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No. 10-1259

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTOINE JONES

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

REPLY BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Respondent's central contention is that GPS surveillance of a vehicle's public movements for *any* period of time amounts to a Fourth Amendment search. Br. 10. That position—which is far broader than the court of appeals' holding—fails. Although GPS technology is more advanced than the beeper technology used to follow a vehicle in *United States* v. *Knotts*, 460 U.S. 276 (1983), it reveals the same type of information—the movements of a car on "public thoroughfares"—in which *Knotts* held that a person has "no reasonable expectation of privacy." *Id.* at 281. And respondent's backup argument (Br. 12-13)—that installation and use of the GPS monitor is a "seizure"—cannot be reconciled with *United States* v. *Karo*, 468 U.S. 705, 712-713 (1984), which found no "meaningful interference with" an indi-

vidual's property interests despite a beeper's "technical trespass" in an item the individual owned.

Under this Court's Fourth Amendment precedent, the GPS monitoring in this case was neither a search nor a seizure. The Court should not expand those doctrines to prohibit the government from acquiring information "knowingly expose[d] to the public," *Katz* v. *United States*, 389 U.S. 347, 351 (1967), based on hypothetical concerns arising from "emerging technology." *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2629 (2010). If society deems such limitations warranted, it may impose them through the legislative process—as it has in other contexts. And, in any event, if the Court determines that GPS monitoring of a vehicle in public spaces implicated the Fourth Amendment, the activities here, based on individualized suspicion, were constitutionally valid.

A. Respondent's Contention That Any Period Of GPS Tracking Constitutes A Search Conflicts With *Knotts*

Respondent barely defends the court of appeals' "mosaic" approach to the Fourth Amendment. Pet. App. 29a. Instead, respondent contends (Br. 14-30) that a search occurs in GPS monitoring of a vehicle's public movements for *any* period of time. But *Knotts* held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," and it therefore rejected a claim that beeper monitoring constituted a "search." 460 U.S. at 281-282.

Respondent contends (Br. 16-30) that GPS technology is different from beepers in ways that transform its use into a search. See also Yale Law Sch. Info. Soc. Project Scholars *et. al.* Amicus Br. (Yale Amicus Br.) 20-28; Center for Democracy & Tech. *et al.* Amicus Br. 16-22.

According to respondent, GPS surveillance: (1) involves physical contact with his property (Br. 16-24); (2) poses unique dangers to privacy because of its low cost (Br. 24-28); and (3) records data that is "different from what the human eye observes" (Br. 28-30). Even if true, those characteristics do not create a legitimate expectation of privacy in the movements of vehicles on public roads.

1. Physical placement of a GPS device on a vehicle does not transform GPS surveillance into a search

a. Respondent contends (Br. 16-17) that the "unauthorized physical intrusion" in placing a GPS device on his vehicle is a "feature of * * * GPS surveillance" that gives rise to reasonable "privacy expectations."

i. Respondent relies primarily on *Silverman* v. *United States*, 365 U.S. 505 (1961), in which the Court found a Fourth Amendment violation when officers heard conversations inside a row house by inserting a "spike mike" under the baseboard of an adjoining house to contact the defendants' heating duct. *Id*. at 506-507. The Court reasoned that "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by [the defendants]." *Id*. at 509. The Court distinguished (*id*. at 510-512) the non-invasive surveillance of conversations through a detectaphone touching the wall of an adjoining office, held not a search in *Goldman* v. *United States*, 316 U.S. 129 (1942).

