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 THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF THE NATION'S CAPITAL AS A*MICI CURIAE* IN SUPPORT OF RESPONDENT

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The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*, including in numerous cases involving the Fourth Amendment. In particular, the ACLU and its members have long been concerned about the impact of new technologies on the constitutional right to privacy. The ACLU of the Nation's Capital is the Washington, D.C. affiliate of the ACLU. It filed an amicus brief in this case before the D.C. Circuit.

STATEMENT OF THE CASE

In the fall of 2005, members of an FBI-D.C. Metropolitan Police Department Safe Streets Task Force sought to track the movements of Antoine Jones in order to gather evidence for an ongoing narcotics investigation. On September 27, 2005, the task force installed a Global Positioning System ("GPS") device on a motor vehicle registered to Jones's wife. J.A. 107, 101. The GPS device remained attached to the car until October 24, 2005. J.A. 109.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No party's counsel authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No party or entity other than *amici*, their members, or their counsel, made a monetary contribution to this brief's preparation or submission.

During this twenty-eight day period, the GPS device allowed the task force to pinpoint the location of the car at every moment. It had an antenna that received signals from satellites; the device used these signals to determine its latitude and longitude every ten seconds, accurately pinpointing its location to within 50-100 feet. J.A. 79-80. Members of the task force connected that data to software that plotted the car's location and movements on a map. J.A. 108-109. The software also created a comprehensive record of the car's locations.

Depending on the needs of the investigation, members of the task force sometimes monitored the GPS device live and other times reviewed its stored data. J.A. 107-108. The task force could track the car's individual trips as well as identify patterns in the car's daily routine. For instance, it could note repeated visits to particular locations. Over the 28-day period during which the GPS device was installed, the task force had constant access to the car's location, except during a five-day period after the GPS device's batteries had run out. During this period, task force members visited Jones's car to install new batteries. J.A. 111.

The task force would not have been able to obtain this comprehensive real-time and historical record of the car's movements without the aid of GPS technology. The GPS device allowed the task force to collect far more information – and far more detailed information – than it would have been able to collect through physical surveillance, and to collect this information more covertly and at minimal expense.

This round-the-clock GPS surveillance was undertaken without a valid search warrant. A

warrant had been obtained on September 16, 2005, but its authorization expired before the GPS device was installed. J.A. 31-34. The government has not relied on that warrant to justify its actions in this case. Pet. App. 38a-39a n.*, 66a-74a, 83a. In any event, the September 16th order authorized installation of the GPS device only within the District of Columbia, but the GPS device was installed while the car was parked in Maryland. J.A. 98-100.

The government used the GPS data as a central part of its criminal case against Jones for his alleged involvement in a drug trafficking conspiracy. In October 2005, investigators arrested Jones and his fellow defendants and charged them under 21 U.S.C. § 846 with conspiracy to distribute cocaine, among other crimes. J.A. 35. The government used the GPS data to establish Jones's presence at the house alleged to have been the center of the drug activity. J.A. 112. Jones moved to suppress the GPS evidence prior to trial. J.A. 12. The district court denied the motion, allowing the government to use the GPS data except data recorded while the car was parked in Jones's private garage. J.A. 14-15.[2] A jury acquitted Jones of all charges except for a conspiracy charge, on which there was a hung jury. J.A. 16. Jones was then retried on the conspiracy charge and convicted. He was sentenced to life in prison. J.A. 66-69.

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[2] This was a meaningless exclusion. The GPS device did not transmit data when the vehicle was not moving, J.A. 84, and it told the police, within ten seconds, when the vehicle arrived at Jones's garage and when it departed.

The Court of Appeals reversed the conviction, concluding that the government's use of a GPS device to record the "totality and pattern of [Respondent's] movements from place to place," Pet.App. 22a, for nearly a month intruded upon his reasonable expectation of privacy. Pet.App. 16a. Having determined that the GPS tracking was a search under the Fourth Amendment, the Court of Appeals ruled that the GPS data should have been excluded because the government had not obtained a valid warrant or justified its failure to do so under the well-recognized and limited exceptions to the warrant requirement. Pet.App. 38a-39a.

