criminal penalties for violation of the hours-of-service rules, among others); Indiana statutes IC 8-2.1-24-18 (adopting the federal hours-of-service rules, among others) & 8-2.1-24-24 Violation, 8-2.1-24-26 Civil penalty, and 34-28-5-4 Maximum judgments; and Wisconsin statutes: Wis. Adm. Code s Trans 325.02 (order of the Secretary of Transportation adopting the federal HOS rules, among others), W.S.A. 194.37 (giving the Dept. of Transportation authority to enforce its orders) W.S.A. 194.11(allowing agents of the department to stop commercial motor vehicles to enforce the rules), and W.S.A. 194.17 (providing penalties for violations of orders of the Secretary). Every state imposes such penalties as a participant in the Motor Carrier Safety Assistance Program. 49 C.F.R. Part 350.

special needs exception. But if the Court rules in this case that a warrant is not necessary to use GPS devices for law enforcement purposes, then the Government will no longer need to establish a special needs exception in order to use such devices, and will be liberated to use them to meet the "ordinary needs" of law enforcement. The Court should carefully guard against the dilution of this standard in crafting its ruling in this case.

## CONCLUSION

For these reasons, and those set forth in the Respondent's brief, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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