Silverman relied on a "physical encroachment" concept (365 U.S. at 510) that the Court repudiated in *Katz*. *Katz* held that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S. at 352-353; see also *Kyllo* v. *United States*, 533 U.S. 27, 32 (2001)

(“We have * * * decoupled violation of a person’s Fourth Amendment rights from trespassory violation of his property.”); *Karo*, 468 U.S. at 712-713 (“physical trespass” “is neither necessary nor sufficient to establish a constitutional violation”).

ii. Respondent incorrectly contends (Br. 19 & n.2) that, although a physical trespass is no longer necessary for a Fourth Amendment search, *Silverman* still means that if the government “usurps” property to obtain evidence, “its conduct is more likely to be a search.” The relevant question under *Katz* is whether the individual has a reasonable expectation of privacy in the information the government acquires, and for information “knowingly expose[d] to the public,” the answer is that he does not. 389 U.S. at 351. Physical contact may be relevant to the “search” inquiry when the contact is used to obtain information otherwise kept private, as with the “spike mike” in *Silverman*, 365 U.S. at 511, or the “physical manipulation” of a bus passenger’s bag in *Bond* v. *United States,* 529 U.S. 334, 337-339 (2000). But when the contact does not reveal private information, it does not convert observations into a search.

In *Karo*, the installation of a beeper in a canister of chemicals transferred to the defendant was not a search because the placement of the device “conveyed no information that [the defendant] wished to keep private.” 468 U.S. at 712. Likewise in *Knotts*, the Court attached no significance to the physical presence of the beeper on respondent’s can, instead the Court focused on what the beeper revealed: a driver’s location on public roads accessible “to anyone who wanted to look.” 460 U.S. at 281.

Respondent attempts to distinguish (Br. 35-36) *Karo* and *Knotts* by noting that the physical intrusion in those

cases was not "unauthorized" because the beepers were installed with the consent of the cans' initial owners before the cans were transferred to the defendants. See also Constitution Project Amicus Br. 14-15. That distinction has no constitutional significance. Once a hidden monitoring device is installed, its presence is just as much an "unauthorized" intrusion on a later owner's property interests as an initial covert installation. *Karo* found that intrusion irrelevant, because the electronic device itself neither invaded privacy interests nor "interfered * * * in a meaningful way" with "anyone's possessory interest[s]." 468 U.S. at 712. The relevant issue for the Court was the informational value of the device and its impact on privacy—issues unaffected by property questions.

b. Respondent incorrectly contends (Br. 11, 31-35) that the government argues that *only* "technological intrusions into *private places* can infringe a legitimate expectation of privacy." Br. 31 (quoting U.S. Br. 22) (emphasis added by respondent). That is not the government's position; that position would contradict *Katz*, on which the government relies. U.S. Br. 17-18.[1] Rather, the government's position is that "a person has no reasonable expectation of privacy in *information* that is exposed to public view." *Id.* at 18 (emphasis added); see also *id.* at 19 ("The Fourth Amendment does not preclude the government from using technology to collect information that is in public view, because the technology does not make the information collected any less public.").

[1] Although respondent critiques (Br. 34) the government's use of ellipses, this Court has used them identically in quoting *Katz*. *Maryland* v. *Macon*, 472 U.S. 463, 469 (1985); *United States* v. *Miller*, 425 U.S. 435, 442 (1976).

c. Respondent further contends (Br. 20 & n.3) that the government infringed his reasonable expectation of privacy because a private individual could not have placed a GPS device on his vehicle without committing a trespass to chattels or perhaps a state law stalking crime. That comparison is inapposite.

i. A trespass to chattels does not constitute a search unless it infringes a reasonable expectation of privacy. See *New York* v. *Class*, 475 U.S. 106, 114 (1986) (an officer's reaching inside a vehicle to move papers that obscured the VIN number on the dash board was not a search; the VIN's mandated visibility made it similar to the exterior of the car, in which the defendant had no reasonable expectation of privacy); *Cardwell* v. *Lewis*, 417 U.S. 583, 591 (1974) (plurality) (officers examined a car's wheel and took paint scrapings from it; "we fail to comprehend what expectation of privacy was infringed"). Because respondent, like the defendants in those cases, had no reasonable expectation of privacy in the exterior of his vehicle (see U.S. Br. 39-41), the law of trespass does not assist him.

ii. Respondent also relies on (Br. 20 n.3) state stalking convictions of private individuals who placed GPS devices on other peoples' cars to establish a purported reasonable expectation of privacy from law enforcement GPS surveillance. But those crimes require following a victim in order to intimidate her, which is not the case here.[2] Police do not use GPS surveillance to intimidate

