No. 10-1259

IN THE
# Supreme Court of the United States

UNITED STATES,

*Petitioner,*

*v.*

ANTOINE JONES,

*Respondent.*

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

## BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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## INTEREST OF THE AMICUS CURIAE [1]

The Center on the Administration of Criminal Law is dedicated to defining good government practices in criminal matters through academic research, litigation, and participation in the formulation of public policy. The Center regularly comments on issues of broad importance to the administration of the criminal justice system.

The questions presented here are ones of significant practical import in the daily enforcement and administration of criminal law by federal and state law enforcement officers. The case requires the Court to answer those specific questions against the broader backdrop of evolving technology—here, global positioning systems—capable of contributing not only to crime detection and prevention, but also to government cost savings in trying financial times.

The Center has a strong interest in such legal and policy matters and files this *amicus* brief to aid the Court in its review of the D.C. Circuit's decision. The Center supports the position of the United States and accordingly urges the Court to reverse the D.C. Circuit's holding that law enforcement's month-long use of a GPS tracking device violated petitioner Antoine Jones's Fourth Amendment rights.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* represents that all parties have consented to the filing of this brief.

## BACKGROUND

A 2004 joint narcotics investigation conducted by the Federal Bureau of Investigation and the Metropolitan Police Department focused on Antoine Jones and the "Levels" nightclub he owned in the District of Columbia. The investigation included the installation of a GPS tracking device on Jones's car while parked in a public parking lot. Police later replaced the device's battery while Jones's car again was parked in a public parking lot. Following indictment on a federal narcotics conspiracy charge, Jones moved to suppress the information obtained from the GPS device. The district court denied the motion, and an ensuing jury trial ended with Jones being convicted and sentenced to life imprisonment. *United States v. Maynard*, 615 F.3d 544, 549 (D.C. Cir. 2010).

The D.C. Circuit reversed the conviction, holding that the warrantless use of a GPS device to track Jones's public movements violated the Fourth Amendment. Distinguishing *United States v. Knotts*, 460 U.S. 276 (1983), as a case involving electronic surveillance of discrete travel for approximately 100 miles, the D.C. Circuit panel held that the police's continuous use of a GPS device "over the course of a month" revealed a totality of information about Jones that was "not exposed to the public" because the "likelihood anyone will observe all those movements is effectively nil." *Maynard*, 615 F.3d at 558. "A reasonable person," the court explained, "does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those

movements to remain disconnected and anonymous." *Id.* at 563 (citation and internal quotations omitted).

Although this Court granted review on the question, the D.C. Circuit panel did not address Jones's alternative argument that the warrantless installation of the GPS violated the Fourth Amendment.

## SUMMARY OF ARGUMENT

The ubiquitous challenge for law enforcement is to find improved and more cost-effective ways to detect and prevent crime. The use of new technology is one way to help answer the challenge. While the financial savings alone can be significant, the potential for crime reduction may be even greater where, as here, a particular type of technology (GPS locational tracking) affords law enforcement the opportunity to strategically increase its presence in communities and thereby better allocate resources, including physical surveillance teams, to matters of priority focus. Far from theoretical, this conclusion finds support in empirical assessments of the factors contributing to certain crime reductions in recent years. This case presents the Court an opportunity to reinforce the point by applying settled Fourth Amendment principles to uphold law enforcement's use of a new means of technology to conduct non-intrusive surveillance of vehicles in public places.

The D.C. Circuit invalidated the month-long use of GPS locational tracking on reasoning not only in considerable tension with *Knotts*, but also on the basis of an aggregation principle that puts law enforcement in the practical predicament of having to gauge when the daily parts of surveillance sum to a whole that triggers the warrant requirement. This

result is as unworkable as it is unnecessary in the setting of GPS surveillance on public streets, where the only information yielded is locational information—the whereabouts of a car—not what an individual does or says in any particular place. The Fourth Amendment is able to accommodate the uses of such new technology while protecting the traditional lines of privacy marked in the Court's precedent.

Accordingly, the Center supports the position of the United States and urges the Court to hold that the warrantless installation in a public place of a GPS device on a car's exterior, as well the subsequent use of the device to track locational information on public roadways, does not violate the Fourth Amendment.