This Court granted certiorari to decide whether warrantless GPS surveillance constitutes a "search" under the Fourth Amendment and whether the government violated the Fourth Amendment by installing a GPS tracking device without a valid warrant and without consent.

SUMMARY OF ARGUMENT

GPS technology provides law enforcement agents with a powerful and inexpensive method of tracking individuals over an extensive period of time and an unlimited expanse of space as they traverse public and private areas. Unless this Court concludes that GPS tracking is a Fourth Amendment search, any individual's movements could be subject to remote monitoring, and permanent recording, at the sole and unfettered discretion of any police officer. Without judicial oversight, the police could track unlimited numbers of people for days, weeks, or months at a time. Americans could never be confident that they were free from round-the-clock

surveillance of their activities. With a network of satellites constantly feeding data to a remote computer, police could, at any instant, determine an individual's current or past movements and the times and locations that he or she crossed paths with other GPS-tracked persons.

With technology that is already available, the police could monitor the movements of all members of disfavored political organizations, or all congregants at particular places of worship. Under the government's submission, the police could engage in this surveillance even if the targeted individuals were completely law abiding and presented no reasonable ground for any suspicion. Moreover, they could engage in this surveillance without judicial oversight of any kind.

This Court has never suggested that such surveillance is beyond the concern of the Fourth Amendment. *See United States v. Knotts*, 460 U.S. 276 (1983). Yet, the government candidly acknowledges that it wishes to use GPS technology "to gather information to *establish* probable cause," Pet.Br. at 50 (emphasis in original), rather than to deploy it after probable cause has been established and a warrant has issued.

The government seeks to justify its position by arguing that no reasonable expectation of privacy attaches to information that is capable of being ascertained by others, because such information has been "knowingly expose[d] to the public." Pet. Br. 18-19 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). But not all information that is capable of being ascertained by others has been knowingly exposed to the public. Indeed, if the Court had

accepted the government's equation in *Katz*, the Court would have been obligated to conclude that even the content of telephone calls warranted no Fourth Amendment protection, because a call made from a public phone booth may be monitored by an external wiretap or overheard by passersby. The Court did not endorse the government's reasoning in *Katz*, and it has not endorsed it since.

To hold that Americans lack a reasonable expectation of privacy in any information that is capable of being ascertained by others would have been problematic a century ago; today, such a holding would be devastating. Today's powerful technologies make it possible for government actors to ascertain many facts that individuals would prefer to keep private. GPS devices are only one of numerous new technologies capable of exposing private facts about individuals who have done nothing more than set foot outside of their homes. The cost of being out of doors should not include being targeted by a battery of technologies that possess surveillance capabilities far exceeding those of the unaided five senses.

Amici agree that the government's GPS tracking of Jones's movements was a Fourth Amendment search.[3] The information gathered was not knowingly exposed to the public. While Americans are obligated to take ordinary precautions to protect their privacy, they are surely not obligated

[3] *Amici* also agree with Respondent that the installation of a GPS device on Respondent's car meaningfully interfered with his possessory interests and therefore constituted an unconstitutional seizure under the Fourth Amendment. This brief, however, does not address that issue.

to examine the undercarriages of their vehicles for covertly-installed GPS devices every time they go for a drive. The fact that discrete portions of one's life may be observed by friends, neighbors, and passers-by surely does not mean that Americans expect that the government will maintain a comprehensive, collated, and possibly permanent record of their movements each time they get into their cars. Pet.App. 29a ("[t]he difference is not one of degree but of kind"). Moreover, the type of information gathered by GPS devices exposes patterns of activity that are independently entitled to constitutional protection—every trip to a political meeting, medical appointment, or house of worship. This Court should hold that location data of the kind at issue here is properly considered private because it is not *knowingly* exposed to the public—just as the telephone call in *Katz* was not *knowingly* exposed to the public—and conclude that law enforcement agents may access it only by demonstrating probable cause and obtaining a warrant.