[2] See Resp. Br. 20 n. 3 (citing, *e.g.*, *People* v. *Sullivan*, 53 P.3d 1181, 1184 (Colo. App. 2002) (noting that defendant told wife he "was aware of where she went and what she did," demonstrating his "motive to instill fear in his victim"); *L.A.V.H.* v. *R.J.V.H.*, No. CN08-05322, 2011 WL 3477016, at *4 (N.J. Super. Ct. App. Div. Aug. 10, 2011) (noting that stalking involves engaging in a course of conduct "that would cause a

suspects. To the contrary, police hope to conduct GPS surveillance without being detected.

More fundamentally, this Court has never looked to whether a private individual would or could conduct comparable surveillance to determine whether the government's collection of information in public view infringes a reasonable expectation of privacy. The police routinely investigate in ways private citizens would not or could not do, such as conducting extended around-the-clock visual surveillance, reviewing a suspect's bank records, installing a pen register on his phone, or examining his trash. Although private individuals may be accused of stalking if they engaged in such activities, the police might do so without implicating the Fourth Amendment. See *Karo*, 468 U.S. at 721; *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *Smith* v. *Maryland*, 442 U.S. 735, 745-746 (1979); *California* v. *Greenwood*, 486 U.S. 35, 44-45 (1988).

Nor does the existence of three state laws prohibiting warrantless GPS surveillance by law enforcement officers suggest that respondent had a reasonable expectation of privacy. Resp. Br. 22 n.4. State laws do not create a reasonable expectation of privacy under the Fourth Amendment. *Greenwood*, 486 U.S. at 43-44 (state law prohibited searching garbage; this Court found no Fourth Amendment search); see also *Quon*, 130 S. Ct. at 2632 (finding no authority for the proposition that a "statutory protection renders a search *per se* unreasonable"); *Virginia* v. *Moore*, 553 U.S. 164, 173 (2008) ("[W]hen States go above the Fourth Amendment minimum, the Constitution's protections concerning

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reasonable person to fear for he[r] safety"); *M.M.* v. *J.B.*, No. A-6292-09T4, 2010 WL 1200329, at *2 (Del. Fam. Ct. Jan. 12, 2010) (same)).

search and seizure remain the same."); *Dow Chem. Co.* v. *United States*, 476 U.S. 227, 232 (1986) ("State tort law governing unfair competition does not define the limits of the Fourth Amendment."); *Oliver* v. *United States*, 466 U.S. 170, 183-184 & n.15 (1984) (officers who trespassed on private land did not violate the Fourth Amendment).

2. The efficiency of GPS technology and its potential for widespread use does not transform GPS surveillance into a search

Respondent further contends (Br. 24-28) that the efficient potential use of GPS technology for prolonged monitoring of citizens "supports the reasonableness of [his] privacy expectations." But respondent never explains how GPS's potential to capture "innocent information" (Br. 25) gives him a reasonable expectation of privacy in the public movements of his vehicle. And the Court should not alter its Fourth Amendment framework to guard against potential future applications of GPS technology to others.

a. This Court has made clear that "Fourth Amendment cases must be decided on the facts of each case," *Dow Chem. Co.*, 476 U.S. at 238 n.5, and the established reasonable-expectation-of-privacy analysis should not be expanded to protect against hypothetical misuses of technology. See *Knotts*, 460 U.S. at 283-284 (reserving constitutional judgment on "such dragnet-type law enforcement practices as respondent envisions" if they "should eventually occur"); see also *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566 (1978) (observing that very few instances had been cited "involving the issuance of warrants for searching newspaper premises," and stating that "if abuse occurs, there will be time enough to deal

with it"). The agents in this case tracked the movements of a single vehicle driven on public streets by an individual suspected of trafficking in cocaine. Pet. App. 2a, 54a. That was a proper use of GPS technology, and it presents no occasion for revamping established doctrine to invent an expectation of privacy in the movements of a car on a public street.