## ARGUMENT

### I. THE USE OF A GPS DEVICE TO CONDUCT LOCATIONAL SURVEILLANCE OF MOVEMENTS IN PUBLIC PLACES DOES NOT VIOLATE THE FOURTH AMENDMENT.

Like the D.C. Circuit, the parties recognize that the answer to the question presented on the use of the GPS tracking device turns upon whether the reasoning of *Knotts* extends to this form of electronic surveillance. The Center agrees with the Solicitor General's view that the primary rationale of *Knotts*—specifically, that an individual had no reasonable expectation of privacy in movements on public roads and thus the use of an undisclosed beeper to track those movements did not constitute a search under the Fourth Amendment—should control here. On

this score, the Center wishes to highlight three interrelated points.

*First*, the D.C. Circuit erred in framing a central dimension of its analysis in terms of "what a reasonable person expects another might actually do." *Maynard*, 615 F.3d at 559 (citing *California v. Greenwood*, 486 U.S. 35, 40 (1988); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986); *Florida v. Riley*, 488 U.S. 445, 450 (1989)). The panel cast its holding in these same probability terms: "the likelihood a stranger would observe all those movements [on public streets over a month] is not just remote, but it is essentially nil." *Id.* at 560. Nothing in *Knotts* compels this "likelihood" or probability inquiry, and no aspect of the Court's reasoning hinged on whether Leroy Knotts thought it likely Minnesota narcotics officers would use an electronic beeping device to follow his co-defendant across state lines to Knotts's cabin 100 miles away in Shell Lake, Wisconsin.

The same reasoning applies to the facts in *Greenwood*, *Ciraolo*, and *Riley*. Those decisions did not turn on whether the respective defendants reasonably expected others to rummage through curbside trash or to fly over fenced residential backyards looking for marijuana plants. To the contrary, the Court's assessments of the reasonableness of any subjective privacy interest turned on the fact that the respective defendants exposed activity (marijuana growing) or things (household trash) to the public—thereby running a risk, however likely or unlikely, that others would see those things or such activity. *See Riley*, 488 U.S. at 450-51 (plurality opinion); *Greenwood*, 486 U.S. at 40-41; *Ciraolo*, 476 U.S. at 213-14.

In short, application of the test articulated by Justice Harlan in *Katz v. United States*, 389 U.S. 347, 360-61 (1967)—at least in the context of surveillance of activity undertaken in public—has not to date required courts to handicap the likelihood of whether an individual reasonably expected the challenged government action. *Cf. United States v. Jacobsen*, 466 U.S. 109, 122-23 & n.22 (1984) (upholding a field test on narcotics discovered by a shipping company and observing that "[t]he concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities"); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (noting that a "legitimate" expectation of privacy "means more than a subjective expectation of not being discovered").

*Second*, the D.C. Circuit's reasoning yields the backward result that an individual has no Fourth Amendment protected interest in the *Knotts*-like situation of one day's travel on public streets (say, as here, to engage in narcotics trafficking), but at some undefined point in time acquires a Fourth Amendment interest by continuing the conduct for a prolonged period—for example, running drug proceeds from a street corner to a stash house five days per week. To be sure, the panel was correct to observe that "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance," including patterns and sequences of movements. *Maynard*, 615 F.3d at 562 & n.*. But nothing about the observation explains why repeated patterns and sequences of activity in public space should receive greater Fourth Amendment protection.

There is an air of unreality to permitting the FBI to observe a suspected al Qaeda operative drive from Queens to lower Manhattan to take pictures of the Brooklyn Bridge, but forcing the FBI to seek a warrant when it becomes clear the individual is making repeat trips via New York City streets to study the Bridge's structural support.

The Court should avoid this result by adhering to the reasoning of *Knotts* and reaffirming that individuals do not have a legitimate expectation of privacy in that which they reveal to third parties or leave open to view by others. *See Knotts,* 460 U.S. at 281-82; *accord Riley*, 488 U.S. at 449-50; *Greenwood*, 486 U.S. at 40-41; *Ciraolo*, 476 U.S. at 213-14; *Smith v. Maryland*, 442 U.S 735, 743-44 (1979). *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("[O]bjects, activities or statements that [a person] exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.")