ARGUMENT

I. THE MERE FACT THAT INFORMATION IS CAPABLE OF BEING ASCERTAINED BY OTHERS DOES NOT DIVEST IT OF FOURTH AMENDMENT PROTECTION.

This Court has never held that all facts that are capable of being ascertained by others have been "knowingly expose[d] to the public," *Katz*, 389 U.S. at 351, and therefore devoid of constitutional protection. The government's proposal that, "when the police make observations of matters in public view, the assistance of technology does not transform

the surveillance into a search," Pet. Br. 22, does not fairly address the issue presented in this case. It wrongly assumes an expansive reading of what is "in public view"—one that is out of step with this Court's prior decisions, which have held that only facts *knowingly* exposed to others are divested of constitutional protection. Respondent did not knowingly expose a recorded collection of all his movements, for nearly a month, to the public. To accept the government's argument would dramatically shrink the scope of the Fourth Amendment because today's technologies make it easy to ascertain facts that individuals reasonably prefer and intend to keep private.

A. This Court Has Never Ruled That All Information Capable of Being Ascertained By Others Has Been Knowingly Exposed To The Public.

A person has not "knowingly exposed" a fact to the public simply because someone could gain access to it by some means. Indeed, if all information that could be ascertained by others lacked constitutional protection, then virtually nothing would be protected. The rule proposed by the government finds no support in this Court's prior decisions. Nor does it comport with the reality of modern life. In fact, had the Court accepted the government's construction of the "knowingly exposed" test in *Katz*, it would have been compelled to conclude that even telephone conversations are not protected.

In *Olmstead v. United States*, the Court considered whether the Fourth Amendment protects the content of telephone calls, and wrongly concluded that it did not. 277 U.S. 438 (1928). The majority

held that "[t]he reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment." *Id.* at 466.

In his dissent, Justice Brandeis recognized that the march of technological progress would not end with the telephone. This insight shaped his view of how to interpret the Fourth Amendment. He wrote, "[c]lauses guaranteeing to the individual protection against specific abuses of power, must have a . . . capacity of adaptation to a changing world." *Id.* at 472. The alternative, Justice Brandeis believed, was to allow the Fourth Amendment to weaken and become increasingly marginalized, a result that would "place the liberty of every man in the hands of every petty officer." *Id.* at 474 (internal quotation marks omitted). He wrote that "in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be." *Id*. (internal quotation marks omitted). More concretely, Justice Brandeis recognized that one of the core values protected by the Constitution is the right to exchange thoughts in private and that "[t]here is, in essence, no difference between the sealed letter and the private telephone message." Both, in his view, were entitled to constitutional protection. *Id.* at 475.

Thirty years later, the Court endorsed Justice Brandeis's reasoning and abandoned *Olmstead's* crabbed view of the Fourth Amendment. As Judge Posner has explained, "the Supreme Court has

insisted, ever since *Katz v. United States*, that the meaning of a Fourth Amendment search must change to keep pace with the march of science." *United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) (Posner, J.) (citation omitted).

In *Katz*, a majority of the Court, referencing the values protected by the Fourth Amendment, concluded that the government must obtain a warrant based on probable cause before eavesdropping on a telephone conversation. 389 U.S. at 351. In what has become a cornerstone of Fourth Amendment jurisprudence, the Court wrote:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. (citations omitted).

Katz "decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property." *Kyllo v. United States*, 533 U.S. 27, 32 (2001).[4] Instead, the Court drew a dichotomy between "[w]hat a person knowingly exposes to the public," on the one hand, and "what he seeks to preserve as private," on the other. 389 U.S. at 351. Justice Harlan's concurrence posited that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that

[4] This is not to say that property notions are irrelevant to the Fourth Amendment but, after *Katz*, they are no longer the sole determinant.

society recognizes as reasonable." *Kyllo*, 533 U.S. at 33 (citing *Katz*, 389 U.S. at 361).