b. In support of his claim that GPS surveillance of a car is intrusive, respondent notes (Br. 26) that his car's GPS device transmitted data while the car was parked in his closed garage. Although the district court excluded data transmitted while the vehicle was parked in the garage, Pet. App. 83a-85a, that data did not infringe his privacy expectations. The vehicle entered the garage in public view, and the GPS device revealed nothing that the officers did not already know. That fact distinguishes GPS surveillance of a vehicle from GPS surveillance using personal effects like clothing, a briefcase, or a purse. See Resp. Br. 24. Under *Karo*, a warrant would be required before police could conduct GPS surveillance using a personal effect that would be carried into private places and that would disclose its location within them. 468 U.S. at 714 (holding that "monitoring of a beeper in a private residence, a location not open to visual surveillance," violates the Fourth Amendment). GPS surveillance of a car does not do that.

Respondent also asserts (Br. 3, 39-40) that abuse of GPS technology is occurring, relying on various articles. The articles provide no details about the basis for GPS surveillance of two specific individuals and fall far short of demonstrating abuse. Respondent also refers to a congressional inquiry into cell-phone tracking by intelligence agencies, but that does not establish law enforcement abuse of GPS. It is no surprise that so few indica-

tions of purported abuse have surfaced. Scarce law enforcement resources are focused on realistic threats. And the use of GPS monitoring today is not nearly as simple or low cost as respondent assumes.[3]

c. But even if the Court were to take the "long view," *Kyllo,* 533 U.S. at 40, and imagine ways in which GPS technology could be more widely used in the future, the possibility of mass collection of GPS data is not a reason to find a constitutional privacy protection for respondent. Respondent suggests (Br. 27) that unless constrained by the Fourth Amendment, law enforcement will be encouraged to widely and indiscriminately use low-cost GPS technology and could conduct suspicionless surveillance of "networks of individuals and even entire neighborhoods, towns, or cities." Speculation that government would collect GPS information just to monitor its citizens should not justify a new constitutional analysis with unforeseeable implications. For example, under respondent's approach, roadside cameras that capture and store images of drivers or pedestrians, or computers that synthesize data from E-Zpass systems, might become Fourth Amendment searches. Unlike

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[3] As the record below reveals (J.A. 93-100), GPS surveillance requires an investment of police resources to install the device while the vehicle is in a public area and the suspect is away from it. The same level of coordination is required any time the battery needs to be replaced. J.A. 110-112, 129-132, 144-146. Although GPS observations are more efficient than visual surveillance, the resource drain in placing devices in every vehicle in a city or town, as respondent posits (Br. 27), makes such scattershot activity unrealistic. And visual, warrantless surveillance is often superior to the information returned by GPS devices. For example, officers could determine who was driving the vehicle, who was a passenger in the vehicle, and whether any passengers or items were loaded or unloaded at any given stop the vehicle made.

Kyllo, which involved protection of privacy at one's home—the "very core" of the Fourth Amendment (533 U.S. at 31)—this case involves travel on public streets, which has never been deemed a private activity. The Court should hesitate before altering settled principles to accommodate hypothetical scenarios that may never come to pass. See *Quon*, 130 S. Ct. at 2629 ("Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations.").

d. Respondent further contends (Br. 25) that even when a GPS device is used to investigate an individual suspect, it infringes privacy interests because the device produces "broad swaths of innocent information." That does not distinguish GPS surveillance from any of a wide variety of non-search investigative techniques that produce a large volume of innocent information about citizens without implicating the Fourth Amendment. For example, officers may follow individuals on foot or in vehicles, use a beeper to track items they are transporting in cars, install pen registers on their telephones, review their bank records, or repeatedly look through their trash. As long as the information police acquire is exposed to public view, police infringe no reasonable expectation of privacy when they acquire "broad swaths" of it.