*Third*, a noteworthy omission in the D.C. Circuit's holding is the lack of any limiting principle. Not a word of the panel opinion explains how long is too long to monitor an individual's movement in public places. The silence will leave law enforcement officers uncertain whether they tripped the timing wire and need to get a warrant to continue street surveillance of a child predator, mob boss, or suspected terrorist. Street surveillance is the bread and butter work of law enforcement, and the panel's opinion provides no guidance on when the whole of an individual's movements on a public street exceed the sum of its individual parts. The more workable solution is to conclude that the reasoning of *Knotts* applies to the GPS locational surveillance challenged

here—surveillance that showed only movements of Antoine Jones's car on public streets in and around Washington, D.C., not what Jones did or said inside either the car or any location to which he drove.

## II. THE USE OF A GPS DEVICE TO CONDUCT LOCATIONAL SURVEILLANCE ADVANCES IMPORTANT LAW ENFORCEMENT INTERESTS WITHOUT INFRINGING UPON PRIVACY RIGHTS.

### A. The D.C. Circuit's Holding Risks Depriving Law Enforcement Of The Full Value Of New Technology Able To Advance Crime Detection And Prevention Efforts.

Reducing costs to increase output is a proven path to enhanced profitability. This basic economic principle applies with full force to law enforcement's efforts to more efficiently and effectively prevent and detect crime. No better example exists than *Knotts*, where the Court emphatically rejected the suggestion that the police's reliance on new technology—the tracking beeper—to supplement their visual surveillance raised a Fourth Amendment concern. "Nothing in the Fourth Amendment," the Court stressed, "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." *Knotts*, 460 U.S. at 282.

The Court in *Knotts* then went further, acknowledging the broader policy point that new technology can enable more effective law enforcement:

> Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.

*Id.* at 284.

By no means is *Knotts* isolated, however. The U.S. Reports contain many examples of the Court confronting questions about the application of the Fourth Amendment to law enforcement's use of new technologies. The dividing line to date has been between technology used to reveal private information and technology used to help observe things or activity exposed and accessible to others. *Compare Kyllo v. United State*s, 533 U.S. 27, 40 (2001) (holding that the use of a thermal imaging device violated the Fourth Amendment because it revealed "details of the home that would previously have been unknowable without physical intrusion"), *and United States v. Karo*, 468 U.S. 705, 714 (1984) (holding that "monitoring of a beeper in a private residence, a location not open to visual surveillance" violated the Fourth Amendment), *with On Lee v. United States*, 343 U.S. 747, 754 (1952) (rejecting Fourth Amendment challenge to the use of a radio transmitter to enhance work with an informant), *Smith*, 442 U.S. at 744-45 (upholding use of pen registers and explaining that no "different constitutional result is required because the telephone company has decided to automate [its operations]"), *Dow Chem. Co. v. United States*, 476

U.S. 227, 238 (1986) (upholding aerial mapping photography and recognizing that the use of visual enhancement technology did not create constitutional issues), *and United States v. White*, 401 U.S. 745, 753 (1971) (upholding the undercover use of a recording device and reasoning that the Court should not "erect constitutional barriers" to new technology able to yield "relevant and probative evidence which is also accurate and reliable").

The use of a GPS to conduct surveillance falls on the permitted side of the Court's line, as the device affords a new and cost-effective means of conducting locational surveillance without revealing anything an individual says, writes, or does in private or with others. In this regard, then, GPS tracking reveals only limited information while permitting law enforcement to realize the full benefits made available by new technology.

The importance of cost savings—especially in these financial times—is difficult to overstate. Hardly a day goes by without stories of acute fiscal challenges besetting one or another law enforcement agency. *See, e.g.*, Michael Cooper, *Spending Agreement Hurts Police and Fire Agencies*, N.Y. TIMES, Apr. 15, 2011, at A18; Tom Jackman, *Police Chiefs feel Pinch of Budget Cuts*, WASH. POST, Sept. 30, 2010, at A2.