Katz makes clear that otherwise-protected information does not lose its protected character merely because it can be ascertained by others without physical intrusion into a protected space. Specifically, *Katz* held that even though "the eavesdropping device picked up only sound waves that reached the exterior of the phone booth," *Kyllo*, 533 U.S. at 35, Charles Katz had a reasonable expectation of privacy in the content of his phone conversations, *Katz*, 533 U.S. at 351. A person who shuts the door of a public phone booth is "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* at 352.

In *Kyllo*, the Court again rejected the proposition that information that is ascertainable by others has by definition been knowingly exposed to the public. 533 U.S. at 35. The Court held that the use of a thermal imaging device to measure heat emanating from a home was a search, even though heat that has escaped from a building is ascertainable by others without invading or even touching the house. *Id.* at 40. Homeowners need not swaddle their interior rooms with insulation to manifest an expectation that the heat-generating activities in their homes will not be subject to warrantless searches. While the dissent in *Kyllo* argued that there had been no search because "the ordinary use of the senses" can in some circumstances allow a neighbor to gauge the heat radiating from a building, for example by observing snow melt patterns, *id.* at 43, the majority found this to be "quite irrelevant," *id.* at 35 n.2. "The fact that

equivalent information could sometimes be obtained by other means," the Court wrote, does not make lawful the use of means that violate the Fourth Amendment." *Id.* In short, the Court was not willing to approve the warrantless use of technology to obtain information about individuals simply because that information could in some circumstances be ascertained by others.

Between the bookends of *Katz* and *Kyllo* the Court repeatedly recognized reasonable expectations of privacy even where facts were ascertainable by others. In *Bond v. United States*, 529 U.S. 334, 338-39 (2000), the Court held that a police officer's manipulation of a soft-sided bag on a bus luggage rack was a search, even though travelers know that other travelers have access to bags on the rack and may handle them. Travelers are not obligated to purchase hard-sided luggage to protect their belongings from the poking and prodding fingers of law enforcement agents. In *Walter v. United States*, 447 U.S. 649, 657-59 (1980), the Court found that an individual had a reasonable expectation of privacy that required the government to demonstrate probable cause and obtain a warrant to view his motion pictures, even though the government had lawfully come into their possession and could readily view them using a projector. And in *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Court held that a public employee can have a reasonable expectation of privacy in personal effects kept in his or her office desk and file cabinets, even though the employee knows that supervisors and colleagues have access to the employee's office.

The principle established by these cases is that the mere possibility that private information can be ascertained by others does not divest it of Fourth Amendment protection. The government's submission here is reminiscent of the majority's discredited reasoning in *Olmstead*. The government contends, in essence, that Jones's location information was unprotected by the Constitution because his travels did not take place entirely within his garage. But failure to guard against every possible means of access to one's life cannot fairly be equated with "knowing exposure."

B. In the Twenty-First Century, A Rule That All Information Capable of Being Ascertained By Others Has Been Knowingly Exposed to the Public Would Shrink The Fourth Amendment Into Irrelevance.

To hold that all facts capable of being ascertained by others are unprotected by the Fourth Amendment would radically constrict Americans' privacy rights. More and more facts about each of us are being collected and stored, "accessible at any time to reconstruct events or track behavior." Lawrence Lessig, *Code 2.0*, at 203 (2006). If the Court accepts the government's proposed rule, there will be little left of the privacy that Americans have long relied upon and that the Fourth Amendment was intended to guarantee.