All of those examples of non-search techniques are conducted outside of public view, yet the Court saw no need to alter its Fourth Amendment doctrine to impose novel constraints. Accordingly, respondent's suggestion (Br. 26) that police will expand their use of GPS without fear of accountability because GPS surveillance is surreptitious and not subject to public scrutiny is unfounded. And when the government secures a conviction

based on evidence from GPS, that fact will be of public record.

e. Finally, there is no reason to believe that the Orwellian scenarios respondent describes would come to pass "unless [GPS monitoring on public streets is] constrained by the Fourth Amendment." Resp. Br. 27. The Fourth Amendment protects against unreasonable searches and seizures, and the monitoring of a vehicle's public movements does not fall within this Court's longstanding interpretations of those terms. But other constitutional constraints—notably the First Amendment's protection of free speech and assembly, and the Fifth and Fourteenth Amendments' guarantee of equal protection—guard against invidious harassment and suppression of political dissent. The Fourth Amendment need not be altered to safeguard those values. See *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

Beyond those protections, if society deems measures necessary or appropriate to guard against the collection of public information using a GPS device, that protection should be afforded through the legislative process, not through novel expansion of search and seizure doctrine. If GPS surveillance could affect everyone, the political process is well-suited to address it. Through legislation, citizens have limited the government's access to pen register data and bank records, even though this Court held in *Smith* v. *Maryland*, *supra*, and *United States* v. *Miller*, *supra*, that obtaining those types of information does not amount to a search or seizure under the Fourth Amendment. See U.S. Br. 35-36. If similar restrictions are to be placed on the collection of public information

obtained through GPS devices, those restrictions should likewise be imposed through the legislative process.

3. The form of data produced by a GPS device does not transform GPS surveillance into a search

The third characteristic of GPS surveillance that respondent asserts (Br. 28-30) contributes to his reasonable expectation of privacy in his vehicle's public movements is that GPS produces a form of evidence that is "different from what the human eye observes." He singles out GPS's production of "longitudinal and latitudinal positions," which differs "in both form and quality from the evidence that can be obtained through visual surveillance." See also Center for Democracy & Tech. *et al.* Amicus Br. 26-31; Yale Amicus Br. 17-18. That characteristic does not distinguish GPS from other devices that are used to acquire public information.

The accuracy with which a GPS device can track a vehicle's movements and transmit it to a computer for recording of data differs very little from the accuracy and permanent record-keeping capabilities of a pen register. A pen register allows the capture of every telephone number called, records the exact time at which the call was placed, and makes a permanent record of that data. Although no police officer observes all (or any) of that information through visual surveillance, those technological capabilities were irrelevant to the Fourth Amendment analysis in *Smith* v. *Maryland*, *supra*.

The Court has also held that the compelled taking of a voice exemplar does not implicate the Fourth Amendment because a person has no reasonable expectation of privacy in the sound of his voice, which is "repeatedly produced for others to hear." *United States* v. *Dionisio*,

410 U.S. 1, 14 (1973). That practice involves "transferring a recorded voice to a machine, called a sound spectrograph, that transforms the sounds on tape into electrical coordinates" that "manifest themselves as different shadings on paper." *United States* v. *Smith*, 869 F.2d 348, 353 n.9 (7th Cir. 1989). Similar to the data produced through a pen register or a spectrograph, the locational data collected by a GPS device does not infringe a reasonable expectation of privacy simply because the data is accurate and can be transferred to a computer and displayed on an interactive map.

While the means through which information is collected is relevant to identifying a search, see *Kyllo*, 533 U.S. at 35 n.2, the line between augmentation of the senses (acceptable, see *Knotts*, 460 U.S. at 282; Resp. Br. 37) versus "wholly automated" and "superhuman" acquisition of information, see Center for Democracy & Tech. *et al.* Amicus Br. 25; Yale Amicus Br. 17-18, has no meaningful application here. When information placed in the public domain is acquired with a technological assist, the public-exposure principle of *Katz* controls. Accordingly, the acquisition of public information about respondent's movements using GPS technology instead of the human eye lacks constitutional significance. Respondent had no reasonable expectation of privacy in his movements on public streets.