Finding new ways to do the same or more with less is the unrelenting challenge for law enforcement. Compared with physical surveillance, GPS surveillance costs less and requires fewer personnel hours to execute while fully respecting the privacy divide established by this Court's precedents. As Judge Posner put the point:

> It is the difference between, on the one hand, police trying to follow a car in their own car, and, on the other hand, using cameras (whether mounted on lampposts or in satellites) or GPS devices. In other words, it is the difference between the old technology—the technology of the internal combustion engine—and newer technologies (cameras are not new, of course, but coordinating the images recorded by thousands of such cameras is). But GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.

*United States v. Garcia*, 474 F.3d 994, 997 (7th Cir. 2007) (Posner, J.), *cert. denied*, 552 U.S. 883 (2007).

### B. The Savings Enabled By GPS Locational Surveillance Also Contribute To Crime Reduction.

The benefits of GPS devices extend beyond dollars and cents. GPS locational surveillance allows law enforcement to redeploy personnel that otherwise would have been used for physical surveillance. For example, the NYPD might choose temporarily to increase its physical presence around the United Nations building while using GPS tracking to cover prior surveillance assignments. In this way, then, law enforcement is able to draw upon

new technology to adjust its resource allocations to enhance crime prevention and detection efforts. *Cf. United States v. Hensley*, 469 U.S. 221, 228 (1985) (recognizing the "general interest present in the context of ongoing or imminent criminal activity is 'that of effective crime prevention and detection'" (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968))).

Decisions on whether to employ new technology to enable the reallocation of resources in ordinary police work implicate a broader question about the effective way to reduce crime—through increased investments in prevention and detection or through increased punishment. On this point, studies show that the effective deterrence and prevention of crime depend more on individuals' expectations about the certainty of being detected and apprehended than on the length of any ultimate term of imprisonment. *See* Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 12-15 (1998) (summarizing studies suggesting that the certainty of sanction, not the severity of punishment, has a greater deterrent effect); *see also* John M. Darley, *On the Unlikely Prospect of Reducing Crime by Increasing the Severity of Prison Sentences*, 13 J. L. & POL'Y 189, 193-95, 202-05 (2005) (summarizing reports suggesting that, while there are no general demonstrations of crime reductions achieved through longer sentences, increased prevention of crime appears possible when individuals assess the risk of detection to be high).

One recent analysis concluded that the substantial crime reductions in the 1990s in New York City resulted in significant part from the addition of 7,000 new NYPD officers focused on high-

crime areas. *See* Franklin L. Zimring, *How New York Beat Crime*, SCIENTIFIC AMERICAN 74-79 (Aug. 2011); *accord* Franklin L. Zimring, THE GREAT AMERICAN CRIME DECLINE 151 (2007) (observing that "there is powerful circumstantial evidence that compound major changes in the quantity of police and the tactics of policing had a major impact" on the reduction of crime in New York City). These analyses support law enforcement decisions to expand police presence and thus overall detection efforts through the use of new technologies like GPS tracking devices.

### C. Barring The Warrantless Use Of GPS Surveillance Will Hinder Investigations Generally While Disproportionately Impacting Long-Term Investigations.

Not only does the D.C. Circuit's ruling risk macro setbacks to crime reduction efforts, the Court's aggregation reasoning would adversely alter daily police work. Street surveillance often marks an early step in investigating potential criminal activity. And police at the outset of surveillance often have no way to know or predict whether an individual is engaged in criminal conduct. Time tells the answer. It takes the police observing a totality of circumstances—conduct, movements, relationships, demeanors, and sometimes simply locational information—to reach a probable cause conclusion about criminal activity. These parts, in other words, are what often lead over time to the whole that provides the basis for a probable cause determination. In this way, then, the D.C. Circuit's rule may have the backward effect of preventing a technique undertaken precisely to

determine whether probable cause exists in the first place.