GPS devices are among the most powerful of the currently available technologies that enable the government to ascertain what would otherwise be private facts. GPS devices allow lengthy and precise tracking of a vehicle's every movement, with minimal

effort and expense. Not even the most dedicated police squad could follow its target in such a manner. And while this case involves law enforcement agents attaching a GPS device to the undercarriage of a car, the increased prevalence of integrated car navigation systems may soon make even this minimal legwork unnecessary. *See, e.g.*, *United States v. Coleman*, No. 07-20357, 2008 WL 495323, at * 1 (E.D. Mich. Feb. 20, 2008) (discussing issuance of court order requiring car navigation company to disclose location data to law enforcement).[5]

GPS technology may be used in even more intrusive ways. Tracking cars is an imperfect way of tracking people. Cellular telephones are a better proxy because many people carry their cell phones with them wherever they go, in private as well as public spaces. There are now more than 302 million active cell phone subscriber accounts in the United States.[6] The latest statistics indicate that 26.6% of households no longer even maintain a landline. *Id.* The government's proposed rule would effectively

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[5] Systems such as OnStar retain even more information; OnStar gleans information about "when your car's ignition is turned on or off and when your fuel is refilled," vehicle speed, safety belt usage, tire pressure, oil life remaining, and use of the car's features. OnStar Privacy Practices, Jan. 1, 2011, *available at* http://www.onstar.com/web/portal/privacy. Chrysler's new navigation system, Mopar EVTS, offers excessive speed notifications, arrival and departure notifications, historic maps of a vehicle's past location, and online tracking. Mopar EVTS, Chrysler, (2011), *available at* http://www.mopar.com/accessories/evts.html.

[6] CTIA, The Wireless Association, Wireless Quick Facts, *available at* http://www.ctia.org/advocacy/research/index.cfm/aid/10323.

turn each of these cell phones into an instrument of state surveillance to be activated at the unsupervised whim of any law enforcement officer.

With the assistance of cell phone companies, law enforcement agents already track cell phones in real time or check on their past locations by obtaining records cell phones companies keep. According to the Department of Justice, Verizon stores the past locations of its customers for one year while AT&T keeps records "from July 2008." Department of Justice, Retention Periods of Major U.S. Cellular Service Providers (Aug. 2010). In most circumstances, this surveillance is judicially approved, but under the government's proposed rule, it could take place without judicial oversight.[7]

Increasingly, law enforcement agents do not even need the cooperation of cell phone companies to track the location of cell phones. They can now do so on their own using devices variously known as triggerfish or stingrays. Department of Justice, Electronic Surveillance Manual 171 (2005), *available at* http://www.justice.gov/criminal/foia/docs/elec-sur-manual.pdf. These devices imitate cell phone towers, forcing cell phones to register their location so that they can be tracked. Jennifer Valentino-DeVries, *'Stingray' Phone Tracker Fuels Constitutional Clash*, Wall St. J., Sept. 22, 2011. They can also be used to identify all of the phones in a given location. Jennifer

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[7] Law enforcement agencies rely on the provisions of the stored communications acts to obtain historical cell phone location records. *See, e.g.*, *In re The Application Of The United States For An Order Directing A Provider Of Elec. Commc'n Serv. To Disclose Records To The Gov't*, 620 F.3d 304, 307-08 (3d Cir. 2010).

Valentino-DeVries, *How 'Stingray' Devices Work*, Wall St. J. Digits Blog (Sept. 21, 2011), *available at* http://blogs.wsj.com/digits/2011/09/21/how-stingray-devices-work.

The hundreds of millions of Americans who choose to drive or use cell phones have not forfeited their privacy interest in their movements merely by availing themselves of technologies so commonplace that it would be difficult to live in society without them. Concluding that a person has no reasonable expectation of privacy in his movements because they are capable of being ascertained by others would divest Americans of privacy they have long enjoyed and continue to desire.

The government's proposed rule would have implications for other kinds of sensitive information as well. For example, facial recognition systems, too, enable the government to ascertain facts that individuals have not knowingly exposed to the public. A recent *Wall Street Journal* article described handheld facial recognition cameras that enable law enforcement agents to "snap a picture of a face from up to five feet away, or scan a person's irises from up to six inches away, and do an immediate search to see if there is a match with a database of people with criminal records." Emily Steel & Julia Angwin, *Device Raises Fear of Facial Profiling*, Wall St. J., July 13, 2011, at A1. Additional databases (*e.g.,* of people who have submitted insurance claims for drug treatment, or people who have defaulted on their mortgages) could obviously be added to the search. At $3,000 apiece, there is no meaningful financial barrier to the widespread use of these devices by law enforcement. *Id.* While walking around in public has

always brought with it the possibility of being recognized by an acquaintance, that is very different from having one's life history immediately available to every police officer with a fancy camera.