B. Prolonged GPS Surveillance Does Not Constitute A Fourth Amendment Search

Respondent briefly defends (Br. 42-45) the court of appeals' holding that even if GPS surveillance does not always constitute a search, it becomes a search when it is conducted for "prolonged periods." That "mosaic"

standard is not sensible, workable, or consistent with precedent.

1. Respondent contends (Br. 43) that prolonged GPS monitoring infringes a reasonable expectation of privacy because visual surveillance of the same length without the assistance of a GPS device would be "practically impossible." Under that approach, the police would conduct a search whenever they use technology to collect public information that they might not be able to acquire without the technology because of time, resource, or practical constraints. But even the surveillance in *Knotts* would have amounted to a search under that formulation; the Court acknowledged that because of the "failure of visual surveillance," the officers "would not have been able to [locate the destination of the chloroform] had they relied solely on their naked eyes." 460 U.S. at 285.

Respondent's test of "practical impossibility" also would tie reasonable expectations of privacy to varying factors that have nothing to do with an individual's legitimate expectations. The practical feasibility of visual surveillance in any given case depends on the importance of the target and the resources of the law enforcement agency conducting the surveillance. For example, agents from the FBI followed terrorism suspect Najibullah Zazi as he drove 1800 miles from Denver to New York, often reaching speeds of up to 100 miles per hour. See David Johnston & William Rashbaum, *Rush for Clues Before Charges In Terror Case*, N.Y. Times, Oct. 1, 2009, at A1, A30. An individual's reasonable expectation of privacy cannot vary based on the specific resources and capabilities of the law enforcement agency conducting an investigation.

2. Respondent further contends (Br. 43-44) that prolonged GPS surveillance infringes a reasonable expectation of privacy by potentially revealing patterns of movements. See also Yale Amicus Br. 22-27. But a pattern-based test could invalidate a variety of common non-search law-enforcement practices; combining pen registers from multiple locations, for example, could generate enormously revealing patterns. Respondent argues (Br. 44) that GPS surveillance differs from other investigatory techniques because it is a "uniquely intrusive means" of observing patterns. But GPS surveillance of the public movements of a vehicle is no more intrusive than following a person through the streets, reviewing his bank records, or sifting through his trash—all techniques held not to be searches.

3. Finally, respondent acknowledges (Br. 45) that the court of appeals' holding requiring a warrant before police may engage in "prolonged" GPS monitoring would be workable only if this Court arbitrarily defined what period of time would be sufficiently "prolonged." Respondent suggests (*ibid.*) that it would be "reasonable" to hold that GPS surveillance "for longer than a day" is a search.

Adopting that short a time period would be wholly inconsistent with every court of appeals to have determined that GPS surveillance of a vehicle did not amount to a search.[4] It would also conflict with this Court's deci-

[4] See, *e.g.*, *United States* v. *Cuevas-Perez*, 640 F.3d 272 (7th Cir. 2011), petition for cert. pending, No. 11-93 (filed July 20, 2011) (holding that 60-hour GPS surveillance of a vehicle as it traveled from Arizona to Illinois was not a search); *United States* v. *Hernandez*, 647 F.3d 216 (5th Cir. 2011) (holding that two-day GPS surveillance of a vehicle was

sion in *Karo*, where officers left a beeper in a can of ether for five months as the can was transported between different locations. 468 U.S. at 708-710. No precedent justifies an arbitrary one-day limit to collection of public information using GPS; if the collection is not a search on day one, it is not a search on days two, three, or four either.[5]

C. Neither Placing The GPS Tracking Device On Respondent's Vehicle Nor Recording Data About Its Public Movements Was A Fourth Amendment Seizure

1. Respondent contends (Br. 45-52) that the installation of the GPS device was a Fourth Amendment seizure because it "meaningfully interfered with [his] possessory interest in excluding others from exploiting or usurping his vehicle." Every court of appeals to have considered this argument has rejected it. U.S. Br. 43-44.