The impact of the D.C. Circuit's aggregation reasoning will be even more pronounced on long-term investigations, where the importance of investigations enabling dot connecting over time is at an apex. Cases are made (or not) as law enforcement assemble the parts into a coherent whole. In this respect, then, the D.C. Circuit's requirement of sending law enforcement agents to courthouses for warrants every time they approach an imprecise aggregation threshold risks the diversion of resources at potentially great opportunity costs. Examples are not hard to envision:

- *Organized Crime Investigation*: Suppose, for instance, that the Chicago Police Department has spent months targeting an organized crime organization led by a reclusive mob boss heavily insulated from detection through a complex web of associates. The police attach a GPS to the car of an individual believed to be a low-level associate, but reach the D.C.'s Circuit's aggregation threshold before compiling enough evidence to obtain a warrant. Investigators now face the difficult decision of allocating otherwise occupied officers to physical surveillance or abandoning surveillance of the associate altogether. Either way, the investigation is affected.
- *Terrorism Investigation*: Assume the FBI learns of a possible terrorist cell in Los Angeles and identifies a taxicab driver as

> an affiliate. Agents then begin warrantless GPS surveillance on the taxi, but along the way misgauge the D.C.'s Circuit's aggregation threshold without realizing it. The investigation continues for months, only then to later see the government lose a motion to suppress important evidence obtained after the breach of the threshold.

The practical difficulties of complying with the D.C. Circuit's ruling may be most consequential and indeed comparatively disproportionate in the conduct of long-term investigations.

## III. THE COURT SHOULD HOLD THAT A WARRANT IS NOT NECESSARY TO INSTALL A GPS DEVICE IN A PUBLIC PLACE.

This Court also granted review on the question whether the warrantless installation of the GPS—independent of its subsequent use—violated the Fourth Amendment. On this point, the Court should hold that the installation of a GPS on the exterior of a car parked in a public place does not violate the Fourth Amendment.

The Court's decision in *Karo* provides the proper beginning point. In *Karo*, the Court held that the "installation" of a beeper contained in a can of ether then provided to the defendant constituted neither an impermissible search nor seizure. *Karo*, 468 U.S. at 713. No search occurred, the Court explained, because the installation of the beeper "conveyed no information that Karo wished to keep private" and therefore infringed no privacy interest. *Id.* at 712. So, too, was there no seizure because "it

cannot be said that anyone's possessory interest was interfered with in a meaningful way [through the challenged installation]. At most, there was a technical trespass on the space occupied by the beeper." *Id.*

Earlier the same Term, the Court decided *Oliver v. United States*, 466 U.S. 170 (1984), emphasizing in the context of further defining the open fields doctrine that the Fourth Amendment is not "intended to shelter from government interference or surveillance" activities—including private activities—in such visible locations. *Id.* at 179. "[A]s a practical matter," the Court emphasized, open fields "usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be." *Id.*

Two years later the Court, in deciding *New York v. Class*, 475 U.S. 106 (1986), drew upon *Oliver* to underscore the lessened privacy interests in activity in open spaces. In *Class*, the Court held that the police did not violate the Fourth Amendment by reaching inside a car "driven upon the public roads" to move papers covering the vehicle identification number. *Id.* at 114. In so holding, the Court reminded that "the physical characteristics of an automobile and its use result in a lessened expectation of privacy," *id.* at 112, while also explaining that "[t]he exterior of a car, of course, is thrust into the public eye and thus to examine it does not constitute a 'search,'" *id.* at 114 (citing *Cardwell v. Lewis*, 417 U.S. 583, 588-89 (1974)).

These principles find straightforward application to the facts here. Law enforcement officers installed the GPS on Jones's car and later

replaced the device's battery at times when the Jeep was parked in public parking lots. At no point did the officers enter the car. *See* Brief of the United States at 39, 41. Nor has Jones alleged that he took any action to prevent the public from observing the Jeep's bumper or undercarriage. Also missing is any suggestion that the GPS somehow affected the car's driving qualities, drew power from the car, took up room otherwise available for passengers or packages, altered the car's appearance, or resulted in any action that could be construed as intruding upon Jones's possessory interest in the Jeep. Put differently, this case is not one requiring the Court to address installation of a GPS inside a residential garage or similar location or in some manner triggering a more difficult balancing of interests. Everything here happened in public without in any way infringing upon Jones's use of or activity inside the Jeep.

Accordingly, the Court should hold that the installation of a GPS device on the exterior of a car parked in a public space does not violate the Fourth Amendment.

## CONCLUSION

For these reasons, and those articulated in the Solicitor General's brief, the Court should reverse the D.C. Circuit's ruling and hold that neither the warrantless use nor installation of a GPS tracking device violated Antoine Jones's Fourth Amendment rights.

Dated: August 18, 2011

Respectfully submitted,

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