Americans who choose to step outside their homes have surely not thereby forfeited their privacy interest in their arrest records, medical histories and credit ratings. Concluding that a person has no privacy interest in his most personal information because some aspects of that information, frequently in fragmented form, are capable of being ascertained by others would deprive Americans of the privacy they have traditionally enjoyed even in public places. Pet.App. 26a ("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 of those movements is not just remote, it is essentially nil").

This Court has been mindful that the rules it adopts "must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 36. Technologies that enable the monitoring and recording of a person's travels and identity are currently the most widely distributed and advanced tools that make it possible to ascertain traditionally private facts, but there are others on the horizon. For example, new "artificial nose" technology may allow government agents to detect odors from human perspiration that reveal details about the perspirer's health, history of drug or alcohol consumption, and emotional state. The Department of Homeland Security has funded studies to determine whether human body odor may indicate whether a person is telling the truth or

lying. Shaun Waterman, *Body Odor: New Proof of ID?*, United Press Int'l, Mar. 10, 2009; *see also* Thomas Frank, *Anxiety-Detecting Machines Could Spot Terrorists*, USA Today, Sept. 18, 2008, at 2A ("The futuristic machinery works on the same theory as a polygraph, looking for sharp swings in body temperature, pulse and breathing that signal the kind of anxiety exuded by a would-be terrorist or criminal. Unlike a lie-detector test that wires subjects to sensors as they answer questions, the 'Future Attribute Screening Technology' (FAST) scans people as they walk by a set of cameras.").[8]

Until now, courts have not had to grapple seriously with the distinction between facts that are "knowingly exposed" and facts that are ascertainable by others, because technology has been relatively modest in its power. The beeper at issue in *Knotts*, 460 U.S. at 277, was crude and limited, predating the availability of sophisticated surveillance technology. For most of our history, the Court has been able to rely on the natural limitations of human perception, perhaps assisted by magnifying glasses and flashlights, as a substantial if unacknowledged barrier on the ability of the state to monitor the people. That barrier is falling. Given that reality, the Court should not allow the Fourth Amendment to become a victim of technological obsolescence.

Allowing the Fourth Amendment status of a given fact to hinge on whether it is technically

[8] Needless to say, the "terrorists" detected by such machines may be people who are anxious because they're about to give an important business presentation, or have just been told they have cancer, or are walking toward a job interview.

capable of being ascertained by others would unmoor the Fourth Amendment from any consistent meaning. The scope of the Fourth Amendment would continuously shrink as the technologies of surveillance evolve.

In sum, the Court should not accept the government's suggestion that, "when the police make observations of matters in public view, the assistance of technology does not transform the surveillance into a search." Pet. Br. 22. If "in public view" means ascertainable by members of the general public—however different those observations may be in quality and quantity from the surveillance that the government seeks to undertake—then the government's proposed rule is in conflict with this Court's decisions recognizing that people can have privacy expectations even in facts that others can technically ascertain; it would shrink the scope of the Fourth Amendment because today's powerful technologies allow so much information about all of us to be ascertained by others; and it would destabilize constitutional privacy protection because the constantly-evolving state of technological development would dictate an ever-shrinking Fourth Amendment.

II. THE GOVERNMENT'S GPS TRACKING OF JONES'S MOVEMENTS WAS A FOURTH AMENDMENT SEARCH.

Amici agree with the reasons stated in Respondent's brief that use of the GPS device constituted a Fourth Amendment search. As Respondent explains, there are three reasons why even short-term tracking via GPS constitutes a

search requiring a warrant and probable cause. Resp. Br. 16.