Respondent relies (Br. 49) in part on Justice Stevens's dissent in *Karo*, which asserted that the placement of a beeper in a container of chemicals sufficiently changed "the character of the property" to constitute a

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not a search); *United States* v. *Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010), petition for cert. pending, No. 10-7515 (filed Nov. 10, 2010) (holding that GPS tracking over a four-month period was not a search).

[5] A one-day GPS rule would be far more arbitrary than the 48-hour presumptive period adopted for a probable-cause determination after a warrantless arrest in *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-56 (1991), where the Court simply made concrete the accepted requirement of a "prompt" probable-cause determination, or the 14-day break-in-custody rule adopted in *Maryland* v. *Shatzer*, 130 S. Ct. 1213, 1223 (2010), which made manageable a prophylactic constitutional rule established by this Court. Respondent provides no indication whether the one-day rule applies per investigation, or per an individual's life, or for some other period.

seizure. 468 U.S. at 729 (citing *Silverman*, *supra*). The *Karo* majority rejected that argument, however, concluding that "[a]lthough the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way." *Id.* at 712. The Court explained that placing the beeper in the can amounted at most to a technical trespass, which was only "marginally relevant" to the Fourth Amendment inquiry. *Id.* at 712-713. The same is true here.

Respondent invokes (Br. 47-48) the common-law conception of property, which features a broad "right to exclude."[6] But to find a Fourth Amendment seizure, the interference with the right to exclude must be "meaningful." See *Karo*, 468 U.S. at 712 (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984)). The government did not meaningfully interfere with respondent's property rights. While the GPS device was in place, respondent remained free to use his vehicle however he wanted. He went where he wanted, he transported anyone and anything he wanted, and none of the operational systems of the vehicle were affected in any way. Amici suggest that the government asserted *control* over the vehicle by converting it to governmental

[6] Respondent also cites (Br. 47-48) *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); see also Constitution Project Amicus Br. 11, but *Loretto* is not a Fourth Amendment case. It is an eminent domain case in which the Court held that a "permanent physical occupation" of a building owner's property by a cable company's "direct physical attachment of plates, boxes, wires, bolts, and screws to the building" was a taking of property that required just compensation. 458 U.S. at 435, 438. Even if that test applied, which it does not, officers only temporarily attached a nonintrusive GPS device to the exterior of respondent's vehicle without penetrating or occupying any part of it.

use, Constitution Project Amicus Br. 13, but the government in no way controlled the vehicle. Respondent remained in control; the device simply enabled the government to acquire public information about where the vehicle went. The device worked no more of a seizure than the beeper involved in *Karo*.

2. Respondent further asserts (Br. 53-54) that the government violated the Fourth Amendment by attaching a GPS device to his vehicle, thereby "seizing" "non-observable data" about its movements. Respondent cites no authority for this novel argument, which conflicts with this Court's precedent.

Respondent is wrong that his locational data was not observable. Unlike a conversation in a phone booth or information stored on a personal computer (see Resp. Br. 53-54), the location of respondent's vehicle on public roads was observable. The manner in which GPS records the information does not make locational data private. See pp. 13-14, *supra*.

Moreover, respondent has no more of a possessory right to GPS data about his vehicle than a person would have to the data created and stored by a pen register, see *Smith*, 442 U.S. at 744, or spectrograph data created during voice exemplar, see *Dionisio*, 410 U.S. at 14. This Court has never held that individuals have a possessory right to such data. To the contrary, the Court has long held that the recording of data as to which no expectation of privacy attaches does not implicate the Fourth Amendment. *Arizona* v. *Hicks*, 480 U.S. 321, 324 (1987); *Lopez* v. *United States*, 373 U.S. 427, 439 (1963); see *United States* v. *White*, 401 U.S. 745, 751-753 (1971) (plurality).

D. Even If The Use Of The GPS Device Amounted To A Search Or Seizure, It Was Constitutionally Reasonable

If the Court concludes that GPS surveillance is a search or seizure, it should hold such surveillance reasonable where, as here, it is supported by reasonable suspicion.