First, GPS devices must be installed by intruding onto private property, specifically an individual's car, in order to serve the government's purpose. *Id.* at 16-24. Just as the government's embedding of a spike mike in the wall of a house was found to violate the Fourth Amendment in *Silverman v. United States*, 365 U.S. 505, 512 (1961), so, too, attaching a GPS device to Jones's car renders the subsequent use of that device a search.

Second, GPS tracking is extremely invasive of personal privacy. *Id.* at 24-28. It enables law enforcement to capture the details of someone's movements for months on end unconstrained by the normal barriers of cost and officer resources. *See United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J, dissenting from denial of rehearing en banc) ("The modern devices used in Pineda-Moreno's case can record the car's movements without human intervention—quietly, invisibly, with uncanny precision. A small law enforcement team can deploy a dozen, a hundred, a thousand such devices and keep track of their various movements by computer, with far less effort than was previously needed to follow a single vehicle.").

Third, GPS devices generate data that could not be obtained through other means. Resp. Br. 28-29. No person could generate the constant and scientifically precise stream of data about another's whereabouts that is generated by a GPS device. *A fortiori*, as Respondent argues, the government's use

of GPS tracking for 24 hours a day for four weeks constitutes a search. *Id.* at 42-45.

But GPS surveillance of the sort the Government defends in this case violates the Fourth Amendment for still another reason: because it exposes patterns of activity, such as attendance at political meetings and visits to places of worship, that are independently entitled to constitutional protection.

As other courts have explained, GPS tracking—particularly over a prolonged period—can reveal a great deal about a person's values, associations, and beliefs. As the D.C. Circuit explained, "[a] person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts." Pet.App.30a. *See also People v. Weaver*, 909 N.E.2d 1195, 1199 (N.Y. 2009) ("Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on."); *State v. Jackson*, 76 P.3d 217, 223 (Wash. 2003) (en banc) ("In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments,

associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one's life."); *United States v. Cuevas-Perez*, 640 F.3d 272, 286 (7th Cir. 2011) (Wood, J., dissenting) ("The technological devices available for [monitoring a person's movements] 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.").

To know where a person goes is to know who he is—how he spends his time and, by extension, what he values. Pet.App.30a. This Court has recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and has also acknowledged that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460, 462 (1958). In *NAACP v. Alabama*, the Court held that Alabama could not compel the NAACP to divulge its membership list. That holding would have little force if Alabama could simply have attached GPS tracking devices to cars parked outside NAACP meetings and tracked those cars to their owners' homes, thereby ascertaining members' identities.[9]

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[9] Such information gathering might be subject to First Amendment challenge if it were known, but GPS surveillance is by its nature covert. This Court has recognized that Fourth Amendment safeguards are more important, not less, when

Beyond private associational activity, GPS tracking can also reveal a person's religious beliefs, or the existence of medical issues, each of which is also independently entitled to constitutional protection. The First Amendment protects one's "assembl[ance] with others for a worship service," *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990), but the exercise of this right would be seriously burdened by knowledge that the government is free to attach a GPS tracking device to every vehicle parked outside of a particular church, temple, or mosque. Similarly, an individual's right to make private medical decisions would suffer if her every doctor's visit could be monitored and recorded by a deputy sheriff or a District Attorney on a fishing expedition for evidence of painkiller abuse or late-term abortions. *See Whalen v. Roe*, 429 U.S. 589, 600 (1977) (discussing a patient's "interest in the nondisclosure of private information and also their interest in making important decisions independently").

As Respondent explains, the government's surreptitious GPS tracking of his movements violated his constitutional rights. Individuals reasonably expect that they will not be tracked in this manner even if they do not examine the undercarriages of their vehicles each and every time they drive. *Amici* agree with Respondent's demonstration of why this tracking violates the Fourth Amendment, and urge the Court to recognize that the power of GPS tracking to burden many other

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First Amendment rights are at stake. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978); *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

constitutionally protected activities is a strong additional reason to find that it should be carried out only with a judicially issued probable cause warrant.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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