1. Respondent contends (Br. 55-56) that this Court could not uphold the search in this case based on reasonable suspicion as it did in *United States* v. *Knights*, 534 U.S. 112, 118-121 (2001), because the defendant in *Knights* had conceded the district court's finding of reasonable suspicion, whereas here the district court judge presiding over respondent's trial did not make an explicit finding of reasonable suspicion or probable cause. The record in this case amply demonstrates reasonable suspicion.

Before trial, respondent raised numerous challenges to the government's investigation, including to text message and wiretap search warrants that were issued shortly before the GPS warrant for respondent's vehicle. The district court reviewed the affidavits supporting those warrants—which were incorporated by reference into the GPS warrant affidavit—and concluded that they established probable cause to believe respondent was a leader in a large-scale cocaine distribution conspiracy. J.A. 21-34; Resp. C.A. App. 350-412; see also Pet. App. 56a-57a, 60a-63a, 66a-69a (describing basis for probable cause). Even leaving aside Judge Friedman's finding of probable cause to issue the GPS warrant, J.A. 31-34, the record is more than sufficient to demonstrate reasonable suspicion for using GPS surveillance.

2. Respondent contends (Br. 57-59) that the Court should not require less than a warrant and probable

cause for GPS surveillance because the Court has typically done so "only when special circumstances, distinct from the general interest in law enforcement, justify the departure." That is incorrect.

Since *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court has recognized, in a variety of situations, that certain law enforcement actions that qualify as Fourth Amendment searches or seizures are nevertheless not so intrusive as to require a warrant or probable cause. *Terry* approved a warrantless stop and frisk based on reasonable suspicion, and the Court has applied that standard in numerous other law enforcement contexts. See, *e.g.*, *Maryland* v. *Buie*, 494 U.S. 325 (1990) (protective sweep incident to arrest); *Michigan* v. *Long*, 463 U.S. 1032 (1983) (weapons search of a car); *United States* v. *Place*, 462 U.S. 696 (1983) (warrantless seizure of personal luggage on the basis of reasonable suspicion to believe that it contained contraband or evidence of a crime). *Place* rejected the contention that, "absent some special law enforcement interest such as officer safety, a generalized interest in law enforcement cannot justify an intrusion on an individual's Fourth Amendment interests in the absence of probable cause." *Id.* at 703-704.

3. Under the general Fourth Amendment balancing test that weighs "the degree to which [a search or seizure] intrudes upon an individual's privacy" against "the degree to which it is needed for the promotion of legitimate governmental interests," *Samson* v. *California*, 547 U.S. 843, 848 (2006), GPS surveillance is reasonable if conducted based on reasonable suspicion.

GPS surveillance constitutes a limited intrusion, if any, on legitimate privacy interests. The device does not conduct either a visual or aural search of the vehicle onto which it is attached or of any place into which it is

taken, but only provides information about the vehicle's location. See *Quon*, 130 S. Ct. at 2631 (considering "the extent of an expectation" of privacy in assessing a search). Although the government attached a GPS device to respondent's property, that contact, like the placement of a beeper in a canister, amounted at most to a "technical trespass." *Karo*, 468 U.S. at 712. And whatever expectation of privacy one might have on public roadways, it is tempered by the reality that a car "travels public thoroughfares where both its occupants and its contents are in plain view." *Knotts*, 460 U.S. at 281 (citation omitted). Against that limited intrusion must be weighed the interest of law enforcement in investigating leads and tips on drug trafficking, terrorism, and other crimes before those suspicions have ripened into probable cause.[7] If GPS surveillance is deemed a search, the balance should be struck at reasonable suspicion.

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[7] For an example of how GPS surveillance could be used to narrow a pool of suspects in order to prevent a criminal act, see Keith Hodges, FBI Bulletin, *Tracking "Bad Guys" Legal Considerations in Using GPS* (July 2007), http://www.fletc.gov/training/programs/legal-division/downloads-articles-and-faqs/articles/FBI-LE-Bulletin-GPS-Tracking-Jul2007.pdf/view (describing hypothetical surveillance of plausible, but unconfirmed, suspects to thwart an obstruction of justice).

CONCLUSION

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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